



JOSE TALANCON 1998 FAMILY TRUST v. BUREAU OF LAND MANAGEMENT

174 IBLA 152

Decided March 20, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

JOSE TALANCON 1998 FAMILY TRUST

v.

BUREAU OF LAND MANAGEMENT

IBLA 2007-123

Decided March 20, 2008

Appeal from a decision of Administrative Law Judge James H. Heffernan affirming decisions of the Winnemucca (Nevada) Field Office, Bureau of Land Management, increasing authorized livestock grazing use and denying temporary non-renewable grazing use. N2-2005-02 and N2-2005-03.

Affirmed.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

When the Bureau of Land Management increases permanent authorized grazing use on an allotment, it is not obligated to increase it to the maximum use consistent with carrying capacity or forage utilization objectives. It may authorize use at a lesser level in its discretion.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

In calculating grazing capacity and determining the permanent permitted use level of a grazing allotment, the Bureau of Land Management acted rationally and within its discretion in establishing permitted use at a level that avoids exceeding utilization objectives for all pastures in the allotment.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for Appellant; Nancy S. Zahedi, Esq., Assistant Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Appellant Jose Talancon 1998 Family Trust appeals from a January 25, 2007, decision of Administrative Law Judge (ALJ) James H. Heffernan affirming two decisions of the Bureau of Land Management (BLM) Winnemucca Field Office regarding Appellant's authorized grazing use of the Hot Springs Peak Allotment (HSPA) in Humboldt County, Nevada, under the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.*, and implementing regulations at 43 C.F.R. Part 4100.¹ The first decision was a Final Multiple Use Decision dated March 2, 2005 (2005 FMUD), that, among other things, increased Talancon's authorized grazing use in the HSPA. The second is a July 8, 2005, decision denying Talancon's application for additional temporary non-renewable (TNR) grazing use (2005 TNR Decision). For the reasons explained below, we affirm.

FACTUAL AND LEGAL BACKGROUND

A. *Grazing on the Hot Springs Peak Allotment from 1993-2003*

Jose Talancon acquired the base property associated with, and the grazing preference for, the HSPA as part of a ranch acquisition in the summer of 1993. Jose Talancon 1998 Family Trust's Statement of Reasons (SOR) at 13.² On December 16, 1993, the BLM Winnemucca Field Office issued a Final Multiple Use Decision for the HSPA (1993 FMUD). SOR at 14; Response to Appellant's Statement of Reasons (BLM Response) at 2; Hearing Exhibit (Ex.) A-2; testimony of Amanda DeForest (DeForest), Transcript of Hearing (Tr.) at 833. The 1993 FMUD established a carrying capacity of 1,770 animal unit months (AUMs)³ of which 270 AUMs were placed "in the 'not scheduled category' for conservation purposes until monitoring data shows that the distribution problem within the summer use areas has been corrected." Ex. A-2 at 3; *see also* testimony of Everett Bartz (Bartz), Tr. at 292. The 1993 FMUD therefore established an authorized use of 1,500 AUMs, plus 270 AUMs not yet scheduled. Ex. A-2 at 6.

The 1993 FMUD established May 31 through July 31, and November 1 through January 31, as the seasons of use. *Id.* at 7. The summer grazing range

¹ Hereinafter, both Jose Talancon and the Jose Talancon 1998 Family Trust (of which Jose Talancon apparently is a trustee) are referred to individually or collectively (as the context may require) as "Talancon."

² The grazing permit in the HSPA is now held solely by the Jose Talancon 1998 Family Trust.

³ An AUM "means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. § 4100.0-5.

consisted of the central portion of the HSPA encompassing the lower eastern slope areas of the northern portion of the Hot Springs Range, descending eastward into the western portion of the Eden Valley. The pastures within this portion of the HSPA were called Klaumann Seeding A, Klaumann Seeding B (adjoining Seeding A on the south), Klaumann Seeding C (adjoining Seeding B on the south), and the so-called "Burned Field," which surrounded the Klaumann Seedings on the north, west, and south. *Id.*; Exs. G-6, A-1.⁴ The 1993 FMUD also established a rotation schedule for use of the three Klaumann Seedings. Ex. A-2 at 6. The winter grazing range consisted of the Hot Springs Peak pasture (the higher elevations of the northern portion of the Hot Springs Range west of the summer range and descending the western slope of the range toward the Little Humboldt River) and the Eden Valley pasture (east of the summer range), with annual rotation of the two pastures. Exs. G-6, A-1.

The 1993 FMUD specified two short-term multiple use management objectives under which grazing would be monitored, *i.e.*, 50 percent utilization of "key plant species" in upland habitats and 50 percent utilization of crested wheatgrass. Ex. A-2 at 4. Long-term objectives included improving range condition from poor to fair on 53,135 acres, as well as managing and improving rangeland conditions to provide forage on a sustained yield basis for livestock, at a stocking level of 1,770 AUMs. *Id.* at 2. The 1993 FMUD further noted:

It has been determined through monitoring that water availability is the limiting factor on the Hot Springs Peak Allotment and not vegetative resource. At present, every pasture within the allotment has distribution problems based on this factor.

Id. at 3.

BLM subsequently determined that Talancon had corrected water distribution problems for the 1994 grazing season by hauling water to temporary troughs. Ex. G-38C; Bartz, Tr. at 292-94. BLM then activated the unscheduled 270 AUMs in April 1995, providing Talancon with a total active use of 1,770 AUMs. This allowed Talancon to increase the number of livestock from 190 cows to a total of 240 cows, and to extend the summer grazing season by 2 weeks (through August 15). *Id.* at 294.

Beginning in 1995, BLM also authorized TNR use from year to year in addition to the 1,770 AUMs of permanent permitted use under the 1993 FMUD. Ex. G-26

⁴ With the construction of a fence in 1996, the portion of the Burned Field north of the Klaumann Seedings became known as the "North Burn." The portion on the west and south of the Klaumann Seedings became known as the "South Burn." SOR at 17.

at 6. In 1995 and 1996, TNR use was 544 and 595 AUMs, respectively, bringing the total AUMs authorized to 2,314 AUMs in 1995 and 2,365 AUMs in 1996. *Id.* In 1997, TNR use increased to 1,992 AUMs, for a total of 3,762 AUMs authorized in that year. *Id.* When Talancon applied for a substantial increase in permitted use on February 15, 1998, Ex. A-10, BLM responded by notifying Talancon that BLM would first need to undertake an Allotment Evaluation. Testimony of Robert Schweigert (Schweigert), Talancon's expert witness, Tr. at 1107-09. Pending issuance of that evaluation, BLM authorized TNR use so that, in Schweigert's words, "rather than stay at the lower number of AUMs, we would increase the number of livestock used, and monitor that. And that would provide additional information for, again, the pending Allotment Evaluation." *Id.* During the period from 1998 through 2003, BLM continued to authorize varying increased levels of TNR use, from a low of 2,304 AUMs in 2001 to a high of 3,472 AUMs in 1999 (for a total of between 4,074 and 5,242 AUMs authorized). Ex. G-26 at 6. This resulted in an increase from the 240 head of cattle authorized for the HSPA under the 1993 FMUD to a total of 449 and 450 head by 2002 and 2003, respectively. Exs. G-38A at 58, A-27A at 2.

BLM issued a Draft Allotment Evaluation (Draft AE) on December 12, 2000, which analyzed data collected between 1994 and 1999. Ex. G-1 at 1-12. The Draft AE concluded that for key upland plant species, "[t]he short term objectives were met for all pastures until 1997. However, utilization objectives were reached in 1997 and exceeded in 1998 and 1999 on low elevation areas in the North and South Burn, Hot Springs Peak and Eden Valley pastures."⁵ *Id.* at 17. The Draft AE further concluded that utilization for crested wheatgrass reached maximum allowable levels in Klaumann Seedings A and B in 1997, and that utilization objectives were exceeded for Klaumann Seeding C in 1998 and Klaumann Seedings B and C in 1999. *Id.* The Draft AE noted that "[t]he seedings are now in a downward trend. Overuse from 1997 to 1999 in these seedings depletes root reserves and decreases root population." *Id.* With regard to the failure to keep utilization within short term objectives between 1997 and 1999, the Draft AE observed: "Present stocking rates coupled with inoperable water systems focus grazing pressure on service areas" *Id.* The Draft AE also calculated a carrying capacity for each pasture. Ex. G-1 at 39, Appendix 1.

On March 13, 2001, Talancon filed three alternative grazing applications with BLM, each of which sought a permanent permitted use of 11,386 AUMs. Ex. G-25. Talancon modified the application in certain respects on May 29, 2001, and

⁵ Forage utilization objectives are met when plant utilization is at or below the level of the objective (in this case, 50 percent of the identified plant categories). Utilization levels are not met, or are "exceeded," when utilization exceeds that intended level. In other words, if utilization objectives for a pasture are not met or are exceeded, the pasture has been overgrazed.

August 24, 2001, Exs. A-12 and G-19, but the total permanent permitted use that Talancon sought did not change.

The Final Allotment Evaluation was issued on December 5, 2001 (Final AE) (Ex. G-2), along with the Proposed Multiple Use Decision for the HSPA (2001 PMUD) (Ex. G-3). The Draft AE's conclusions regarding utilization objectives remained unchanged. Ex. G-2 at 17. The 2001 PMUD proposed that permitted use be set at 4,930 AUMs in Year 1, increasing each year through Year 5, when it would be set at 7,082 AUMs. Ex. G-3 at 5. However, the 2001 PMUD specified that these increases "will be dependent upon meeting the short term utilization objectives and standards^[6] for each pasture in the Hot Springs Peak Allotment." *Id.* The 2001 PMUD further stated that "[i]f utilization objectives and standards are not met for any pasture, and, if water is not hauled, then scheduled increases in AUMs will not occur. Moreover, if allotment objectives and standards are not met in each pasture, then stocking levels will be adjusted . . . back to the previous stocking level or another level to be determined when and if needed." *Id.* at 13. *See also* Ex. G-2 at 57, 63.

Talancon filed a protest of the 2001 PMUD on December 20, 2001. Ex. G-5. Following that protest, the BLM Winnemucca Field Office determined that it was necessary to conduct an environmental assessment (EA) to support a final grazing decision, and so notified Talancon on September 22, 2002. Ex. G-28; Seidlitz, Tr. at 173. Talancon subsequently withdrew the protests of the PMUD on December 5, 2003. Ex. G-37.

B. *The 2004 Rangeland Health Determination, Environmental Assessment, and Proposed Multiple Use Decision*

This process led to the preparation of the Determination Document/Standard for Rangeland Health (RHD) for the HSPA, issued on February 27, 2004 (Ex. G-121), and the Hot Springs Peak Allotment Multiple Use Decision Environmental Assessment issued on March 4, 2004 (2004 EA). Ex. G-38A. The time between the 2001 PMUD and the RHD and 2004 EA gave BLM experience in management of the HPSA over a longer period at higher rates of TNR use. In the RHD, BLM said that monitoring data collected since the Draft AE in December 2000 "confirm that management changes are necessary to achieve the SRH and allotment specific objectives within the HSPA." Ex. G-121 at 1. The RHD stated that key plant upland species utilization objectives were exceeded for several pastures in the allotment in the period from 1998 through 2003, and that because of limited available water sources, there were "areas of

⁶ *I.e.*, the "Standards and Guidelines for Nevada's Sierra Front - Northwestern Great Basin Area," Ex. G-118, which is usually referred to as the Standards for Rangeland Health (SRH). *See* 43 C.F.R. § 4180.2.

excessive trailing in the south and west burn pastures” in 2003. *Id.* at 1, 2. With regard to causal factors for not achieving the standards, the RHD stated:

Existing livestock grazing management practices and levels of grazing use are significant factors in failing to achieve the Standards and conform with the Guidelines. The lack of dependable permanent waters, lends itself to concentrating livestock and creating distribution problems throughout the Hot Springs Peak Allotment especially in the North, South and West Burn pastures.

Id. at 3.

In the 2004 EA, BLM incorporated an additional 4 years of data that had not been analyzed in the Final AE and 2001 PMUD, thereby analyzing all of the data collected between 1994 through 2003. *See* Ex. G-38A at 59-70. The 2004 EA observed that “[a]llotment specific objectives and standards for rangeland health have not been met at all locations for all pastures beginning in 1998. This is manifested as forage over-utilization by livestock at certain locations within the allotment.” Ex. G-38A at 9. The 2004 EA further noted that “[w]ater developments were and continue to be the primary limiting factor for uniform livestock utilization on the HSPA. Attempts have been made that would have improved livestock distribution and utilization. Examples would be the Poverty and Burned Field wells (both dry holes).” *Id.* at 10. With respect to water resources generally, the 2004 EA stated:

Surface water resources within the allotment are limited to ephemeral drainages and less than one quarter mile (.25) of the Little Humboldt River (LHR). The northern half of the allotment boundary is bordered by the LHR, but is outside of the allotment on private land. . . .

Livestock water sources found within the allotment are the result of range improvement projects constructed for watering livestock and include three wells and two pipelines originating from spring sources outside of the allotment.

Id. at 23-24. The 2004 EA also noted that pasture utilization objectives had been exceeded in the West and South Burns in 1998, 1999, 2001, and 2003, in the Eden Valley pasture in 1998-2000, and in the Hot Springs Peak pasture in 2001, *id.* at 29, 31, and identified various adverse impacts that would occur with “[c]ontinued over[-]utilization” of the latter two pastures. *Id.* at 31.

In addition, BLM witnesses testified extensively regarding issues related to water availability and maintenance of water systems, problems with livestock concentration and overgrazing, failures to meet utilization objectives in different pastures, and the need to modify the grazing authorized in certain years in order to address utilization concerns resulting from TNR use. *See, e.g.,* Seidlitz and Bartz, Tr. at 54-92, 106-46, 184-96, 277, 312-13, 317-19, 347-76, 403-05, 509-14, 529-30, 589, 593. This information led BLM to conclude that the higher level of TNR use authorized from 1998 through 2003 should be scaled back. *E.g.,* Seidlitz, Tr. at 196, 202-03. In 2004, BLM authorized 696 AUMs of TNR use (compared to 2,758 AUMs of TNR use in 2003), resulting in a reduction in total authorized grazing from 4,528 AUMs (450 cows) in 2003 to 2,466 AUMs (306 cows) in 2004. DeForest, Tr. at 876.

BLM issued a new Proposed Multiple Use Decision for the HSPA on July 1, 2004 (2004 PMUD) (Ex. G-123), which proposed an initial increase of 688 AUMs in permanent permitted use, for a total of 2,458 AUMs, which could increase by another 322 AUMs (for a total of 2,780 AUMs) if two years of monitoring at the initial level “indicates successful achievement of allotment specific objectives and standards.” Ex. G-123 at 6. The additional 1,010 AUMs proposed in permitted use reflected a 57 percent increase over permanent permitted use under the 1993 FMUD.

C. *The 2005 Final Multiple Use Decision and Denial of TNR Use*

On July 19, 2004, Talancon protested the 2004 PMUD for, *inter alia*, providing an insufficient level of increased use. Ex. G-124. BLM also received one other protest, which objected to any increase in permitted use. Ex. G-125. Following Talancon’s protest of the 2004 PMUD, BLM re-examined its proposed increase in the permanent stocking level. When the Winnemucca Field Office staff could not replicate the method by which the 57 percent proposed increase was derived, BLM adopted a different method for the final decision. DeForest, Tr. at 939-40, 943, 965; testimony of Arlan Hiner (Hiner), Tr. at 2857-64.

In the 2005 FMUD, BLM relied upon actual use data, utilization monitoring results, and precipitation data to authorize a permanent increase of 836 AUMs in permitted use over the 1993 permit, for a total of 2,536 AUMs. Ex. G-26 at 8. The 2005 FMUD stated:

The applications submitted March 13, 2001 are denied. All three applications request an increase in excess of 11,000 AUMs, which is not conducive to meeting the short term or long term allotment objectives or the Standards for Rangeland Health within the HSPA. Monitoring data collected throughout the evaluation period showed that when used [*sic*] reached a level of 4074 AUMs the short term monitoring objectives were not met within the HSPA.

The stocking level is an average based on actual use data collected in 1994, 1995, 1996, 1997, and 2004, where the short term utilization objectives were met. During 1994, 1996, and 1997, the precipitation during the growing season was below the average of 3.77 inches. The 2004 grazing season had below normal precipitation for the whole year and the short term objectives were met. Based on these data, the authorization of 2536 AUMs should allow for continued attainment of the short term utilization objectives and allow for significant progress towards attainment of the Standards for Rangeland Health. The pasture rotation was analyzed within the realm of the March 4, 2004 Environmental Assessment.

Although this decision implements an increase in the permitted use of the HSPA, in actuality it decreases the number of livestock and AUMs that have been authorized by TNR to a manageable number and no further TNR will be authorized under this decision. . . .

Ex. G-26 at 10. The decision also established a new grazing system for the HSPA, including pasture rotation, rest during critical growth periods, seasons of allowed grazing, etc., along with various terms and conditions to be incorporated into the new 10-year grazing permit. *Id.* at 8-12. The short-term objectives for utilization of key upland plant species and crested wheatgrass were essentially identical to the 1993 FMUD; long-term objectives and the standards and guidelines for rangeland health, similar to the 1993 FMUD, were updated. *Id.* at 4-5. Talancon appealed the 2005 FMUD.

On May 26, 2005, Talancon submitted an application for TNR use in the HSPA from July 11-31, 2005, and September 1 through October 31, 2005. Ex. A-19. BLM issued a Notice of Proposed Decision on July 8, 2005, denying the TNR application (2005 TNR Decision), and clarifying that BLM would not consider TNR use until a full 3-year grazing cycle had been completed and showed that short-term utilization objectives were being met. Ex. G-145. Talancon did not protest the proposed decision, which then became a final decision. DeForest, Tr. at 984. Talancon appealed the 2005 TNR Decision, which appeal was consolidated with the appeal of the 2005 FMUD.

D. *The ALJ Decision*

A hearing in the consolidated appeal was held on October 3-7, 2005, March 13-17, 2006, and June 26-28, 2006. In his January 25, 2007, decision, the ALJ determined that Talancon had failed to demonstrate that BLM had no rational basis for its decision in the 2005 FMUD, and found that “nothing presented by the Appellants during the hearings served to adequately rebut the legal sufficiency of the

2005 FMUD.” ALJ Decision at 6. The principal bases of the ALJ’s analysis were the following:

1. After observing that the 2005 FMUD authorized a permanent increase of 836 AUMs over the 1993 FMUD, and noting that Talancon asserted that this was not a large enough increase, the ALJ said:

The utilization levels covering the key vegetative species on this allotment are generally defined to be at the 50% level. Inherent in Appellants’ basic case is the contention that BLM is mandated to approve grazing levels up to and inclusive of applicable 50% utilization levels and the related contention that BLM does not enjoy the legal discretion, based upon professional judgment, to approve an increase in authorized AUMs that is lower than that applied for by the Appellant. . . . I do not concur with Appellants’ contentions, which, in context, amount to little more than a traditional dispute over conflicting methodologies, as well as, a general, and legally incorrect, contention by Appellants that BLM does not enjoy the legal discretion to stock the public range at an increased, but still conservative rate, based upon well-articulated professional judgment by BLM employees.

ALJ Decision at 2. The ALJ further opined:

BLM’s approach would be improper only if the agency were legally obliged to always approve stocking levels up to the prescribed 50% utilization level, as contended by the Appellants. . . . Inherent in Appellants’ entire case is the premise that BLM must authorize grazing up to the 50% utilization level, even during a severe multi-year drought. This also constitutes the fatal legal flaw in Appellants’ case, because BLM is not legally obliged to always authorize grazing up to the 50% utilization specified in the applicable land use plan.

Id. at 14; *see also Id.* at 21, 25.

2. Although Talancon argued that BLM must accept Talancon’s methodology for determining grazing capacity, Talancon’s figures were not credible because his expert twice changed his testimony regarding the allotment’s carrying capacity, ultimately reducing the number to only 54 percent of the original AUMs for which Talancon applied. *Id.* at 4-5.

3. Talancon’s application for a “geometric increase” in permanently authorized AUMs to 11,386 was unreasonable. *Id.* at 6, 11.

4. BLM's monitoring methodology and results are entitled to just as much weight as Talancon's. The ALJ stated: "In the end this appeal is merely a disagreement over competing methodologies, and, under such factual circumstances, BLM's 2005 FMUD is entitled to deference." *Id.* at 8; *see also id.* at 17.

5. In the ALJ's view, that conclusion led to "the issue of whether BLM enjoys the legal discretion to limit the number of authorized AUMs based on a worst case analysis, or, in the alternative, whether BLM is mandated . . . to take an averaging approach . . . and to automatically stock-up to the 50% utilization level on a pasture-wide or allotment-wide basis." *Id.* at 8. The ALJ concluded:

In my opinion, BLM is legally empowered to take a worst case approach, based upon noncompliance in certain heavily grazed areas, such as, those in low elevations proximate to water, and, in turn, to limit grazing on an allotment-wide basis to a reasonable level, based upon BLM's professional judgment that demonstrable noncompliance with short-term objectives in certain heavily grazed areas of certain pastures may result in continued over-grazing and continued distribution problems within the allotment as a whole.

Id. *See also id.* at 14.

6. Talancon's methodology for calculating grazing capacity improperly assumed essentially uniform cattle distribution over the entire allotment and did not properly account for uneven pasture utilization. Utilization had been concentrated in the lowland areas nearer to available water and feed. *Id.* at 9-12; *see also id.* at 26-28.

7. "[C]ontrary to the contentions of Appellants that BLM was obliged to adopt Mr. Schweigert's selected methodology, there is no single mandatory, prescribed methodology for calculating a carrying capacity." *Id.* at 13; *see also id.* at 24.

The ALJ therefore affirmed the 2005 FMUD and the 2005 denial of TNR use. Talancon then appealed the ALJ Decision to this Board.

E. *The Administrative Standard of Review Applicable to BLM Grazing Decisions*

The standard of review that applies in administrative appeals from BLM's grazing decisions is well established. As we recently reiterated in *Tabor Creek Cattle Co.*, 170 IBLA 1 (2006):

BLM enjoys broad discretion in determining how to manage and adjudicate grazing privileges. Under 43 CFR 4.478(b) (2001), BLM's

adjudication of grazing preference will be upheld on appeal if it appears reasonable and substantially complies with the provisions of 43 CFR Part 4100. That language has consistently and repeatedly been interpreted as considerably narrowing the scope of review of BLM grazing decisions by both an ALJ and this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis, and the burden is on the objecting party to show by a preponderance of the evidence that the decision was improper. *Ross v. BLM*, 152 IBLA 273, 282 (2000); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 235-36 (1998). Where 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,” and the burden is on the objecting party to show that the decision was improper. *Wayne D. Klump v. BLM*, 124 IBLA 176, 182 (1992); *Lewis M. Webster v. BLM*, 97 IBLA 1, 4 (1987); *George Fasselin v. BLM*, 102 IBLA 9, 14 (1988); *Bert N. Smith v. BLM*, 48 IBLA 385, 393 (1980).

170 IBLA at 15-16. See also *Foianini v. BLM*, 171 IBLA 244, 251 (2007). That standard thus applies to this Board’s review of the ALJ Decision.

Against this background, and as discussed further below, the question of whether the ALJ Decision is not supportable on any rational basis turns on two questions, namely (1) whether the ALJ was correct in concluding that BLM is not legally required to increase the permanent authorized grazing use to the maximum level of forage utilization, and, (2) if the ALJ was correct in that conclusion, whether BLM acted without a rational basis in not authorizing a greater increase in permanent AUMs than it did in the 2005 FMUD.

ANALYSIS

I. *BLM Is Not Legally Compelled to Increase the Permanent Authorized Grazing Use to the Maximum Forage Utilization Level.*

A key premise of Talancon’s position is that once BLM decided to increase the permanent authorized use on the allotment, it must increase it to the maximum use consistent with the allotment’s carrying capacity, *i.e.*, the maximum forage utilization level. Talancon argues that “at no time did BLM ever state in the 2005 FMUD or during the Hearing that BLM would not increase the Permitted use *to the extent of the carrying capacity, aka forage available on a sustained yield basis.*”⁷ In its post-hearing

⁷ SOR at 94, repeating identical language from the Jose Talancon 1998 Family

(continued...)

Responsive Brief before the ALJ, Talancon acknowledged that the provision of 43 C.F.R. § 4110.3-1 (2005), that “[a]dditional forage *may* be apportioned to qualified applicants for livestock grazing use consistent with multiple-use management objectives” (emphasis added), does not mandate that BLM allocate forage utilization so as to reach the maximum utilization level. Talancon Responsive Brief at 17-18. Notwithstanding that concession, Talancon asserted, and in this appeal continues to assert, that BLM *must* increase permitted grazing use to the maximum forage utilization level if it authorizes any increase at all. Talancon’s position in this appeal is founded primarily upon this assertion.⁸

[1] To the contrary, BLM is not required to increase the permanent permitted use to the maximum use consistent with grazing capacity or forage utilization objectives. Talancon has cited no authority in support of the proposition that BLM must do so. The level of grazing preference authorized in a permit — whether as originally set or as increased or decreased by subsequent decision — is subject to the sound discretion of authorized BLM officials. At the time BLM issued the 2005 FMUD, 43 C.F.R. § 4110.2-2(a) provided in relevant part:

Permitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases. . . . Permitted livestock use shall be *based upon* the amount of forage available for livestock grazing as established in the land use plan, activity plan, or decision of the authorized officer under § 4110.3-3 [Emphasis added.]

This language fully supports BLM’s decision not to allow overgrazing in light of available forage. It does not imply that BLM must permit grazing use at the maximum level consistent with available forage in every case. Indeed, 43 C.F.R. § 4110.3 prescribed:

The authorized officer shall periodically review the permitted use specified in a grazing permit or lease and shall make changes in the permitted use as needed to manage, maintain, or improve rangeland productivity, to assist in restoring ecosystems to properly functioning

⁷ (...continued)

Trust’s Responsive Brief before the ALJ at 18-19 (Talancon Post-Hearing Response Brief) (underscored and italicized emphasis in both originals).

⁸ Provisions in 43 C.F.R. Subparts 4110 and 4180 quoted here and below were amended in 2006 (71 Fed. Reg. 39504 and 39508 (July 12, 2006)), but the relevant substance remained unchanged. Unless otherwise noted, all citations are to the 2005 regulations.

condition, to conform with land use plans or activity plans, or to comply with the provisions of subpart 4180 of this part. . . .

These provisions contemplate considerable discretion on the part of the BLM authorized officer in their administration. While BLM has the authority to permit grazing use at the maximum level consistent with available forage, nothing in law compels it to do so.

Further, while the 2005 FMUD increased the level of permanent authorized grazing, it decreased the total AUMs of actual grazing relative to the prior permanent authorized level plus TNR use before 2005. Title 43 C.F.R. § 4110.3-2(b) provided:

When monitoring or field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce permitted grazing use or otherwise modify management practices.

In turn, 43 C.F.R. § 4180.2(c) provided:

The authorized officer shall take appropriate action as soon as practicable but not later than the start of the next grazing year upon determining that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section. . . .

This is precisely what occurred in this case. In the 2004 RHD and the 2004 EA, BLM determined that the existing grazing practices, including the level of TNR use allowed in most of the previous years, were significant factors in the HSPA's failing to meet allotment-specific utilization objectives and to achieve the SRH. The BLM authorized officer accordingly took action to reduce permitted grazing in the HSPA in the 2005 FMUD. Nothing in the applicable regulations or any other principle of law provides or requires that if BLM decreases total grazing use, it cannot decrease that use below what an applicant claims is the maximum forage utilization level.⁹

⁹ Nor did BLM bind itself to increase permanent permitted use to the maximum utilization level. Talancon's argument that BLM is somehow compelled to increase permanent permitted use to the level of carrying capacity because BLM did not say that it would not do so is a *non sequitur*.

The implication of Talancon's underlying legal assumption is that if BLM decides to increase permanent permitted use, its discretion effectively is limited to determining what constitutes an allotment's carrying capacity or maximum forage utilization level. That is contrary to the well-established principle discussed above that BLM possesses broad discretion in managing and adjudicating grazing privileges. Simply stated, the underlying premise of Talancon's position is wrong as a matter of law, and the ALJ was correct in rejecting it.

II. *Talancon Has Failed to Demonstrate that the ALJ Erred in Upholding BLM's Determination Not to Grant a Greater Increase in Permanent Permitted Grazing Use.*

Having established that BLM is not required to increase permanent permitted use to the carrying capacity or maximum forage utilization level, it follows that the only circumstance in which Talancon can prevail in this appeal is if it shows that the increase in permanent authorized use that BLM did grant is so low as to lack any rational basis, *i.e.*, that it would be irrational for BLM not to authorize substantially more AUMs than it did even in light of the broad discretion afforded to the agency. Only in that case would this Board set the ALJ's decision aside and remand for a redetermination of the authorized AUMs.

Talancon's SOR raises two principal lines of argument in this respect, with several sub-arguments, namely, (1) the 2004 RHD was erroneous because BLM failed to follow the procedure described in one of its manuals, and because it interpreted utilization data incorrectly; and (2) BLM's calculation of grazing capacity and its determination of permitted use were irrational and unlawful. We consider each of these in turn.

A. *Talancon's Arguments Regarding the 2004 RHD Do Not Support Reversal of the ALJ Decision or Overturning the 2005 FMUD.*

Talancon argues that the 2004 RHD incorrectly relied on BLM's monitoring of forage utilization as an indicator in determining that certain rangeland health standards were not met. The first asserted reason is that since the SRH do not identify utilization as an indicator, BLM violated its Rangeland Health Standards Handbook H-4180-1 (Ex. G-142) by considering utilization. SOR at 79-82. Talancon portrays the *BLM Handbook* as prescribing the indicators that must be used, and, by negative inference, precluding the use of other indicators. Contrary to that characterization, the *BLM Handbook* directs the team conducting the assessment to select indicators. *See* Ex. G-142 at III-6. Moreover, the SRH specifically state, in the section captioned "Guidelines for Grazing Management," that "[t]he utilization, monitoring, and evaluation process will be used as a tool to promote healthy rangelands and achieve Standards." Ex. G-118 at 5. Actual forage utilization is

highly relevant in assessing and evaluating rangeland health, and Talancon offers no explanation of why it would not be.¹⁰ As the ALJ correctly concluded, “there are a wide variety of different types of data that help inform BLM with respect to a determination of rangeland health.” ALJ Decision at 19. We find no error in the ALJ’s conclusion or in BLM’s considering utilization in the RHD.

Talancon next argues that even if utilization can be considered, BLM erred in interpreting the utilization data to conclude in the RHD that the SRH were not met. SOR at 82-87. The RHD (Ex. G-121) determined that Standard 1 of the SRH (Ex. G-118) for soils and Standard 4 for plant and animal habitat were not met in the HPSA because the allotment-specific utilization objectives were not met. Standard 1 for soils is: “Soil processes will be appropriate to soil types, climate, and land form.” Ex. G-118 at 2. Standard 4 for plant and animal habitat is: “Populations and communities of native plant species and habitats for native animal species are healthy, productive, and diverse.” *Id.* Both of these standards are phrased very generally. Neither the SRH nor, as discussed above, the *BLM Handbook*, prescribe the indicators to be used in evaluating whether particular standards are met in any given case. Using the utilization objectives as the measure of whether a particular standard is met may, in practice, substitute the allotment utilization objectives for the standard at issue. That may or may not be consistent with the procedures for assessing and determining whether SRH have been achieved (*see* Rangeland Health Standards Handbook, Ex. G-142, chapter III). However, for reasons we now explain, we need not decide that question here.

Monitoring data indicate that certain areas of certain pastures failed to meet utilization objectives during one or more years between 1998 and 2003, but that other areas of these same pastures then met those objectives. *See* 2004 EA (Ex. G-38A) at 62-70 and Ex. G-143. As a tool for proper rangeland management, the failure to meet utilization objectives in any area of a pasture is clearly germane and may be relevant to BLM decisionmaking (*e.g.*, under 43 C.F.R. § 41101.3-2), with BLM assessing the weight and importance of utilization data in applying its technical expertise and exercising its professional judgement. Even if failure to meet utilization objectives in some areas of some pastures for some years does not by itself demonstrate that the HPSA failed to meet the SRH, that is not fatal to the decision on appeal. The 2005 FMUD and the 2005 TNR were preceded and may have been precipitated by the RHD, but they are not dependent on that determination. BLM must take action if the SRH were unmet under 43 C.F.R. § 4180.2(c), but it is not precluded from acting if it determines that allotment objectives are being or may be

¹⁰ Talancon made the same arguments regarding utilization as an indicator in evaluating rangeland health in its opening Post-Hearing Brief (at 104-108), to which BLM responded extensively in its Post-Hearing Response Brief. In its SOR in this appeal, Talancon simply repeated its original argument *verbatim*.

exceeded. For example, under 43 C.F.R. § 4110.3-2(b), BLM shall reduce grazing use when grazing use is “causing an unacceptable level or pattern of utilization[.]” BLM evaluated grazing use under the circumstances presented, as analyzed in the 2004 EA, and then issued the decision under review in this appeal. As the ALJ found:

. . . BLM is legally empowered to take a worst case approach, based upon noncompliance in certain heavily grazed areas, such as, those in low elevations proximate to water, and, in turn, to limit grazing on an allotment-wide basis to a reasonable level, based upon BLM’s professional judgment that demonstrable noncompliance with short-term objectives in certain heavily grazed areas of certain pastures may result in continued over-grazing and continued distribution problems within the allotment as a whole. This is especially so during a protracted multi-year drought, which the record proves persisted from 2000-2004. See, e.g.: Tr., 175-77; Exs. G-28 & G-29. Relatedly, it is my determination that BLM is not procedurally or legally obliged to take an averaging approach in the fashion that Mr. Schweigert did, because that approach may, indeed, serve to mask the ripple effects of overgrazing in certain heavily-grazed lowland areas of the HSPA. See: Willoughby, Tr., 228l.

ALJ Decision at 8. We agree with the ALJ and conclude that evaluating rangeland health on the basis of the condition and usage of each pasture is well within BLM’s management discretion.¹¹

Talancon nonetheless contends that BLM failed to calculate a “confidence interval” in determining whether utilization objectives were met, as specified in two BLM Technical References,¹² and that the 2005 TNR Decision refutes earlier determinations in the RHD because it “revealed that the achievement of the Utilization objectives was to be interpreted upon measured utilization values of ‘less than 60 percent use,’ not measured utilization values of 50% or more.” SOR at 84

¹¹ We also agree with BLM that Talancon’s reliance on *Filippini Ranching Co. v. BLM*, 149 IBLA 54, 65-66 (1999), SOR at 83-84, is misplaced. In that case, the appellants challenged the methodology BLM used to prepare use pattern maps showing utilization across the permittees’ allotment. BLM did not provide a reasonable explanation for its methodology and offered no witnesses at the hearing to refute the appellants’ analysis. In the instant case, in contrast, BLM has proffered a reasonable and sound explanation for its methodology.

¹² As BLM described it, a “statistical confidence interval establishes the degree of confidence one has that the true value falls within a given range of the measured value.” Respondent’s Post-Hearing Response Brief at 14.

(emphasis in original). Under Talancon's first contention, it argues that observed utilization in excess of 50 percent, but within the "confidence interval," should be regarded as meeting the utilization objectives, as also demonstrated by the testimony of Dr. Lamar Smith, Talancon's expert witness. SOR at 86-87. The monitoring data utilized by BLM, as summarized in the 2004 EA, indicate that BLM determined that utilization objectives were unmet where area or transect data exceeded 60 percent use. Ex. G-38A at 62-68. Where area or transect data were equal to or greater than 55 percent but less than 60 percent, BLM determined that objectives were met for the Burned Field (1995 – 57 percent), South Burned Field (1998 – 57 percent), and Hot Springs Peak (2002 – 57 percent) pastures, *id.* at 60, 62, 68, but unmet for the Hot Springs Peak (1999 – 55 percent) and Eden Valley (2000 – 57 percent) pastures, *id.* at 63, 64. Rather than contradicting Smith's view on using confidence intervals to determine whether utilization data demonstrates that utilization objectives were met, BLM's determinations are remarkably consistent with that view.¹³

In denying Talancon's application for TNR use, the 2005 TNR Decision provided that future TNR use may be authorized if "monitoring shows that the short term utilization objectives (less than 60% use on both the native and seeded species) have been met in all pastures." 2005 TNR Decision at 2. Short-term utilization objectives were established in the 2005 FMUD at 50 percent use; the 2005 TNR does not change those objectives, but only clarifies what must be shown to demonstrate that those objectives had been met. That is consistent with BLM's previous determinations, as reflected in the 2004 EA discussed above, and with the views expressed by Smith, and does not undercut the 2005 FMUD.

B. *The ALJ Properly Upheld BLM's Decision Regarding Permitted Grazing Levels.*

1. *Averaging Total AUM Use for Years in Which the Short-Term Utilization Objectives Were Met in All Pastures Incorporates a Rational Relationship Between Forage Utilization and Authorized Use Levels.*

Talancon asserts that BLM's calculation of grazing capacity and its determination of permitted use were irrational and unlawful. SOR at 87-100. The

¹³ Smith testified that "confidence limits should be assumed to be relatively large. This means the differences in measured utilization levels of 5 to 10 percent. For example, 30 percent compared to 35 or 40 or less should probably be interpreted as non-significant unless statistical separation is demonstrated." Tr. at 4387-88. Smith also calculated confidence intervals on some of BLM's utilization transect data and concluded that they "would be plus or minus somewhere between five and ten percent." *Id.* at 4388-89.

substantive argument is that the method that BLM used (averaging total annual AUMs of use in years in which the short-term forage utilization objectives were met in all pastures) is incapable of yielding accurate information because BLM measured whether forage utilization objectives were exceeded on a pasture-by-pasture basis, but applied the conclusions to the entire allotment in calculating a stocking rate. SOR at 96-100. Thus, according to Talancon, BLM “improperly mixed apples . . . and oranges” SOR at 97. Talancon argues that if actual use were averaged annually by pasture, the total carrying capacity for the allotment would be much higher (4,294 AUMs as opposed to 2,536 AUMs). SOR at 100.

[2] We do not find that BLM’s method was irrational. To the contrary, we agree with BLM (Respondent’s Post-Hearing Brief at 19-20 and BLM Response at 28) that the method it selected would provide a level of increased use (over the 1993 FMUD), while facilitating significant progress toward meeting the SRH. Talancon’s argument might have greater weight if forage utilization were uniform across the allotment, but such is not the case. Cattle have distributed themselves unevenly and have concentrated in areas of more available feed and water, and may be expected to continue to do so in the future. BLM’s method takes this into account. BLM acted rationally when it took the approach that total permitted use in the allotment should be at a level that allows for utilization objectives not to be exceeded for all pastures — most particularly the pastures that have seen the heaviest utilization in the past. BLM did not “mix apples and oranges.” Instead, its method incorporates a very rational relationship between forage utilization and authorized AUMs of use.

As was the case with its preferred method of evaluating utilization, Talancon’s alternative approach to calculating carrying capacity and determining authorized use simply reflects a contrary opinion, which is not sufficient to meet Talancon’s burden of proof. The ALJ was correct in not compelling BLM to adopt Talancon’s preferred approach. ALJ Decision at 8, 14.

2. *Talancon’s Procedural Arguments Are Not Persuasive.*

In asserting that BLM’s calculation of grazing capacity and its determination of permitted use were irrational, Talancon also asserts three arguments that are procedural in nature. First, Talancon says that BLM violated 43 C.F.R. § 4130.3-3 in failing to provide Talancon an opportunity to comment on the method BLM ultimately used to calculate the new permanent authorized use. SOR at 87-90. This regulation provided in relevant part:

Following consultation, cooperation, and coordination with the affected lessees or permittees . . . the authorized officer may modify terms and conditions of the permit or lease when the active use or related

management practices are not meeting the land use plan, allotment management plan or other activity plan, or management objectives To the extent practical, the authorized officer shall provide to affected permittees or lessees . . . an opportunity to review, comment, or give input during the preparation of reports that evaluate monitoring and other data that are used as a basis for making decisions to increase or decrease grazing use, or to change the terms and conditions of a permit or lease.

43 C.F.R. § 4130.3-3. Talancon's reliance on this rule to argue that the determination of the level of authorized use was irrational is illogical. Even if BLM had violated the consultation requirement, it would have no bearing on whether the authorized use level established in the 2005 FMUD was rational. Moreover, this rule does not require what BLM accurately characterizes as a "step-by-step consultation with the permittee . . . right up to the moment of issuance of the FMUD." BLM Response at 22. Nor, as BLM correctly notes, does it require BLM to give Talancon "another opportunity for input into the decision making process after he had submitted his protest of the 2004 PMUD." *Id.* The record is replete with examples of ongoing consultation and communication with Talancon throughout the process of evaluating the allotment and adjusting the authorized use. *E.g.*, Exs. G-4, G-5, G-35, G-36, G-122, G-124, G-135, and G-139. The ALJ correctly found:

BLM effectuated coordination, cooperation and consultation under the purview of 43 C.F.R. 4130.3-3 with all interested parties, including the Appellants, with respect to the 2004 Environmental Assessment and the 2004 PMUD. Exs. G-38A & G-123. Appellants, along with others, enjoyed a full, procedural opportunity for review, comment, and, ultimately, protest and appeal.

ALJ Decision at 13.

Second, Talancon argues that BLM allegedly relied on actual use data alone to calculate carrying capacity, in violation of the applicable land use plan (the Paradise-Denio Management Framework Plan (MFP), Ex. A-25). SOR at 90-93. The MFP stated: "Grazing adjustments, if required, will be based upon reliable vegetation monitoring studies. . . . It is current Bureau policy that grazing preference adjustments, either upward or downward, following the grazing EIS shall not be based solely on vegetation production surveys, but shall be based on monitoring or a combination of monitoring and range surveys." Ex. A-25 at 7-8.

We do not agree that BLM's method for determining the new permanent permitted AUMs violated the MFP. As Talancon admits, BLM looked to actual use in those years when the monitoring of forage utilization indicated that the pastures

were not overgrazed. BLM thus used utilization data, along with actual use data, in determining carrying capacity and the new permitted use level. *See* ALJ Decision at 19-20 and cited testimony (DeForest, Tr. at 938-42, 947-49, 953-54, 963). Talancon's argument implicitly asserts that the land use plan somehow requires that utilization data be incorporated into the final mathematical formula used to calculate carrying capacity and establish a new, adjusted permitted use level. The MFP nowhere says that. It says only that the determination is to be "based on" information that includes monitoring and utilization data. Talancon's argument is a strained and artificial reading of the MFP and the ALJ correctly rejected it.¹⁴

Talancon's final procedural argument is that BLM's method for calculating grazing capacity and establishing the new permitted use levels is not outlined in any BLM manual, handbook, or technical reference. The fundamental flaw in this argument is that there is no one method for calculating carrying capacity or adjusted permanent permitted use levels prescribed in any BLM manual, handbook, or technical reference. Nor is there a legal obligation that BLM establish a single method. We agree with BLM on this question (*see* BLM Response at 25-27) and agree with the ALJ in rejecting Talancon's argument. ALJ Decision at 13.

III. *Talancon's Challenges to Other Aspects of the 2005 FMUD and to the 2005 TNR Decision Are Without Merit.*

Talancon raises additional challenges to the 2005 FMUD: (1) its "season of use" lacks a rational basis, and (2) it failed to provide "adequate notice" to Talancon with regard to certain elements of the grazing system and certain terms and conditions of the permit. Talancon also asserts that the 2005 TNR Decision was in error because it relied on the allegedly flawed 2005 FMUD.

A. *BLM Had a Rational Basis for the Prescribed Season of Use.*

Talancon argues that the season of use prescribed in the 2005 FMUD for the North Burn and South Burn pastures lacks a rational basis. SOR at 101-105. The principal premise of this argument is that BLM should have accepted Talancon's proposal to construct a fence to separate the South Burn pasture into two pastures — the South Burn and a new "West Burn" — and to revise the pasture use and rotation schedule because Talancon's proposal supposedly would have better accomplished

¹⁴ Talancon's position is particularly ironic in view of his argument (addressed earlier) that the 2004 RHD incorrectly relied on BLM's monitoring of forage utilization as an indicator in determining that certain rangeland health standards were not met. Talancon does not explain why forage utilization must be taken into account in determining carrying capacity and new authorized use, but may not be taken into account in determining rangeland health.

the intent of the FMUD. *Id.* at 103-105. To argue that the only way the season of use and pasture rotation prescribed in the 2005 FMUD could have been rational is to construct new fences and to prescribe a different schedule more in keeping with the grazer's preference is a *non sequitur*, and certainly not sufficient to meet Talancon's burden to show error.¹⁵ We agree with BLM's analysis of this argument (BLM Response at 30-33 and testimony cited), and agree that the ALJ correctly found that BLM had a rational basis for the prescribed season of use and rotation of the respective pastures. ALJ Decision at 21.

B. *Talancon's Argument Regarding "Adequate Notice" Does Not Imply Any Error or Irrationality in the 2005 FMUD.*

Talancon asserts that the 2005 FMUD is unclear in certain very technical respects, and therefore does not provide "specific notice" as to parts of the grazing system and how certain permit terms and conditions will be applied. SOR at 105-108. BLM responds: "Appellant seeks to convert relatively minor clarification questions that a permittee may have as part of the implementation of a final multiple use decision, into a fatal legal defect in the 2005 FMUD." BLM Response at 35. The alleged lack of clarity — assuming, *arguendo*, there is any lack of clarity — is so minor as to be resolvable by a simple telephone call. Nothing in Talancon's argument demonstrates or implies any legal error in the 2005 FMUD; nor has Talancon shown that any permit terms and conditions or objectives in the 2005 FMUD are irrational. We concur with BLM's analysis in this regard and reject Talancon's arguments. BLM Response at 37-40.

C. *The 2005 TNR Decision Is a Reasonable Exercise of BLM's Discretion.*

Talancon asserts that the 2005 FMUD, in stating that "no further TNR will be authorized under this decision" (Ex. G-26 at 10), deprives Talancon of the "legal opportunity" to apply for TNR use, although Talancon acknowledges that BLM may deny such an application. SOR at 108. Given the fact that Talancon submitted an application for TNR use on May 26, 2005 — almost 2 months after the FMUD was issued on March 2, 2005 — we do not see how the FMUD deprived him of an opportunity to do what he actually did.

¹⁵ Talancon also alleges a contradiction between the statement in the 2005 FMUD that there would be "[n]o livestock grazing during the hot season" (Ex. G-26 at 10) and the FMUD's authorization of grazing in certain rotations to July 10 (rather than through June 30), with no grazing authorized for July 10 through October 31 (rather than July 1 through October 31). SOR at 102-103. Because there is no specific or binding definition of "hot season," we do not perceive any contradiction in these provisions.

Talancon also asserts that the 2005 TNR decision (clarifying that BLM would not consider TNR use until a full 3-year grazing cycle had been completed and showed that short-term utilization objectives were being met) should be set aside because it was “premised upon the flawed 2005 FMUD.” SOR at 109. This argument fails because Talancon has not demonstrated any legal flaw in the 2005 FMUD. The ALJ correctly upheld the 2005 TNR Decision as a reasonable application of BLM’s discretion.

Any arguments not specifically addressed herein have been considered and rejected.

CONCLUSION

For the reasons explained above, Talancon has failed to meet its burden of showing that the ALJ Decision lacked any rational basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge