

DON AND MARTHA P. SIMS

IBLA 95-203

Decided October 16, 1997

Appeal from the wild horse portion of the Final Multiple Use Decision for the Copper Kettle allotment issued by the Area Manager, Lahontan Resource Area, Bureau of Land Management, that determined livestock and wild horse grazing allocations. NV-030-95-02.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A decision by BLM allocating livestock and wild horse use that is based on monitoring, research, and analysis of usage of the public lands and is shown to be made in consideration of the condition of the affected range in terms of availability is properly affirmed.

2. Wild Free-Roaming Horses and Burros Act

The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation. Allocation determinations must be based on research and analysis, and on monitoring programs which include studies of grazing utilization, trends in range conditions, actual use, and climactic factors.

APPEARANCES: John E. Marvel, Esq., Elko, Nevada, for Appellants; John O. Singlaub, District Manager, Carson City District, Carson City, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Don and Martha P. Sims have appealed from the wild horse portion of the Final Multiple Use Decision (Decision) for the Copper Kettle allotment dated November 21, 1994, issued by the Area Manager, Lahontan Resource Area, Bureau of Land Management (BLM). The Decision allocated 2,339 animal unit months (AUM's) for 219 cattle year-round and 588 total horse AUM's

for 49 wild horses year-round on the allotment. Appellants allege in their Supplemental Statement of Reasons (Supp. SOR) on appeal that there is no "reasonable, legitimate or rational basis to support the wild horse numbers established as the AML [Appropriate Management Level] by the Decision." (Supp. SOR at 4.)

The Record of Decision for the Lahontan Environmental Impact Statement and the Lahontan Resource Management Plan were completed on September 3, 1985. These documents established the multiple-use goals and objectives which guide management of the public land on the Copper Kettle allotment. The Rangeland Program Summary (RPS) Update was issued in 1989, which identified the specific allotment objectives for the Copper Kettle allotment. (Decision at 1.)

Starting in 1977, trend data was collected as part of a monitoring effort on the Copper Kettle allotment to determine if existing multiple uses for the allotment were consistent with attainment of the objectives established by the RPS. The data was analyzed in 1993 through the allotment evaluation process to: (1) determine progress in meeting multiple-use objectives for the Copper Kettle allotment and (2) determine what changes in existing management were required in order to meet specific multiple-use objectives for this allotment. (Decision at 1.)

The 1994 Decision here under appeal determined that no change in the allocation of 2,339 AUM's per year (219 cattle) should occur as "the allotment appears to be in good condition and does not warrant any immediate change at this time." (Decision at 2.)

The Decision further stated, with respect to wild horse management on the allotment, in pertinent part:

North Stillwater Herd Management Area [HMA]: It has been determined through monitoring and the allotment evaluation process that a thriving natural balance can be obtained through an Appropriate Management Level (AML) for a maximum of 49 wild horses for the Copper Kettle Allotment portion of the North Stillwater HMA. The Copper Kettle Allotment portion comprises 17 percent of the North Stillwater HMA.

RATIONALE: Monitoring information indicates that the carrying capacity of the Copper Kettle Allotment portion of the North Stillwater HMA is 588 total AUMs, in combination with current livestock numbers and forage reserved for bighorn sheep and deer. Actual counts and utilization records show that approximately 588 AUMs or 49 wild horses are the maximum proper stocking level within the Copper Kettle portion of the North Stillwater HMA. This AML was based on actual numbers of wild horses and livestock during the evaluation period.

By maintaining the wild horses and livestock AUMs at this level, it is anticipated that land use plan objectives will be met, including maintaining or improving [the] current ecological

condition and maintaining [the] utilization at 55% or less on key species on upland areas.

In order to prevent resource damage, horse numbers should be limited to a maximum of 49 animals (Copper Kettle portion). To avoid annual removals and to minimize stresses and band disturbances associated with removals, removals will be conducted every three years. To avoid excess vegetation utilization, horses will be managed for a range of 37 to 49 animals. This will allow for an increase in the population between removals.

(Decision at 3.)

The authority for these BLM determinations with regard to livestock grazing management and wild horse grazing management is found in Title 43 of the Code of Federal Regulations (C.F.R.). Livestock grazing management is addressed in 43 C.F.R. §§ 4110.3 and 4130.3-1(a). Section 4110.3 provides:

The authorized officer shall periodically review the grazing preference specified in a grazing permit or grazing lease and may make changes in the grazing preference status. These changes shall be supported by monitoring, as evidenced by rangeland studies conducted over time, unless the change is either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity.

Section 4130.3-1(a) additionally provides:

The authorized officer shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity as determined through monitoring and adjusted as necessary, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity as determined through monitoring and adjusted as necessary under Sections 4110.3, 4110.3-1 and 4110.3-2.

The authority for the BLM determinations with regard to wild horse grazing levels within the Decision is contained in sections 3(a) and (b) of the Wild-Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. §§ 1331-1340 (1994), and in 43 C.F.R. Part 4700. The regulation at 43 C.F.R. § 4700.0-6(a) provides: "Wild horses and burros shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat." The regulation at 43 C.F.R. § 4710.4 further provides: "Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans." Finally, 43 C.F.R. § 4720.1 states, in pertinent part: "Upon

examination of current information and a determination by the authorized officer that an excess of wild horses or burros exists, the authorized officer shall remove the excess animals immediately * * *."

On September 16, 1994, Appellants appealed the wild horse portion of the Decision of the Area Manager and protested the allocation of 588 AUMs (49 animals) for wild horse grazing. In their subsequent Supp. SOR filed with this Board on February 6, 1995, Appellants have clarified and refined their objections. Appellants first argue that

Allotment Specific Objectives of the allotment evaluation and the RPS state that wild horses and their habitat are to be managed at present population levels (III.C.1.c.) and that 180 AUMs of forage for approximately 15 head of wild horses were to be provided (III.C.2.f). Accordingly, the Decision is directly in conflict with the specific objectives set forth by the BLM's allotment evaluation.

(Supp. SOR at 2.) Appellants' next claim that the August 1991 census of 49 wild horses within the allotment which is used by BLM as the AML to be maintained is inconsistent with the allotment specific objectives of the allotment evaluation, and is clearly arbitrary because it is not justified by any monitoring or other utilization data. Id. Appellants' third argument concerns their claim that while the 1993 allotment evaluation states that additional monitoring is needed to substantiate any adjustments to livestock grazing or wild horse numbers, the number of wild horses has been adjusted upward with no such data. (Supp. SOR at 2-3.)

Appellants next argue that while the 1993 allotment evaluation indicates the allotment is being properly managed with respect to short-term and long-term objectives, the basis for such a conclusion is that the allotment is being managed for approximately 15 head of wild horses, not the 49 authorized in the Decision. (Supp. SOR at 3.) The Sims' fifth claim urges that because the good range conditions existing on the allotment have been due to their efforts, if excess AUMs are available for grazing, they should be allocated to Appellants' livestock grazing preference and not to an increase in wild horse numbers. Id. Appellants' sixth argument is that there is insufficient resource information to determine the AML for the allotment, thus there is no legitimate or rational basis to support the wild horse number established as the AML by the Decision. Id.

The Appellants' seventh claim is that an increase in wild horse numbers to 49 will cause irreparable harm to their ranching operation, together with short-term disruptions and long-term instability. The Sims' final claim is that the "increased horse use" will ultimately result in a reduction in Appellants' grazing preference, in direct violation of applicable law and regulation, to include

the Federal Land Policy and Management Act of 1976, the Public Rangelands Improvement Act of 1978, the Taylor Grazing Act of 1934, the Wild Free-Roaming Horses and Burros Act of 1971 and

43 CFR part 4100, all of which recognize grazing as an important and protectible multiple use.

Id. at 4.

The BLM's Response was filed by the District Manager, Carson City, on February 17, 1995. The District Manager initially noted that the 15-horse figure cited by the Appellants as the baseline population for the allotment was not the figure used as the current population nor what the allotment could support. The District Manager stated:

The Rangeland Program Summary (RPS) Update, 1989, stated "Initially provide 180 AUMs of forage for approximately 15 head of wild horses." The horse AUMs referred to in the RPS were the number of horses counted in the first census conducted after the passage of the Wild Horse and Burro Act of 1971 (Public Law 92-195). This number did not reflect what the habitat could support and was based solely on the number of horses initially counted. In the multiple use decision, the horse number is based on an analysis of monitoring information contained in the Allotment Evaluation. Since we could not attribute any resource damage, from either livestock or wild horses, no reduction in grazing preference or wild horse numbers were proposed in the Multiple Use Decision. We believe that the Copper Kettle Allotment portion of the North Stillwater Herd Management Area can support a maximum of 49 horses along with the current number of cattle and still meet the wildlife and other multiple use decisions objectives.

(Response at 1.)

In response to Appellants' claim of wild horse overpopulation on the allotment because "one transect, run close to water indicated heavy use, mostly by wild horses," the District Manager explains: "While the one transect near water did receive heavy use, the vast majority of the Allotment receives use considered to be at a level that will meet overall allotment objectives." (Response at 2.) Further, in response to Appellants' claim that there is not an HMA plan, the District Manager explains:

Our practice has been to complete an allotment evaluation; issue a multiple use decision and then incorporate the horse numbers set in the multiple use decision into a wild horse herd management area plan. Once the preceding multiple use decision is final a herd management area plan will be prepared with public input.

Id.

The Appellants' claim that there is no monitoring data to justify raising the number of wild horse AUMs on the allotment, is countered by the District Manager, who states: "In the Allotment Evaluation it was

recognized that there were 49 wild horses inhabiting the allotment, however, no resource damage has resulted from the existing population." Id. The Response next addresses the Appellants' claim that

livestock management has in fact been very compatible with and beneficial to good range condition due to the efforts of Appellants, and in the event that excess AUMs are available for grazing, they should be allocated to Appellants' livestock grazing preference and not to an increase in wild horse numbers.

(Supp. SOR at 3.) The District Manager explains the reasons why livestock management within the allotment at 2,333 AUM's is meeting utilization objectives:

Cattle and horses utilize the same grass species, in addition to grasses cattle also utilize shrubs, which horses rarely consume. Because the vast majority of the Allotment receives moderate or less utilization on grass species we feel the plant community can be maintained by managing the current numbers of grazing animals that were identified in the Allotment Evaluation and Multiple Use Decision.

(Response at 2.)

In response to Appellants' sixth claim that "there is not enough data to establish the number of wild horses for the Copper Kettle Allotment," the District Manager states that "[b]ased on the monitoring data we believe that the Copper Kettle Allotment portion of the Herd Area can support 49 horses along with the other identified uses and still meet multiple use objectives." Id. Moreover, the Area Manager of the Lahontan Resource Area had addressed many of these same concerns in his October 3, 1994, letter to Appellants, after receiving their letter of appeal dated September 16, 1994. The Area Manager had explained that in 1988, 54 wild horses were counted within the Copper Kettle allotment, in 1991, 49 wild horses were counted, and in three distribution flights conducted in 1992, 34, 43, and 53 animals, respectively, were counted. (Oct. 3, 1994, letter at 1.)

In response to Appellants' claim that by setting the number of wild horses at 49, their business will be jeopardized, the District Manager explains:

As previously stated, the Multiple Use Decision did not change livestock numbers and the decision set the horse numbers at the current level because we believe that we have enough information to show that the range can support all of the uses and objectives set in the Multiple Use Decision.

(Response at 2.)

The Appellants' final claim maintains that the Decision will ultimately result in increased horse use with a prospective reduction in Appellants' grazing preference. The District Manager states in his Response:

As previously stated the Multiple Use Decision is setting both the wild horse and livestock numbers at the current level. Any future adjustments will be based on additional monitoring information.

We would like to emphasize that the Multiple Use Decision does not change the number of livestock which can utilize the allotment. Also, the wild horse number set in the Multiple Use Decision reflects the current number of horses utilizing the Copper Kettle Allotment portion of the Stillwater Herd Management Area and the utilization levels of the vegetation made by both cattle and wild horses is within acceptable levels which is maintaining a thriving ecological balance. The wild horse numbers referred to in the Range Program Summary Update, were merely the number of horses counted after the passage of the Wild Horse and Burro Act. The number of wild horses, livestock and wildlife identified in the Multiple Use Decision was the result of an analysis of the area and is consistent with all other multiple uses together.

(Response at 3.)

The legislative history of the Wild Free-Roaming Horses and Burros Act supports a finding that Congress had no intention to maintain the free-roaming horses and burros at their 1971 levels. In 1971, Congress was faced with incomplete information as to the number of horses on the public lands. In discussing the need for the 1971 Act, the Senate Report states:

Estimates of the total number of animals subject to the measure are open to question * * *. This indicates an alarming trend as well as a surprising lack of information regarding the animals and prompted the committee to include a provision in the bill for necessary studies of the habits of the animals to be undertaken by the Secretary of the Interior.

S. Rep. No. 92-242, 92nd Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 2149, 2150. In addition, the joint statement of the Committee of Conference specifically

pointed out that the Secretaries of Interior and Agriculture are given a high degree of discretionary authority for the purposes of protection, management, and control of wild free-roaming horses and burros on the public lands. The Act provides the administrative tools for protection of the animals from the depredation of man. This is the paramount responsibility with which the Secretaries are charged under the terms of the statute.

Conf. Rep. No. 92-681, 92nd Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 2159, 2160.

[1, 2] The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation. 16 U.S.C. § 1333(a) (1994); Michael Blake, 135 IBLA 9, 14 (1996); Animal Protection Institute of America, 118 IBLA 20, 23 (1991); Dahl v. Clark, 600 F. Supp 585, 594 (D. Nev. 1984). The test as to appropriate wild horse population levels is whether such levels will achieve and maintain a thriving ecological balance on the public lands. Nowhere in the law or regulations is the BLM required to maintain any specific number of animals or to maintain populations in the number of animals existing at any particular time. Dahl v. Clark, *supra*, at 595. A determination that removal is warranted must be based on research and analysis, and on monitoring programs which include studies of grazing utilization, trends in range conditions, actual use, and climactic factors. Michael Blake, *supra*; Animal Protection Institute of America, 117 IBLA 4, 5 (1990); Animal Protection Institute of America, 109 IBLA 112, 120 (1989); see Craig C. Downer, 111 IBLA 339 (1989).

Conversely, Appellants must demonstrate by a preponderance of the evidence that the BLM erred when collecting and presenting its data. See Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Appellants have failed to carry this burden. Appellants allege that BLM has tripled the wild horse allocation while maintaining the status quo with respect to livestock grazing. Nothing could be further from the truth. During the period from 1988 to 1993 when BLM studied this allotment precedent to issuance of the Final Multiple Use Decision in 1994, the wild horse population was relatively constant, as was the livestock population. The wild horse count was 54 in 1988, 49 in 1991, and 34, 43, and 53, respectively, in three different counts in 1992. Throughout this period, the parties agree that the range condition was healthy without overuse.

In this case, the record establishes that the integrity of the range and its forage capability were never threatened by an overpopulation of horses. There is no evidence that BLM has allocated wild horse and livestock AUM's merely for administrative convenience or in the absence of adequate information. See Animal Protection Institute of America, 109 IBLA at 118. The data shows that utilization levels reflect true ecological balance. Therefore, it cannot be logically concluded that reduction of wild horse AUM's within the Copper Kettle allotment would improve ecological conditions.

The case record supports a conclusion that the allocation numbers within this allotment were not drawn randomly or for administrative convenience. Rather, BLM demonstrated a continuing rational basis for its determination that the number of horses allocated to this allotment as the AML is supportive of the statutory goal of a "thriving ecological balance" on the range.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Final Multiple Use Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

Franklin D. Amess
Administrative Judge

