

Buffalo Hills Allotment 2-23-96

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

9	NEVADA DIVISION OF	)	IBLA No.
	WILDLIFE (NDOW), and	)	
10	NEVADA COMMISSION FOR THE	)	
	PRESERVATION OF WILD	)	
11	HORSES (CPWH),	)	
		)	
12	Appellants	)	
		)	
13	v.	)	
		)	
14	BUREAU OF LAND MANAGEMENT,	)	
		)	
15	Respondent	)	
		)	

16

17 REPLY TO APPELLANT'S STATEMENT OF REASONS

18 Respondent Bureau of Land Management (BLM) submits the  
19 following reply to the Appellants' Statement of Reasons (SOR).

20 Appellants are Nevada state agencies who often comment on  
21 BLM decisions. BLM welcomes their participation, but retains as  
22 it must the final decision-making authority on federal public  
23 lands. This case concerns a decision by the BLM which determined  
24 the appropriate numbers of livestock and wild horses on the  
25 Buffalo Hills grazing allotment. (February 9, 1993, Full Force  
26 and Effect Multiple Use Decision for the Buffalo Hills Allotment  
27 (hereinafter "BLM Decision)). Appellants want to see fewer  
28 livestock and wild horses on the allotment than BLM determined

1 was appropriate, and want to see a different ratio of livestock  
2 and wild horses. However, although Appellants have presented a  
3 different methodology which they would have liked BLM to use,  
4 they have not demonstrated that BLM's methodology was  
5 unreasonable or that it failed to comply with the applicable  
6 regulations. Therefore, the Administrative Law Judge properly  
7 affirmed BLM's Decision.

8 After setting forth the applicable facts in this case, BLM  
9 will respond to the issues raised by Appellants in the order in  
10 which they are presented in the SOR.

11 Statement of Facts

12 The Buffalo Hills allotment is in the Sonoma/Gerlach  
13 Resource Area, and is located near Gerlach, Nevada. Ex A-6, p 1.  
14 It comprises a total of 461,739 acres, of which 431,006 acres are  
15 public land and 30,733 acres are private land. Id. The  
16 allotment has approximately 2,943 acres of wetland riparian  
17 habitat, or less than 1% of the total acreage for the allotment.  
18 Ex A-6 p 56; Tr 27. The allotment also contains streambank  
19 riparian habitat. Ex A-6 p 56.

20 The Buffalo Hills allotment has more AUMs allocated to wild  
21 horses than it does to livestock. Ex A-7 p 7. According to the  
22 1992 Re-Evaluation of the Allotment, in 1991 actual use for  
23 livestock on the allotment was 4159 Animal Unit Months (AUMs),  
24 while for horses it was 21,996 AUMs. Ex A-6 p 12. Prior to the  
25 issuance of the Land Use Plan in 1982, the Buffalo Hills  
26 allotment<sup>1</sup> had approximately 14,000 AUMs allocated to livestock.

27  
28 <sup>1</sup> 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

1 Tr 198. However, on November 15, 1982, just after the Land Use  
2 Plan was issued in July, 1982, the largest permittee on the  
3 allotment had his permits cancelled. Ex A-2 p 2; Tr 199. These  
4 permits added up to nearly 11,112 AUMs, and because of the high  
5 resource and wildlife values on the allotment, they were not  
6 reallocated to other livestock permittees. Ex A-2 p 2; Tr 199.  
7 The Land Use Plan also set the initial stocking rate for wild  
8 horses at 597 or 7,164 AUMs. Ex A-2 p 5.

9 The Decision under appeal was a step in the continued  
10 implementation of the Land Use Plan. Tr 194. The Land Use Plan  
11 (LUP) established general goals and guidelines for resource  
12 management on the allotment. Tr 194; See Ex R-20. The  
13 objectives in the Decision conformed to these general objectives  
14 in the Land Use Plan. Tr 229.

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

23 In 1986, the BLM Washington Office issued Instruction  
24 Memorandum 86-706, which required Area Managers to enter into  
25 agreements or issue decisions within five years after the  
26 publication of the Rangeland Program Summary, which was issued in  
27

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28 exactly the same, for convenience the two allotments will be  
referred to as "the allotment." Tr 198-99.

1 June, 1983. Tr 196; Ex R-15. In order to comply with the  
2 Instruction Memorandum, in 1988 the BLM entered into a livestock  
3 agreement with the permittee. Tr 198; Ex A-3. This agreement  
4 essentially reiterated the AMP, setting livestock numbers,  
5 seasons of use, areas of use, and long and short term objectives  
6 for vegetative resources on the allotment. Tr 198.

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

10 The AMP, the 1988 agreement, and the HMP all required  
11 continued monitoring on the allotment. Tr 201. The data  
12 collected through monitoring was used to complete a Re-evaluation  
13 for the allotment which was agreed to in the 1988 agreement.  
14 Tr 202.

15 The BLM maintained contact with affected interests,  
16 including the appellants, throughout the Re-Evaluation process.  
17 In January of 1991, the BLM sent out a letter which notified  
18 affected interests of the upcoming Re-Evaluation, and asked them  
19 to submit any data they had or to otherwise respond if they  
20 wished to continue to be considered an affected interest.  
21 Tr 202-03; Ex R-16. The BLM received comments to this letter.  
22 Tr 203-04; Ex R-17. In early 1992, the BLM developed a draft Re-  
23 Evaluation and issued that for comments. Tr 205; Ex R-18. The  
24 BLM again received comments to this draft. Tr 206; Ex R-19.

25 After taking the comments on the draft Re-Evaluation into  
26 consideration, the BLM finalized the Re-Evaluation on January 14,  
27 1993. Tr 208; Ex A-6. As set forth in the Re-Evaluation, the  
28 data which had been collected since the 1988 agreement showed



1 that some of the short-term objectives on the allotment were not  
2 being met. Tr 210-11; Ex A-6 p 26. The BLM concluded there were  
3 two reasons for the failure to meet short-term objectives: 1)  
4 the cattle were concentrating in riparian areas, and 2) the wild  
5 horse numbers were excessive. Tr 210.

6 The BLM came to the conclusion that wild horses were  
7 excessive after calculating the carrying capacity for the  
8 allotment and determining appropriate numbers for cattle and wild  
9 horses on the allotment. In order to calculate the carrying  
10 capacity for the allotment, the BLM used the method described in  
11 the 1987 AMP. Tr 251-52; Ex A-2, Monitoring Plan p 7. This  
12 method provides a formula to determine the Potential Stocking  
13 Level (PSL), which is "the level of use that could be achieved on  
14 a management unit, at the desired utilization figure, assuming  
15 utilization patterns could be completely uniform." Ex A-2,  
16 Monitoring Plan p 7. Although with slightly different wording,  
17 this formula is also found in BLM's Technical Reference 4400-7.  
18 Ex A-9 p 55. What the formula essentially does is to compare the  
19 actual use in AUMs, and the utilization of the vegetative  
20 resource caused by that level of use, with the number of AUMs you  
21 would have to use to reach the desired utilization. See formula  
22 at Ex A-2, Monitoring Plan p 7.

23 Technical Reference 4400-7 discusses the use of potential  
24 stocking level. Ex A-9 p 55. The potential stocking level is  
25 the level of use that could be achieved if utilization were  
26 completely uniform, and is useful when assessing the benefits of  
27 improved distribution. Ex A-9 p 55. In this case, the BLM  
28 assumed it would have more uniform utilization, and the

1 management actions in the decision were designed to achieve more  
2 uniform utilization and protect riparian areas. Tr 148-49. The  
3 BLM did not assume perfectly uniform utilization, and it did not  
4 stock the allotment at anywhere near what it determined the  
5 potential stocking level to be. Tr 148; See Tr 244-48.  
6 Technical Reference 4400-7 does not require the BLM to use the  
7 formula for desired stocking level, rather than potential  
8 stocking level, to determine carrying capacity. Tr 253. The  
9 methodology the BLM used to determine carrying capacity conformed  
10 to the requirements of Technical Reference 4400-7. Tr 252-53.

11 In order to determine the utilization caused by the actual  
12 use, the BLM used a method known as weighted average utilization  
13 to determine actual utilization for the PSL formula. Tr 251;  
14 Ex A-2, Monitoring Plan p 7; Ex A-9 p 55; Ex A-8. In order to  
15 determine weighted average utilization, the BLM used "use pattern  
16 mapping" to determine the areas of various utilization classes on  
17 the allotment (no apparent use, slight, light, moderate, heavy,  
18 and severe). Tr 130-31; See Ex R-13. Once the BLM calculated  
19 acreages for each utilization class, it averaged the moderate and  
20 heavy classes to get the weighted average utilization. Tr 131;  
21 Ex A-9 pp 51-53. BLM did not include the no apparent, slight,  
22 and light utilization classes in the calculations, because  
23 livestock were not distributed uniformly on the allotment and BLM  
24 wanted to concentrate on areas where use was actually taking  
25 place. Tr 132.

26 Once BLM had the weighted average utilization for each  
27 pasture in the Buffalo Hills Allotment, it then determined the  
28 actual use for each pasture. Tr 132; Ex A-8. After that, BLM

1 determined what its desired utilization rate would be, which was  
2 the maximum utilization BLM would allow on the allotment.  
3 Tr 230. BLM determined this desired utilization rate to be 60%,  
4 in accordance with the Nevada State Handbook on Best Management  
5 Practices. Tr 233-34; Ex R-21. This number shows up as 0.6 in  
6 the carrying capacity calculation. Tr 230-231; Ex A-8. In the  
7 1988 agreement, the objective had been 50% throughout the  
8 livestock use period. Tr 231-32. However, because wild horses  
9 are on the allotment year-round, and because the Re-Evaluation  
10 process was considering wild horse use in order to create an AML  
11 for the first time, the BLM had to determine what the desired  
12 utilization should be when the November 1 to February 28 period  
13 was included. Tr 231. Because November 1 to February 28 is in  
14 the dormant season for plants, and BLM technical references and  
15 the Nevada State Handbook of Best Management Practices allow 60%  
16 utilization in the dormant season, BLM decided to set the desired  
17 utilization rate at 60% for the allotment. Tr 232; Ex R-21,  
18 App. 2, p II-J-3.

19 The 1988 agreement and the 1992 Rangeland Program Summary  
20 (RPS) both provided utilization objectives which consisted of 30%  
21 for streambank riparian and 50% for upland habitat. Tr 237-38;  
22 Ex A-3 p 1; Ex A-5 p 9. These documents also stated that the  
23 objectives could be adjusted by an "approved activity plan."  
24 Tr 237-38; Ex A-3 p 1; Ex A-5 p 9. An Allotment Management Plan  
25 is an approved activity plan, and the Decision under appeal was  
26 the functional equivalent of an approved activity plan. Tr 237.  
27 Therefore, BLM decided that the terms of the 1988 agreement and  
28 the 1992 RPS provided a basis for adjusting the utilization

1 objectives in the Decision. Tr 238-39. The 60% desired  
2 utilization figure conformed to the Land Use Plan.

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

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

16 Once the BLM had the actual use, weighted average  
17 utilization, and desired utilization, it put these numbers into  
18 the Potential Stocking Level equation to determine the carrying  
19 capacity for each pasture. Tr 133; Ex A-8. At that point, the  
20 BLM had to determine what the proper proportion of horses and  
21 livestock was for each pasture, in order to determine how to  
22 allocate the AUMs for each pasture. Tr 134; Ex A-8. The only  
23 guidance for how to allocate AUMs was found in the Land Use Plan,  
24 which stated in part: "After the fifth year adjustments continue  
25 monitoring and if adjustments in addition to the fifth year  
26 adjustments are required, adjust livestock, wild horses and  
27 wildlife proportionately based on forage availability." Tr 254.  
28 Based on this limited guidance, BLM decided that the best way to

1 apportion the AUMs was to apply the proportion of livestock and  
2 wild horse numbers in the Land Use Plan. Tr 255. However,  
3 because some of the livestock permits had been eliminated, the  
4 BLM decided to go with the livestock numbers in the 1988  
5 agreement rather than using permits which no longer existed to  
6 create the proportions. Tr 256.

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

16       BLM estimated the total carrying capacity for livestock on  
17 the allotment to be 9,913 AUMs. Tr 245. Because the actual use  
18 on the allotment for livestock was 4,159 AUMs, BLM determined  
19 that the livestock numbers were not excessive. Tr 246. Instead  
20 BLM determined that livestock distribution needed to be improved.  
21 Ex A-6 p 47; Ex A-7 p 9.

22       Using the carrying capacity calculations based on the  
23 formula for potential stocking level, BLM calculated the total  
24 carrying capacity to be 18,481 AUMs. Tr 244; Ex A-6 p 39.  
25 However, the carrying capacity in the decision was 12,682 AUMs.  
26 Ex A-7 p 7. BLM arrived at this lower figure because it did not  
27 allocate all of the AUMs available to livestock. Tr 244-48.  
28 Because the allotment was under a rest-rotation system in which



1 only two of the four pastures were being used each year, BLM  
2 determined that only half of the AUMs were available for  
3 livestock each year. Tr 245-46. BLM could have allowed the full  
4 9913 AUMs on two pastures each year, but decided not to do that  
5 because of the critical wildlife habitat values on the allotment.  
6 Tr 246.

7 By allocating half of the AUMs each year, 4957 AUMs were  
8 available for two pastures each year. Tr 246. However, the  
9 active preference was only 4114 AUMs. Ex A-7 p 7; Tr 246. BLM  
10 again could have allocated the additional AUMs, but decided not  
11 to do so for three reasons: 1) short-term objectives for  
12 riparian areas were not being met, 2) there were too many wild  
13 horses, and 3) the BLM wanted to make sure that the herding  
14 system which was proposed to improve distribution would actually  
15 work. Tr 247. Therefore, the BLM did not increase the active  
16 preference for livestock, and arrived at a carrying capacity of  
17 12,682 AUMs by adding the livestock preference to the AML for  
18 wild horses. Tr 247-48. Therefore, 12,682 AUMs is the carrying  
19 capacity for the allotment under the circumstances of the  
20 decision. Tr 279.

21 After setting the carrying capacity for the allotment and  
22 allocating the available AUMs to wild horses and livestock, the  
23 Area Manager decided that the riparian objectives were not being  
24 met because there were too many wild horses and because cattle  
25 were poorly distributed. (Ex A-7 p 12). Therefore, the Decision  
26 took steps to remove excess wild horses and to improve livestock  
27 distribution. (Ex A-7 pp 9-13). Specifically with regard to  
28 improving livestock distribution, the Decision imposed a

1 requirement that the cattle be moved within the pasture or  
2 removed from the pasture once utilization levels had been  
3 reached. (Tr 215-16; Ex A-7 pp 9-10). This requirement was a  
4 new requirement which was not in the 1988 agreement. (Tr 185-86;  
5 Tr 267-68).

6 Scope of Review

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

9 The law is well settled that implementation of the  
10 Taylor Grazing Act of 1934 . . . is committed to the  
11 discretion of the Secretary of the Interior, through  
12 his duly authorized representatives in BLM. . . . By  
13 regulation, the Department has provided that an  
14 adjudication of grazing privileges will not be set  
15 aside on appeal if it is reasonable and substantially  
16 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.

17 Jerry Kelly v. Bureau of Land Management, 131 IBLA 146, 151  
18 (1994). Furthermore:

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

23 Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176, 182  
24 (1992). The standard of proof which the objecting party must  
25 meet is a preponderance of the evidence. Ralph and Beverly Eason  
26 v. Bureau of Land Management, 127 IBLA 259, 262-63 (1993).

27 Finally, with regard to questions of carrying capacity:

28 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.

1 Calvin Yardley et al. v. Bureau of Land Management, 123 IBLA 80,  
2 92 (1992).

3 On appeal to IBLA, an Appellant must do more than simply  
4 reiterate their arguments below. They must point out  
5 affirmatively why the decision appealed from is in error. In re  
6 Eastside Salvage Timber Sale, 128 IBLA 114, 116 (1994).

7 Issues on Appeal

8 I. Appellants had sufficient notice and explanation of the BLM  
9 Decision.

10 Appellants argue that the BLM Decision failed to disclose  
11 the basis of its carrying capacity determination, and that this  
12 alleged failure requires reversal. This issue was not  
13 specifically addressed by the ALJ, probably because it is not one  
14 of the Appellants' Appeal Points and was not set forth in  
15 Appellants' post-hearing briefs as a separate reason to overturn  
16 the BLM Decision. At most, Appellants raised the alleged failure  
17 to explain as part of their argument that the BLM's determination  
18 of carrying capacity was arbitrary and capricious. (See  
19 Appellants Opening Brief, p 9, lines 8-12). None of the  
20 supporting cases set out in their SOR were included in their  
21 post-hearing brief. The IBLA should decline to consider this  
22 argument. See Southern Utah Wilderness Alliance, et al., 128  
23 IBLA 52, 59-60 (1993) (Board need not consider issues raised for  
24 the first time on appeal).

25 At any rate, the Appellants' argument is off-base. The  
26 cases they cite refer to direct appeals to the IBLA from BLM  
27 decisions, in which BLM transmits an administrative record of the  
28 decision to IBLA. In this case, however, Appellants are

1 appealing the Decision of an Administrative Law Judge, and are  
2 not directly appealing a BLM decision to the IBLA. The "record,"  
3 in this case, is the record which was produced at the hearing.  
4 See 43 C.F.R. § 4.478(a) ("The transcript of testimony and  
5 exhibits, together with all papers and requests filed in the  
6 proceedings, shall constitute the exclusive record for  
7 decision.") Appellants had their opportunity at the hearing to  
8 add to that record, and could not now complain that the record  
9 created at the hearing is deficient.

10       What Appellants are complaining about, apparently, is that  
11 the decision and accompanying information did not contain enough  
12 information for them to decide whether to appeal the decision or  
13 accept it. (SOR p 7). However, as demonstrated in their appeal  
14 points, Appellants were quite aware at the time the Decision was  
15 issued of the methodology BLM used to calculate carrying  
16 capacity, and had enough information to appeal that methodology.

17       It is true that the BLM's final determination of carrying  
18 capacity, as represented in the Decision, varied from the  
19 carrying capacity BLM originally calculated. Nevertheless, the  
20 Area Manager provided a rational explanation for this difference  
21 at the hearing. (Tr 244-48). Even if Appellants had not  
22 understood the reasons for the difference between the calculated  
23 carrying capacity and the carrying capacity set forth in the  
24 decision, they once again had ample opportunity at the hearing to  
25 both cross-examine the Area Manager with regard to this rationale  
26 and to present any contradicting evidence. Therefore, Appellants  
27 have not shown how any lack of explanation in the written BLM  
28 decision has caused them harm or prejudiced their appeal rights.

1 See Union Oil Company of California, Union Exploration Partners,  
2 Ltd., 116 IBLA 8, 16-17 (1990).

3

4 Furthermore, although grazing decisions must give reasons  
5 for their actions, the grazing regulations do not specifically  
6 require full explanations of a determination of carrying  
7 capacity. See 43 C.F.R. § 4160.1-1. Nor have Appellants shown  
8 that BLM policy requires an explanation of carrying capacity  
9 determinations in the decision.

10 At any rate, the record shows that before the BLM Decision  
11 was issued, BLM engaged in a considerable amount of dialogue with  
12 the Appellants with regard to the Decision. (See p 4, supra).  
13 Furthermore, Appellants had a chance to protest the proposed  
14 decision. At that time, the difference between the calculated  
15 carrying capacity (which was set out in the Allotment Evaluation  
16 document accompanying the proposed decision), and the carrying  
17 capacity set forth in the proposed decision was quite clear.  
18 (See Proposed Decision p 7) If any lack of explanation for the  
19 difference was of concern to Appellants they had an opportunity  
20 to state this concern as a protest and have it addressed in the  
21 final decision. See 43 C.F.R. §§ 4160.2, 4160.3(b).

22 Given the above, it is difficult to imagine that Appellants  
23 are truly concerned about any lack of explanation in the written  
24 decision. This is simply a procedural issue they are raising  
25 now, because their argument on the merits was properly rejected  
26 at the hearing below.

27

28



1 II. The Hearing Officer Correctly Found That the BLM's  
2 Determination of Carrying Capacity Was Reasonable and Complied  
3 with BLM Grazing Regulations at 43 C.F.R. Part 4100. (Decision p  
4 13, Conclusion of Law # 6).

5 Appellants main concern at the hearing was the methodology  
6 used by BLM to calculate carrying capacity for the allotment, and  
7 to arrive at a final carrying capacity figure as shown in the  
8 Decision. Appellants generally repeat the concerns they set  
9 forth in their post-hearing briefs. As will be shown, their  
10 charge that the BLM was insensitive to riparian resources is  
11 untrue. BLM simply chose a different method to protect those  
12 resources than that preferred by Appellant. To avoid confusion,  
13 Appellants' concerns will be addressed in the order in which they  
14 are raised in the SOR.

15 1. The Area Manager Gave a Rational Explanation for the  
16 Difference Between the Calculated Carrying Capacity and the  
17 Carrying Capacity in the Decision.

18 Appellants argue that the Area Manager did not give an  
19 adequate explanation for the difference between the calculated  
20 carrying capacity and the carrying capacity set forth in the BLM  
21 Decision. (SOR pp 9-10). They claim that the Area Manager  
22 admitted that the calculated figure was too high and would cause  
23 resource damage, that the calculated carrying capacity was  
24 completely unrelated to the final carrying capacity, and that the  
25 Area Manager's explanation at the hearing was merely a  
26 rationalization.

27 However, Appellants fail to show that the Area Manager's  
28 explanation was unreasonable. As set forth in the statement of  
facts above, the carrying capacity for livestock and horses on  
the allotment was calculated as 18,481 AUMS per year. Of this  
number, 8,568 AUMs were allocated to wild horses and BLM

1 allocated the full amount to the wild horses as calculated. (Tr  
2 245, 247-48). This fact alone contradicts the Appellants'  
3 statement that the calculated carrying capacity was irrelevant.  
4 (SOR p 10).

5 BLM did not allocate the full amount of the calculated  
6 carrying capacity to livestock, although the Area Manager had the  
7 discretion to do so. Rather, because the allotment was divided  
8 into four pastures and only two were used each year under a  
9 rotation plan, the Area Manager decided to only allocate half of  
10 the calculated 9913 AUMs for livestock. (Tr 245-46). Half of  
11 the calculated livestock carrying capacity equaled 4957 AUMs.  
12 (Tr 246). The preference for livestock at the time was 4114  
13 AUMs, and the Area Manager decided not to raise the livestock  
14 preference for three reasons: 1) short-term objectives were not  
15 being met on riparian areas, 2) horse numbers would be above the  
16 calculated carrying capacity for a while, and 3) it was unclear  
17 whether the mandatory herding prescribed in the decision to  
18 protect riparian areas would work. (Tr 247). In other words,  
19 the Area Manager twice exercised his discretion in favor of the  
20 forage resource, and this is ironically what Appellants, who  
21 argue for fewer livestock numbers, are complaining about.  
22 Furthermore, evidence in the record showed that allotment  
23 objectives were being met after the decision. (Tr 293-94).

24 The Area Manager reasonably exercised his discretion to  
25 deviate from the calculated carrying capacity. Appellants' call  
26 for mathematical precision, on the other hand, is unreasonable  
27 and does not consider the deference traditionally given to the  
28

1 Secretary in these types of decisions. (See Scope of Review at p  
2 11, supra).

3 2. The BLM's Calculation of Carrying Capacity Was  
4 Reasonable.

5 The central focus of Appellants' argument is in their  
6 discussion of BLM's methodology for calculating carrying  
7 capacity. Once again, Appellants offer up an alternative method,  
8 but fail to show that BLM's chosen method was unreasonable.  
9 Appellants challenge two of the figures used by BLM in the  
10 carrying capacity equation set forth above: 1) the figure for  
11 average utilization (the actual utilization one finds on the  
12 ground), and 2) the figure for desired utilization (the  
13 utilization one hopes to achieve).

14 Before responding to the more technical arguments Appellants  
15 raise, it is first useful to examine their conceptual premise.  
16 They are essentially arguing that BLM policy, as expressed in a  
17 technical manual for grazing, requires an Area Manager to use a  
18 specific equation to determine carrying capacity for an  
19 allotment, to rely solely on that equation, and to never deviate  
20 from the result produced by that equation. However, they have  
21 never been able to point to any section in the manual (Ex A-9 pp  
22 55-57) which requires the use of the specific equation they  
23 believe is required. Nor have they been able to point to any BLM  
24 policy which mandates that the result produced by a carrying  
25 capacity equation can never be changed by the Area Manager.

26 This is because such policies do not exist. Carrying  
27 capacity equations are not tyrants, they are tools. No  
28 particular carrying capacity equation is mandated by the BLM  
technical manual relied on by Appellants, nor does this manual

1 state that the results from a carrying capacity equation are  
2 written in stone. In this case, the Area Manager used the  
3 carrying capacity equation for Potential Stocking Level, which is  
4 designed to show what the carrying capacity would be if  
5 distribution of grazing animals over the allotment were uniform.  
6 This is the equation which was called for in the Allotment  
7 Management Plan. (Ex A-7, Monitoring Plan p 7). It is true that  
8 distribution was not uniform at the time the Area Manager used  
9 the equation to estimate carrying capacity, but the Area Manager  
10 used rigorous steps in the decision to improve distribution.<sup>2</sup>  
11 Furthermore, the Area Manager disregarded the utilization figures  
12 for areas of the allotment which did not receive much use. (Tr  
13 132). Appellants wanted the equation for Desired Stocking Level  
14 to be used, but they failed to show that the use of this equation  
15 was required. Indeed, the equation for Desired Stocking Level  
16 assumes distribution would not change. (Ex A-9 pp 55-57).  
17 Appellants fail to explain how the Desired Stocking Level  
18 equation was required.

19 The difference between the equations for Potential Stocking  
20 Level and Desired Stocking Level lies in how each determines the  
21 figure for the actual observed utilization for a given number of  
22 grazing animals. By using weighted average utilization, the  
23 Potential Stocking Level equation averages utilization over a  
24 larger area of the allotment (although in this case, that area  
25 was limited because only the moderate and heavy categories were  
26 used). The Desired Stocking Level equation on the other hand,

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28 <sup>2</sup> The mandatory herding provisions in the decision are  
discussed at p 202 below.

1 uses utilization figures from key areas on the allotment, such as  
2 riparian areas.

3 Appellants argue that the use of weighted average  
4 utilization downplays the importance of riparian areas. One  
5 should only use the higher utilization figures found around  
6 riparian areas, they argue, so that the number of grazing animals  
7 is appropriate for the utilization one wants to achieve in those  
8 areas. However, their underlying assumption, that the only way  
9 to meet objectives in riparian areas is to reduce numbers, is  
10 incorrect. The Area Manager was concerned about riparian areas,  
11 but decided to impose rigorous herding and fencing requirements  
12 on the permittee to meet utilization objectives on the riparian  
13 areas. Appellants have failed to show that this was  
14 unreasonable. See Natural Resources Defense Council v. Hodel,  
15 624 F.Supp. 1045, 1057 (D.Nev. 1985).

16 The use of the Potential Stocking Level equation was  
17 appropriate and reasonable in this instance. Neither the BLM  
18 Manual relied on by Appellants nor BLM policy dictated otherwise.  
19 The ALJ's findings that the BLM's methodology was reasonable in  
20 this regard was clearly correct. (See ALJ Decision p 12, Finding  
21 of Fact # 5, p 13 Conclusion of Law # 3).

22 Appellants also challenge the figure which BLM used in the  
23 Potential Stocking Level equation for the Desired Utilization.  
24 BLM chose to use 60% as the desired utilization for the  
25 allotment. Appellants, on the other hand, wanted the 30% figure  
26 appropriate for riparian areas to be used for the entire  
27 allotment. Once again, however, they fail to show that the Area  
28 Manager's figure was unreasonable, especially because the Area



1 Manager used other methods to meet the riparian utilization  
2 objective.

3 Appellants argue that BLM improperly went outside of the  
4 planning documents to arrive at the 60% figure. (SOR p 14).  
5 They claim that this was inappropriate, because earlier  
6 management plans and livestock agreements called for lower  
7 utilization figures on the allotment. (SOR p 14).

8 However, those documents left open the possibility that the  
9 appropriate utilization figures could be adjusted in an approved  
10 activity plan, and the Decision under appeal was the functional  
11 equivalent of such a plan. (ALJ Decision p 6). Furthermore, the  
12 grazing environmental impact statement for the allotment stated  
13 that the desired utilization figures could be exceeded under  
14 intensive management, and the allotment was under intensive  
15 management. (ALJ Decision p 6).

16 The basic reason behind the increase of desired utilization  
17 was the fact that this was the first time that a wild horse AML  
18 was established for the allotment and the first time that the  
19 Area Manager had to consider wild horse use in the dormant season  
20 in order to establish the AML. (ALJ Decision pp 5-6). In the  
21 prior livestock agreement, the objective was set at 50%, but the  
22 livestock season of use ended at the end of October. However,  
23 wild horses are on the allotment all year. Because the period  
24 from the end of October to the end of February is in the dormant  
25 season for plants, and because the Nevada Handbook of Best  
26 Management Practices allows 60% utilization in the dormant  
27 season, BLM determined that 60% was appropriate to account for  
28

1 the year round utilization by the wild horses. (ALJ Decision pp  
2 5-6).

3 Appellants also challenge BLM's reliance on herding to  
4 protect riparian areas. In the BLM decision, use on riparian  
5 areas was strictly limited to the 30% utilization limit, and  
6 livestock were required to be moved after that figure was  
7 reached. This was not good enough for Appellants, who claim that  
8 this method had already been tried. (SOR p 15). However, it had  
9 not been tried in the way mandated by the Decision. Although the  
10 Allotment Management Plan referred generally to the use of  
11 herding, the Decision made it clear that livestock would be  
12 removed from riparian areas one way or another once riparian  
13 utilization objectives were exceeded. Decision pp 9-10. It is  
14 the Appellants who "speak falsely", by stating that the  
15 requirements in the Decision had already been tried on this  
16 allotment. (SOR p 15). It should be noted that the herding  
17 requirements in the BLM's decision apply even if the riparian  
18 limits are exceeded by wild horses alone, so that even if wild  
19 horse numbers are excessive riparian areas are still protected  
20 from livestock.

21 With the rigorous protections in the Decision for riparian  
22 areas, Appellants' claim that the Area Manager "sacrificed" these  
23 areas is ridiculous.

24 **III. The BLM Decision Does Not Authorize Livestock Carrying**  
25 **Capacity to Be Exceeded.**

26 Appellants argue that the Decision improperly allows  
27 livestock carrying capacity to be exceeded. Little is needed in  
28 the way of response except to point out, as was done in the post-

1 hearing briefs, that neither the calculated livestock carrying  
2 capacity of 9913 nor the Decision's livestock carrying capacity  
3 of 4114 was exceeded. BLM agrees that wild horse numbers  
4 exceeded the AML at the time of the decision, but that does not  
5 mean that the livestock carrying capacity was exceeded. See 43  
6 C.F.R. § 4110.3-2(b) (referring specifically to "livestock"  
7 carrying capacity). If Appellants had their way, apparently, no  
8 livestock use would be allowed in allotments where wild horse  
9 numbers exceeded the AML. This is tantamount to punishing the  
10 permittee for something which is beyond the permittee's control.  
11 That result is clearly unjust and not required by the  
12 regulations.

13 **IV. The Area Manager Properly Allocated Forage Between Livestock**  
14 **and Wild Horses.**

15 Appellants argue that the Area Manager did not adjust  
16 livestock and wild horses proportionately in the BLM Decision.  
17 They take this view because although the BLM Decision reduced  
18 wild horse numbers, it did not reduce livestock numbers.

19 As the ALJ correctly found, the Area Manager had minimal  
20 guidance with regard to how to properly allocate AUMs between  
21 wild horses and livestock. (ALJ Decision pp 10-11). The only  
22 guidance was in the Land Use Plan which states:

23 After the fifth year adjustments, continue monitoring  
24 and if adjustments in addition to the fifth year  
25 adjustments are required, adjust livestock, wild  
horses, and wildlife proportionately based on forage  
availability.

26 (Ex R-20 p 1). The Area Manager decided that the proper way to  
27 approach adjustments would be to use the same proportions as  
28 those found in the Land Use Plan. (ALJ Decision p 11). However,

1 just after the Land Use Plan was issued, livestock numbers were  
2 drastically reduced on the allotment. Therefore, the Area  
3 Manager decided to go with the livestock numbers reflected in the  
4 1988 agreement rather than the higher numbers in the land use  
5 plan.

6 As the ALJ properly found, the fact that the decision only  
7 reduces wild horses must be seen in the context of the prior  
8 history of the allotment. Since the Land Use Plan was  
9 implemented, wild horse numbers had undergone a dramatic increase  
10 on the allotment, while livestock numbers had decreased. In this  
11 context, it was reasonable for the decision to only reduce wild  
12 horses, and impose livestock restrictions on distribution instead  
13 of reducing livestock numbers.


14 Conclusion

15 For the above reasons, the ALJ's Decision should be  
16 affirmed.

17 Respectfully submitted,

18 David Nawi  
19 Regional Solicitor

20  
21 By:

  
22 John R. Payne  
23 Assistant Regional Solicitor  
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26  
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28

1 CERTIFICATE OF SERVICE

2  
3 The original of the foregoing "Reply to Appellants'  
4 Statement of Reasons" was sent via Certified Mail-Return Receipt  
5 Requested, on February 20, 1996, to:

6 Office of Hearings and Appeals  
7 Board of Land Appeals  
8 4015 Wilson Boulevard  
9 Arlington, VA 22203

10 A copy of the foregoing "Reply to Appellants' Statement of  
11 Reasons" was sent via "Certified Mail-Return Receipt Requested"  
12 on February 20, 1996, to:

13 Wayne Howle  
14 Deputy Attorney General  
15 Office of Attorney General  
16 198 S. Carson Street, No. 311  
17 Carson City, NV 89710

18 Copies of the foregoing "Reply to Appellants' Statement of  
19 Reasons" were sent via regular mail on February 20, 1996, to:

20 State Director  
21 Bureau of Land Management  
22 P.O. Box 12000  
23 Reno, NV 89520-0006

24 District Manager  
25 Bureau of Land Management  
26 705 East Fourth Street  
27 Winnemucca, NV 89445

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

Executed this 20th day of February, 1996 at Sacramento,  
California.

  
Barbara L. Johnson