



IN REPLY REFER TO:

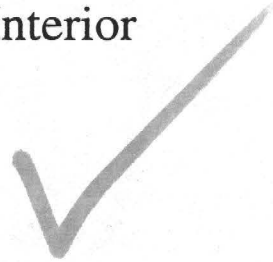
# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals

4015 Wilson Boulevard

Arlington, Virginia 22203



### WILD HORSE ORGANIZED ASSISTANCE COMMISSION FOR THE PRESERVATION OF WILD HORSES

IBLA 95-312, 95-313

Decided November 13, 1997

Appeals from a decision by the District Manager, Carson City District, Nevada, Bureau of Land Management, finding no significant impact and implementing the Pine Nut Mountain Wild Horse Removal Plan. NV 03580.

Affirmed.

1. Administrative Procedure: Stays--Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Stay--Wild Free-Roaming Horses and Burros Act

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 C.F.R. § 4770.3(c), not by 43 C.F.R. § 4.21(a). Under 43 C.F.R. § 4770.3(c), the authorized officer may opt to place a wild horse removal decision into full force and effect, and it "take[s] effect on the date specified, regardless of an appeal."

2. Wild Free-Roaming Horses and Burros Act

If the Secretary (or his designate) determines, on the basis of information available, that an overpopulation of wild horses or burros exists on a given area of the public lands and that action is necessary to remove excess animals, the Secretary has authority to immediately remove excess animals from the range so as to achieve appropriate management levels, restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

APPEARANCES: Dawn Y. Lappin, Reno, Nevada, for the Wild Horse Organized Assistance; Catherine Barcomb, Reno, Nevada, for the Commission for the Preservation of Wild Horses; Karl Kipping, Associate District Manager, Carson City, Nevada, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE TERRY

The Wild Horse Organized Assistance (WHOA) and the Commission for the Preservation of Wild Horses (CPWH) have appealed the February 14, 1995, "full force and effect" Decision issued by the Carson City District Manager, Nevada, Bureau of Land Management (BLM), implementing the Pine Nut Mountain Wild Horse Removal Plan. The BLM's authority to manage wild horse populations is provided by the Wild Free-Roaming Horses and Burros Act (the Act), as amended, 16 U.S.C. §§ 1331-1340 (1994), and implementing regulations in 43 C.F.R. Part 4700. The gather and removal of approximately 48 wild horses was supported by a Decision Record/Finding of No Significant Impact (DR/FONSI). The gather was completed on February 28, 1995.

The DR states that the purpose of the horse removal was to restore the range to a thriving ecological balance by preventing further deterioration of the range threatened by an overpopulation of wild horses outside the Pine Nut Herd Management Area (HMA).

The CPWH contends initially that the Decision, placed into full force and effect, denied it an opportunity "to appeal or request a stay" under 43 C.F.R. § 4.21. Both Appellants contend that the Decision was improperly placed into "full force and effect" because no state of emergency was determined to exist.

The WHOA and CPWH contend that they were allowed only 21, rather than 30 days to submit comments in response to BLM's draft removal plan. The CPWH asserts that it "is our understanding of BLM policy that the comment period for public participation is 30 days." (CPWH appeal at 2.) Further, both Appellants allege that the removal plan failed to disclose the entire capture area or release sites and did not provide for follow-up monitoring of horses released into unfamiliar habitat.

The WHOA and CPWH contend that the Environmental Assessment (EA) failed to discuss seeding or fire rehabilitation, contains no analysis of forage availability at the release sites, nor of the impact of "duplicate captures, within months of one another," during stressful winter months.

The CPWH charges that the EA failed to consider "herd restructuring or carrying capacity of the herd management area" and that older horses were released "without regard to the habitat or established bands." (CPWH appeal at 3-4.)

Finally, CPWH asserts that implementation of the horse removal "potentially stressed pregnant mares, killed foals and increased competition within wild horse bands inhabiting the herd management area." (CPWH appeal at 4.)

The BLM responds that the draft removal plan was mailed to both Appellants on December 30, 1995, with the request that comments be submitted by January 30, 1995. Both Appellants received the draft on

January 4, 1995, allowing 27 days to respond. Both Appellants submitted comments on January 30, 1995. The BLM points out that changes were made in the proposed plan based in part on the comments received from Appellants.

The BLM explains that implementation of the gather in February 1995 was "deemed critical" in order to prevent stress to pregnant mares and newborn foals between March 1 and June 30. (Response to CPWH at 2.)

The BLM points out, and the record discloses, that a map depicting the HMA and surrounding area was included with the draft removal plan. Also, release areas for older horses were specifically addressed in the DR/FONSI, which discloses that eight wild horses were to be released back onto the HMA in an area where, due to the presence of few other horses, minimal impacts on the vegetation resource could be expected. In further response, BLM states that nine horses were released back onto the HMA into a fenced meadow so as to allow them to get used to their new surroundings.

In its response to WHOA, on pages 2-3, BLM notes that the horse removal was not based on seeding or fire rehabilitation, but on statutory and regulatory authority, specifically, 43 C.F.R. § 4710.4, which states that the management objective is to limit the animals' distribution to herd management areas. The BLM further notes that the objective of the removal plan as stated in the plan and in the EA was to prevent further deterioration of the range threatened by overpopulation of wild horses which had established home ranges outside the HMA. The BLM explains that the scope of the removal "was reduced significantly due to public comment and other considerations," focussing on removal from "the Holbrook fire rehabilitation area." The BLM points out that its cover letter notified interested parties that immediate removal was necessary to prevent damage to the fire rehabilitation/seeding project and further over utilization of the vegetation. (Response to CPWH at 4-5.)

Responding to Appellants' concerns about "duplicate captures," BLM explains that according to the plan, horses too old for adoption would be released onto the Pine Nut HMA. Approximately 15 to 20 percent of the 189 horses proposed for removal would have been too old for adoption. The BLM states that

the impact to 27 to 38 horses that would be released into the [HMA] in February to be captured again in 6 to 7 months was considered and the final decision was modified because of this impact. The potential impact of "duplicate captures" was reduced to a minimum (9 horses versus possibly 38 horses) by limiting the removal of the horses that posed a threat to the success of the fire rehabilitation project. These 9 horses had their tails "bobbed" to identify them in the future and avoid recapturing them, if possible.

(Response to CPWH at 5-6.)

In its response to WHOA on page 4, BLM observes that the probability of "duplicate captures" during stressful winter months is unlikely since a late year gather would occur in September or October which are not considered to be winter months.

The BLM states that its policy is to conduct removals "year-round with the exception of the foaling season which is March 1 to June 30." (Response to CPWH at 6.) The CPWH provides no support for its allegation that foals were killed as a result of BLM's February 1995 gather. The EA acknowledges that some stress is unavoidably associated with helicopter herding operations. However, BLM monitors herding contractors to insure that specifications are met and to ensure humane treatment of animals. (EA at 7.)

[1] As we have previously held, the wild horse and burro management regulations contain a specific provision governing the effect of decisions to remove wild horses or burros from public or private lands. Under 43 C.F.R. § 4770.3(c), the authorized officer may opt to place a wild horse removal decision into full force and effect, and it "take[s] effect on the date specified, regardless of an appeal." This regulation has been upheld as consistent with the "statutory language and the legislative history of the Wild Horse Act, as amended." Blake v. Babbitt, 837 F. Supp. 458, 461 (D.D.C. 1993); Commission for the Preservation of Wild Horses, 139 IBLA 327, 328 (1997). Accordingly, the stay provision in 43 C.F.R. § 4.21(a) does not apply. Animal Protection Institute of America, 128 IBLA 90, (1993); Michael Blake, 127 IBLA 109, 110 (1993). The effect of BLM's February 1995 removal decision was controlled by 43 C.F.R. § 4770.3(c), not by 43 C.F.R. § 4.21(a).

In this case, Appellants were not deprived of any rights accorded by regulation, nor were they prejudiced in any manner because they were provided an abbreviated period in which to submit comments to the draft removal plan. As the record shows, they filed comments which were duly evaluated and in part implemented by BLM. Subsequently, Appellants filed appeals with this Board. That right of appeal satisfies Appellants' due process rights. Arthur Farthing, 136 IBLA 70, 75 (1996).

[2] Section 3(b)(2) of the Act, 16 U.S.C. § 1333(b)(2) (1994), provides the statutory authority for the removal of excess wild horses from the public range. Specifically, if the Secretary (or his designate) determines, on the basis of available information,

that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken \* \* \* until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and

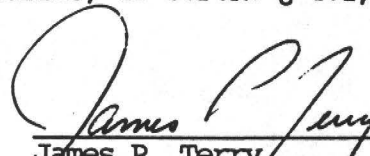
vegetation and to protect the range from the deterioration associated with overpopulation. 16 U.S.C. § 1333(a) (1994); Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984); Commission for the Preservation of Wild Horses, supra, at 329 and cases cited. "[E]xcess animals" are defined as those "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1994). A determination that removal is warranted must be based on research and analysis and on monitoring programs that include studies of grazing utilization, trends in range condition, actual use, and climatic factors. Michael Blake, 135 IBLA 9, 14 (1996); Animal Protection Institute of America, 117 IBLA 4, 5 (1990).

The legislative history of the Act reflects 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," Conf. Rep. No. 92-681, 92nd Cong., 1st Sess. (1971), reprinted in 1971 U.S.C.C.A.N. 2159, 2160.

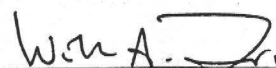
We find that Appellants' concerns are cogently and succinctly answered by BLM's responses and that those responses are supported by the record. Appellants' alleged shortcomings with the EA and with the removal action as set forth in the DR/FONSI are unsupported by evidence and fail to cast doubt on either the necessity or propriety of the removal or its conformance to applicable law and regulation. As we have previously held in appeals of horse removal actions, the burden is on the appealing party to show that BLM's experts erred in collecting the data on which the removal is based, in interpreting that data, or in reaching the conclusions to which it led. Commission for the Preservation of Wild Horses, supra, at 330-31. Moreover, BLM is not required to wait until the range is damaged before it takes preventive action; proper range management dictates herd reduction before the herd causes damage to the rangeland. If the record establishes current resource damage or a significant threat of resource damage, removal is warranted.

Appellants have not shown that immediate removal was based on erroneous information, was unnecessary, or was improperly carried out.

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.

  
 \_\_\_\_\_  
 James P. Terry  
 Administrative Judge

I concur:

  
 \_\_\_\_\_  
 Will A. Irwin  
 Administrative Judge