

597189 10/31/89



RECEIVED
NOV -6 AM 8:00

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

IN REPLY REFER TO:

RECEIVED

LAND MANAGEMENT
BUREAU OF LAND MANAGEMENT

903
431

NOV 7 1989

CRAIG C. DOWNER

IBLA 89-33

NEVADA STATE OFFICE
SPRINGFIELD, NEVADA

Decided October 31, 1989

Appeal from a decision of the Nevada State Office, Bureau of Land Management, approving the Ely/Elko Wild Horse Gather Plan. No. 04-88-2.

Dismissed in part, affirmed in part.

1. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from a herd management area will be set aside where the removal decision is not properly based on a finding supported by the record that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

2. Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal.

3. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from an area outside a herd area will be sustained where it is consistent with the regulation at 43 CFR 4710.4.

APPEARANCES: Craig C. Downer, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a decision of the Nevada State Director, Bureau of Land Management (BLM), approving the final plan for the Ely/Elko



NUMBER RECEIVED		
Routing	Initial	Date
SD		
ASSOCIATE SD		
EEO		
PUBLIC AFFAIRS		
MINERAL RES.	C	
LANDS & REN. RES.		
OPERATIONS	C	
ADMINISTRATION		
ACTION		
FILE		
LIBRARY	C	

Wild Horse Gather which would remove approximately 1,045 wild horses from portions of the public lands (NV-04-88-2). Of the seven areas covered by the plan, appellant objects to removal of horses from six: the Monte Cristo Herd Management Area (HMA); the Cherry Springs Wild Horse Territory (WHT); a "horse free" portion of the Egan Resource Area not designated an HMA; and HMAs identified as Diamond Hills South, Butte, and Maverick-Medicine. Appellant objects to the removal of wild horses from these areas because the plan calls for fewer than 500 wild horses to remain in each. More specifically, he states that:

500 should be considered the minimum viable herd population in each herd area according to population biology assessments. Maintaining adequate population levels is especially important among species with harem social structure, where one male may do most of the breeding, as occurs in many of the wild horse bands.

The State Director's decision approving the Ely/Elko Wild Horse Gather Plan was also the subject of a prior appeal (IBLA 88-679) filed by the Animal Protection Institute of America (APIA). BLM filed a motion requesting that both appeals, and three other appeals filed by APIA from decisions to remove wild horses from the public lands, be consolidated and expedited.

By order dated February 16, 1989, the Board consolidated the four APIA appeals and granted expedited consideration. As had been requested by BLM, the Board also placed into full force and effect BLM's decision to remove horses from four areas not involved in the present appeal. By order dated February 17, 1989, the Board declined to consolidate Downer's appeal with APIA's appeals because we found that Downer had raised distinct questions. We granted expedited consideration.

The Board's decision on the consolidated APIA appeals has recently been issued. Animal Protection Institute of America, 109 IBLA 112 (1989). Our review of the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (codified at 16 U.S.C. §§ 1331-1340 (1982)) and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984), led us to conclude that 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." 109 IBLA at 126. The statute states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information available to him

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[.]

16 U.S.C. § 1333(b)(2) (1982).

[1] In examining the statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public lands: "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, supra at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; Dahl v. Clark, supra at 595; see 16 U.S.C. § 1332(f) (1982).

We found that in most instances the AML's used as a basis for the removal actions approved by the BLM decisions had been taken from land use plans and other documents which set forth previously current wild horse and burro population statistics. We concluded that BLM had used current numbers in these documents for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Animal Protection Institute of America, supra at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." Id. Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Id. at 119.

With respect to the Monte Cristo HMA and the Cherry Springs WHT we found that the analysis undertaken to establish the numbers set forth in the wild horse management plans prepared in 1977 was consistent with the statutory criteria. Id. at 123. However, we also determined that the decision to reduce wild horse herds to the numbers set by these plans was neither in accord with the directive of 43 CFR 4720.1 that a decision to remove wild horses or burros be based on current information nor supported by a record which established that removal was necessary to restore the range to a thriving ecological balance and prevent deterioration. Id.

Because the AML's under review in Animal Protection Institute of America, supra, did not reflect determinations by BLM as to the optimum number of horses which would result in a thriving natural ecological balance and avoid a deterioration of the range, we set aside and remanded the

BLM decision to approve the Ely/Elko Wild Horse Gather plan as it applied to removal of wild horses from five of the six areas challenged by appellant: the Monte Cristo HMA, the Cherry Springs WHT, and the HMA's identified as Diamond Hills South, Butte, and Maverick-Medicine. ^{1/}

[2] In regard to these areas, the result of our setting aside of the BLM decision to remove wild horses is that no further relief can be provided. Consequently, the appeal has become moot with respect to the Wild Horse Gather Plan for these areas and the appeal is properly dismissed as to them. See Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 369, 93 I.D. 285, 287 (1986). This leaves for consideration only the appeal of BLM's decision to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA.

The Removal Plan for the Ely/Elko District Wild Horse Gather indicates that the decision to remove wild horses from the "horse free" area was based on the Egan Resource Management Plan and Egan Resource Area Record of Decision. The latter document states: "Wild horses will not be maintained outside of 1971 use areas." Thus, it appears that BLM regarded areas outside designated HMA's as areas which were to be "horse free."

[3] The Wild Free-Roaming Horses and Burros Act, as enacted in 1971, set forth the congressional policy that wild horses and burros "are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1982). In implementing the statutory mandate, BLM has promulgated regulations at 43 CFR Part 4700. Pursuant to the regulations, a "herd area" is defined as the "geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d); see 43 CFR 4710.2. Further, the regulations provide that: "Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas." 43 CFR 4710.4.

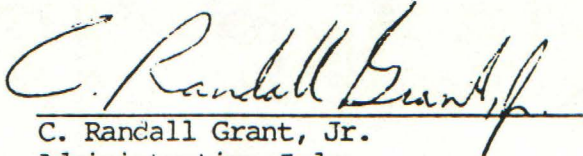
Under the statute, the Secretary is "directed to protect and manage wild free-roaming horses and burros as components of the public lands" and is authorized to "designate and maintain ranges on public lands as sanctuaries for their protection and preservation." 16 U.S.C. § 1333(a) (1982). A designated range is the "amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use

^{1/} We affirmed BLM's decision to remove wild horses from four HMA's because BLM had made a showing "that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, despite the fact that it has not shown that the AML's were properly established * * *." Id. at 123. We also affirmed BLM's decision to remove "problem animals" intruding on private property and to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA. Id. at 127.

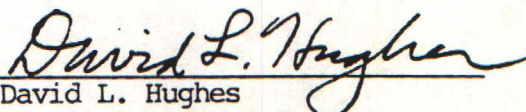
management concept for the public lands." 16 U.S.C. § 1332(c) (1982). This is reflected in the regulations which provide that HMAs may be established for the maintenance of wild horse and burro herds. 43 CFR 4710.3-1. Further, HMA's may be designated as wild horse or burro "ranges" to be managed principally, but not necessarily exclusively, for wild horse or burro herds. 43 CFR 4710.3-2.

The sole argument appellant presents concerns viable herd populations. Although, as BLM appears to recognize, the size of a herd necessary to sustain a viable population is relevant to the determination of AML's, it would not be dispositive in decisions concerning wild horses which have migrated to previously "horse free" areas outside herd areas, HMAs, or designated ranges. In such areas, other uses of the land may require reducing the number of horses to that compatible with such uses or removing them entirely. We find the BLM decision to remove wild horses from the "horse free" area is consistent with the regulation at 43 CFR 4710.4. For this reason, appellant's argument does not present a basis on which to overturn our previous decision to affirm the removal of wild horses from the "horse free" gather area designated in BLM's decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed in part.


C. Randall Grant, Jr.
Administrative Judge

I concur:


David L. Hughes
Administrative Judge



LAND MANAGEMENT
STATE OFFICE
NOV -6 AM 11:00

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

IN REPLY REFER TO:

NOV 7 1989

CRAIG C. DOWNER

IBLA 88-678

Decided October 31, 1989

NUMB	TAKE
Routing	PRIDE IN AMERICA
SD	
ASSOCIATE	
EEO	
PUBLIC AFFAIRS	
MINERAL RES.	C
LANDS & REN. RES.	
OPERATIONS	C
ADMINISTRATION	
LIBRARY	
ACTION	
FILE	
LIBRARY	C

Appeal of a decision of the Nevada State Director, Bureau of Land Management, approving final plans for removal of excess wild horses. N 2-88-2.

Set aside and remanded.

1. Rules of Practice: Appeals: Timely Filing

An appeal will not be dismissed as untimely when the record fails to establish that the decision was served upon the appellant more than 30 days prior to the date the notice of appeal was filed. The period for filing a notice of appeal is measured from "the date of service" of a decision rather than the date the decision is mailed. In the absence of a certified return receipt card or other evidence establishing when the decision was served, the appeal cannot be dismissed as untimely.

2. Wild Free-Roaming Horses and Burros Act

16 U.S.C. § 1333(b)(2) (1982) contains the sole and exclusive authority for BLM to remove wild horses from the public range. The statutory term "appropriate management level" has a very specific meaning in regard to removing wild horses or burros from the public range. It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration. The number of "excess" animals the Secretary is authorized to remove is that which exceeds the appropriate management level, which is the optimum number of wild horses and burros that results in a thriving natural ecological balance and avoids a deterioration of the range.

3. Wild Free-Roaming Horses and Burros Act

An "appropriate management level" established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be

sustained under 16 U.S.C. § 1333(b)(2) (1982). The statute does not authorize the removal of wild horses to achieve an appropriate management level which was established for administrative reasons rather than in terms of the optimum number of animals which results in a thriving natural ecological balance and avoids a deterioration of the range.

APPEARANCES: Craig C. Downer, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a July 22, 1988, decision of the Nevada State Director, Bureau of Land Management (BLM), approving the Wild Horse Removal (Gathering) Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas (N 2-88-2). The plan calls for the removal of approximately 1,117 wild horses from five Herd Management Areas (HMA's). Appellant objects to removal of wild horses from two of the five areas—the Granite Range HMA where 280 horses are to be removed and 176 remain, and the North Stillwater HMA where 107 horses are to be removed and 82 remain. Appellant, a wildlife biologist, states that "the numbers to remain are too low and will result in inbreeding and the decline of the population." Appellant refers to material he previously submitted to the BLM state office as "justifying why I consider such levels as these to be substandard and non-viable." 1/

When BLM forwarded the notice of appeal and the decision record to the Board, it included a cover memorandum from the District Manager discussing the merits of the appeal. There was no indication that the memorandum had been served on appellant. Because 43 CFR 4.27(b) prohibits written communication between a party and the Board concerning the merits of an appeal unless a copy is furnished all parties, we served a copy upon appellant by order dated February 8, 1989. He has responded by a letter received March 24, 1989.

Prior to addressing the substantive issues raised by the appeal, we must consider the assertion in BLM's memorandum that the appeal was not timely filed and should be dismissed. BLM states that a copy of the proposed action was mailed to appellant on August 9, 1988, but that the appeal was not filed in the Winnemucca District Office until September 13, 1988. BLM argues that the appeal was filed beyond the 30 days allowed by 43 CFR 4.411(a).

1/ It is not clear what materials appellant is referring to as they are not included in the record. Cases appealed to the Board are decided based on the administrative record or case file received from BLM and the submissions of the parties on appeal to the Board. See 43 CFR 4.24. Incorporation by reference of documents not filed as a part of the record in the case file at issue will not avail the parties to the extent these documents are not a part of the case file.

[1] The regulation cited by BLM requires that: "A party served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." 43 CFR 4.411(a). When a notice of appeal is not timely filed, the Board lacks jurisdiction to consider the merits of the appeal and must dismiss it. Stewart L. Ashton, 107 IBLA 140, 141 (1989); Ahtna, Inc., 100 IBLA 7 (1987).

The regulation, however, measures the period for filing a notice of appeal from "the date of service" of a decision rather than the date the decision is mailed. As a general rule, the regulations provide that where the mails are used to send a notice to a person, receipt will be deemed to have occurred when it is received by him at his last address of record with BLM. 43 CFR 1810.2(b). Thus, it is the date of receipt rather than the date of mailing which initiates the running of the appeal period. See F. Howard Walsh, Jr., 93 IBLA 297 (1986); Joan L. Harris, 37 IBLA 96 (1978).

Further, an appeal will not be dismissed as untimely when the record transmitted with the appeal fails to establish that the decision was "served" upon the appellant more than 30 days prior to the date the notice of appeal was filed. Jean Emanuel Hatton, 107 IBLA 47, 49 (1989); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 174-76 (1986). The present case record contains no certified return receipt card or other evidence indicating when BLM's decision was served on Downer. In the absence of such evidence, we could not dismiss his appeal as untimely.

Finally, in any event, there is no doubt that Downer's appeal was timely filed. BLM's cover letter accompanying the Wild Horse Removal Plan is dated August 9, 1988, which BLM states is also the date it was mailed. Thus, Downer could not have received BLM's decision prior to August 10, 1988. 2/ The envelope in which the notice of appeal was sent to BLM bears a postmark of September 9, 1988, which would have been within the 30-day period for filing an appeal even if the decision had been served on August 10. 3/ The regulations provide a "grace period" for waiver of any delay in filing "if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR

2/ It is likely that Downer did not receive BLM's decision until some days later. The decision was mailed to appellant at a post office box in Minden, Nevada. In his response to BLM's memorandum, appellant states that the decision "had to be forwarded to me at a distant location," apparently Ellicott City, Maryland. Since delivery to Downer was probably delayed several days by the forwarding, it is very possible that Downer's notice of appeal, which was filed on Sept. 13, 1988, was actually received by BLM within 30 days of the date he was served with BLM's decision.

3/ To determine where the 30-day filing deadline falls, one begins counting the day after the date of service. Luella S. Collins, 102 IBLA 399, 400 (1988). Thus, the filing deadline here was no earlier than Sept. 9, 1988.

4.401(a). Since Downer's notice of appeal was mailed no later than the last day of the 30-day appeal period and received by BLM within 10 days of the earliest date it could have been due, his notice of appeal is properly deemed timely.

The record on appeal consists of a series of documents prepared by BLM which formed the basis for the Wild Horse Removal Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas. As explained in the removal plan, a land-use plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas was completed in 1982. A portion of the planning process was the preparation of the Sonoma-Gerlach Grazing Environmental Impact Statement which led to the issuance of a Management Framework Plan Step III Decisions document (MFP-III) for the Sonoma-Gerlach Resource Area. The MFP-III was approved by the state director on July 9, 1982. One decision included in the MFP-III was that "[e]xisting/current WH&B [wild horse and burro] numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes" except when one of five specified conditions exist. The MFP-III also lists the existing number of wild horses and burros in 15 subdivisions of the Sonoma-Gerlach Resource Area. Other documents in the record concern the Lahontan Resource Management Plan (RMP) which includes a portion of the North Stillwater HMA.

The Wild Horse Removal Plan challenged by appellant lists the 1988 estimated population of wild horses and burros, the "appropriate management level," and the proposed number to be removed for each of the five HMA's. The next section of the removal plan, titled "Justification," after reporting the decision of the MFP-III and the five conditions, states: "None of the above five conditions are applicable to this proposed plan of removal, and the existing/current numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes."

The Board has previously had occasion to review BLM decisions to remove wild horses from the public range in a similar context. In Animal Protection Institute of America, 109 IBLA 112 (1989), the appellant contended that BLM decisions to remove wild horses had failed to properly determine that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological balance and protect the range from the deterioration associated with overpopulation, as required by the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (16 U.S.C. §§ 1331-1340 (1982)), and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984).

[2] Our review of the Act in that case led us to conclude that the provision referred to by the appellant, 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." Animal Protection Institute of America, supra at 126. That provision states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information available to him

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[.]

16 U.S.C. § 1333(b)(2) (1982).

In examining this statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public range. "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, supra at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; see 16 U.S.C. § 1332(f) (1982). The court in Dahl v. Clark held that: "[T]he test as to appropriate wild horse population levels is whether such levels will achieve and maintain a thriving ecological balance on the public lands." 600 F.Supp. at 595.

The record before us in Animal Protection Institute of America indicated that the AML's used as a basis for the removal actions approved by the BLM decisions had been established as a result of directions contained in Instruction Memorandum (I.M.) No. NV-82-305 issued by the Nevada State Director on June 8, 1982. Id. at 115-16; see also Dahl v. Clark, supra at 589-90. The I.M. set forth a series of "conditions" for determining the numbers for wild horses and burros used in developing land-use plans. It stated that, if none of the conditions "are applicable in establishing a starting point for monitoring, the current wild horse and burro numbers will be used." Animal Protection Institute of America, supra at 116-17.

[3] We found that in most instances the decisions on appeal had taken the previously current wild horse and burro population statistics set forth in land-use plans and other documents and made them the AML's to which wild horse herds were to be reduced by the proposed removal actions. We concluded that BLM had originally used the then-current numbers for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Id. at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." Id. Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Id. at 119.

It is clear that the AML's in the decision now on appeal were also taken from land-use planning documents and other documents which adopted the then current wild horse and burro population numbers for reasons of administrative convenience. The AML's for the Granite Range, Calico Mountains, and Fox and Lake Range HMA's are identical to the population figures set forth in the RMP-III. The AML for the North Stillwater HMA is the sum of the RMP-III number and that found in the Lahontan RMP. Accordingly, we find that we are bound by our prior holding in Animal Protection Institute of America, supra, and, hence, we set aside and remand the decision appealed from.


As in our prior decision, the problem we perceive in the case before us is not that BLM chose to use, for reasons of administrative convenience, then current population statistics in its land use plans, the RMP-III, or the other documents prepared prior to issuing a decision to remove wild horses. The Act requires BLM to maintain an inventory of wild horses and burros. 16 U.S.C. § 1333(b)(1) (1982). Consistent with this, the RMP-III used current numbers "as a starting point for monitoring purposes." Rather, the problem is that BLM's decisions to remove wild horses converted these numbers into AML's. Inventory numbers chosen for administrative convenience as a starting point for monitoring purposes are not AML's within the statutory meaning of the term. As stated in the statute, the purpose for maintaining an inventory is to allow the Secretary to

make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals or other options (such as sterilization, or natural controls on population levels). [Emphasis supplied.]

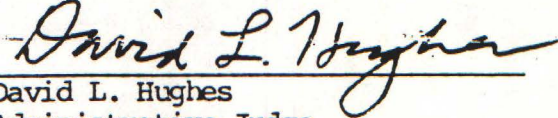
16 U.S.C. § 1333(b)(1) (1982). The inventory is to provide information which, along with other information gathered from monitoring and studies (see 16 U.S.C. § 1333(a), (b)(1), (b)(3) (1982)), will allow the Secretary to determine the optimum number of wild horses and burros that will allow a thriving natural ecological balance and protect the range from deterioration. The inventory itself does not constitute that determination.

Because we find the AML's in BLM's decision to be improper, we need not address appellant's argument as to viable herd populations. As BLM appears to recognize, the size of a herd necessary to maintain a viable population is relevant to the determination of AML's. Included in the record submitted to the Board is Information Bulletin (I.B.) No. 88-144 which includes the report of a study of "Wild Horse Parentage and Population Genetics" made under contract from BLM. The I.B. states that the report is "being forwarded to the National Academy of Science's Committee on Wild and Free-Roaming Horses and Burros for review and interpretation" and that the review should "result in recommendations on the application of these results to herd management."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.


C. Randall Grant, Jr.
Administrative Judge

I concur:


David L. Hughes
Administrative Judge



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
CALIFORNIA STATE OFFICE
2800 COTTAGE WAY, ROOM E-2845
SACRAMENTO, CALIFORNIA 95825-1889



IN REPLY REFER TO:

4700
C-932

NOV 6 1989

Ms. Nancy Whitaker
Program Assistant
Animal Protection Institute of America
P.O. Box 22505
Sacramento, CA 95822

Dear Ms. Whitaker:

I appreciate your meeting and participating with my staff in the review of the "Draft Wild Horse and Burro Policy Modifications Resulting From the Interior Board of Land Appeals Dated June 7, 1989." An additional copy of that document is enclosed for reference. It was also nice to meet you and discuss other aspects of the Bureau's program in California. We would again like to remind you, should you have any comments concerning the above document, please send them to Mr. William A. Kennedy, Bureau of Land Management, 2800 Cottage Way, Sacramento, California 95825, on or before November 10, 1989. We will send your comments along with ours to our headquarters office to be considered in their development of the final document.

Again I wish to express my appreciation for your cooperative attitude and assistance in assuring the proper management of Wild Horses and Burros on public lands in California and the Bureau. I also wish to thank you for participating in the breakfast with Director Jamison. The Director benefitted greatly from the frank discussions at this group meeting.

Sincerely,

Ed Hastey
State Director

Enclosure
As Stated





ANIMAL PROTECTION INSTITUTE OF AMERICA

2831 Fullridge Road, P.O. Box 22505, Sacramento, CA 95822 (916) 731-5521 FAX (916) 731-4467

**COPY FOR YOUR
INFORMATION**

November 7, 1989

Chairman of the Board
KENNETH E. GUERRERO

Vice Chairwoman
LUANA GRIMLEY

Secretary
RICHARD WEMPE

Directors
COLETTE C. FABER
GWENDOLYN MAY SEDLACHEK
ROWLAND MITCHELL

Executive Director
DUF FISCHER

National Advisory Board
ROBERT BROWN
Factory Farming

NEDIM BUYUKMIHCI, V.M.D.
Institutional
Veterinary Medicine

BRUCE MAX FELDMANN, D.V.M.
Veterinary Medicine
and Pet Population

MARJORIE GUERRERO
Humane Education

MRS. KATHY HARRISON
Northwest Regional Activities

SHIRLEY MCGREAL, Ed.D.
Primate Specialist

JOYCE A. TISCHLER, J.D.
Animal Rights and the Law

FLORA KUNG
The Arts

DENNIS FETKO, Ph.D.
Animal Behavior

MRS. RALPH YOUNGDALE
Publicity and Promotions

Foreign Advisors
ANGUS O. McLAREN
Transvaal, South Africa

BARRY KENT MACKAY
Ontario, Canada

MICHAELA DENIS LINDSAY
Nairobi, Kenya

In Memoriam
VELMA JOHNSTON
"Wild Horse Annie"

HARRY DEARINGER

MRS. FRANK V. BRACH

CHARLOTTE L. B. PARKS

CLAUDE,
Countess of Kinnoull

Dean Stepanek
Deputy Director
BLM
Department of Interior
Washington, DC 20240

Dear Mr. Stepanek:

This is in response to your Instructional Memo 90-30, the draft Policy Modifications Resulting from the IBLA Ruling of June 7, 1989. The Animal Protection Institute is concerned with the implementation of that ruling and hopes the following comments will be helpful.

On Page 2, the change in the BLM Manual 4700, Glossary needs to reflect what would constitute the optimum number. We disagree, here, with the use of the phrase "provides a thriving natural ecological balance on the public range." We don't mean to sound nitpicking but we believe this implies that reductions in wild, free-roaming horse populations (e.g., capture and removal) are to be the means by which a thriving ecological balance of the natural system is to be achieved. This would then so easily become the basis for a management program based on controlling numbers rather than the protection of horses and their designated habitat areas. Even though the IBLA ruling does use the word "provide," the context is different. We're pretty sure the IBLA does not interpret the law as allowing wild horses/burros to be scapegoats for overgrazing or the vehicle for achieving a thriving ecological balance of the natural system.

We believe the definition in the Glossary section needs to read:

The appropriate management level in a given area is the optimum number of horses compatible with or fitting with the thriving natural ecological balance of that area under multiple use principles.

This puts the burden on the definition of "a thriving natural ecological balance" to spell out what, in fact, becomes a sound, wild horse management program and the policy that will follow. We think that this definition should read:

The thriving natural ecological balance is the condition of the range as being in an upward trend or stabilized at the seral stage determined for a given area to meet wild, free-roaming horse and wildlife habitat requirements under sustained yield principles.

Two things that disturb us in the overall implementation of a sound wild horse management program are (1) the fact that suitability criteria as defined by BLM in the land use plans are not applied when forage production and carrying capacity of an area are estimated and (2) the fact the ecological condition--as defined by BLM in land use plans--in terms of the non-forage components of the vegetation (e.g., its values to the hydrologic system, soil stabilization, as well as wildlife and wild horse/burro habitat) is not part of the scheme for determining forage availability and usage. Both of these are BLM's own policies. They make sense. They fairly express the intent of Congress. We believe, if applied, they would implement sustainable usage principles as well as wild horse/burro habitat protections.

Attachment 1-3, Part .01, Section #B. needs to include "sustained yield" principles. On this same page, it appears to us that by separating the optimum number in # E from the appropriate management level in #F you contradict the definition of AML that the IBLA ruling is all about. To make sure that this is not the case, we would suggest that #F state that when it has been determined that an excess exists in a given area and a reduction is deemed necessary then the removal of excess horses to an appropriate level will be done as soon as possible. Otherwise it is not clear to us how you expect to "maintain" them at that "appropriate level" without having to periodically determine excess and the optimum number; in fact going through the procedure already stated in #E. Perhaps statutory language needs to be quoted here as the clearest explanation of the objective. In addition to determining if an excess exists, the law also refers to the decision of whether or not removal is deemed necessary. It is after this second decision, when removal is deemed to be necessary, that the law instructs BLM to reduce the number to the appropriate level as soon as possible. It is in this section of the law that BLM is instructed to consider "other options" before removing horses/burros from the public lands. Both the second decision and that "other options" instruction are missing from your proposed modifications. Part #G refers to using the planning process to establish herd management areas and to identify objectives. We believe this objective needs to clarify the statutory constraints on that land use

process when objectives affecting wild horses/burros are considered.

The third Glossary term on page 2 of the Memo refers to "Monitoring." "Part No. 0.6, 4710 - Management Considerations," which is Attachment 1-11 to the memo, includes the changes on monitoring herds and habitat that are to go into the manual. We believe this section is in need of reconsideration and that the Glossary needs to include definitions of (1) what factors are to be included in inventories; (2) what is the balance of uses and how is it to be determined within a designated wild horse/burro use area; and (3) monitoring for excess. There is no mention in this draft of foraging habits, home ranges, herd structure, population dynamics, etc., which would be inventories. Having read the Nevada BLM's Manual Supplement for wild horses we are not in disagreement with what that Supplement says on monitoring, which says:

Vegetation resource data must be collected and analyzed to evaluate the habitat and determine the carrying capacity of the herd use area; emphasis should be placed on quantifying the degree to which habitat conditions are identifiable to particular animal species.

The purpose of censusing which is Attachment 1-8 should be limited to a definition that it is to serve as a baseline for habitat monitoring, population inventory, location of horses (where and when) as well as the number. The census is not the determination of excess. The language in this paragraph that states "in excess of AML" is contradictory to the ruling. This should be deleted.

Because the ruling does in fact refer to actual usage as one of the factors to be monitored, we believe there needs to be a reference to the reductions in forage allowance based on range data that requires reductions be from actual usage.

We don't disagree that monitoring should also include measuring the progress toward objectives set in the land use plans. What we object to in the draft policy statement is the implication that whatever is in the land use plans determines the management of wild horses regardless of protections granted in the law. For instance, in Attachment 1-5 both #.22 and #.23 need to clarify the fact the law places constraints on what goes into land use plans. In # .23-Record of Decision where it says that decisions related to where horses are to be managed, the number to be maintained, and the objectives to provide a thriving natural ecological balance are to be included in the RODs should be deleted because the first sentence is enough. The rest of it puts the land use process ahead of the law.

Of special concern is the definition of Herd Management Areas and Herd Areas. This is Attachment 1-7. Having an area where horses existed in 1971 as a "name only" token area that meets

some legalistic terminology but where no horses are allowed doesn't make sense to us as meeting the statutory provision that requires wild horses/burros be protected in those areas where they existed at the time the law was enacted. We contend that there is a statutory limitation on administrative discretion regarding where horses are to be managed and protected. From our point of view, the provision in the law is pretty black and white so it surprises us that it is confused as meaning not necessarily in those areas where they existed in 1971 or only if BLM decides (in their land use planning) on those areas where they existed in 1971. The IBLA appeals and ruling did not address this issue. However, we suspect it will come up shortly.

In Attachment 1-8, the Section on Population Control that refers to capture and removal needs to address the determination of excess. Since quoting statute is included here, perhaps the statutory definition of excess and the authorizing provision for removal needs to be cited as well.

We think the most important directive to field staff is that wild horses and burros not be managed like domestic livestock are managed; and their habitat is not to be managed like a ranch. We appreciate the fact that implementing the ruling will entail a change in attitude toward wild horses/burros as a protected species and the 1971 Act as a federal law of equal status to all other federal laws for many throughout the BLM. We hope the final memo from the Director will note that and reinforce a positive change.

Sincerely,

Nancy Whitaker
Nancy Whitaker
Program Assistant

**COPY FOR YOUR
INFORMATION**

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

To	Initial	Date
1 SD	B	
Rel-2 ASD		
ADMIN		
3 RES		
In Reply Refer. OFFER.		
PA		
4700 (250) Minerals		
EEO		

October 12, 1989

Instruction Memorandum No. 90-30
Expires 9/30/90

To: State Directors (Except Alaska) and Service Center Director

From: Director

Subject: Draft Wild Horse and Burro Policy Modifications Resulting
From the Decision of the Interior Board of Land Appeals Dated
June 7, 1989

In Reply Refer.

4700 (250)

Action by 9
Surname by _____
Return to _____

10/30

DD 11/3/89 11/15

Recently, the Interior Board of Land Appeals (IBLA) issued a decision on appeals made by the Animal Protection Institute from proposed plans to remove excess wild horses in Nevada. The decision set aside plans to remove wild horses from herd management areas where the decision to remove was not predicated on a determination that the removal was necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range. The decision has far-reaching effects in the wild horse and burro program. The purpose of this memorandum is to set forth the conclusions, findings, and interpretations of the decision and provide draft policy in light of that decision for your review and comment.

The IBLA decision:

1. Interpreted the term "appropriate management level" (AML) to mean that "optimum number" of wild horses which results in a thriving natural ecological balance and prevents deterioration of the range.
2. Noted that the Secretary in his June 1981 letter indicated that an appropriate determination of the number of wild horses to be permitted on the public range, consistent with Section 3(b) of the Act, requires relying on "an intensive monitoring program involving studies of grazing utilization, trend in range condition, actual use, and climatic factors."
3. Found that the statute simply does not authorize the removal of more than the excess number of wild horses.
4. Concluded that Section 3(b) of the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons.
5. Found no support for the position that BLM has discretionary authority to order the removal of wild horses from an area of the public range simply to establish a baseline population for purposes of studying the potential for damage to the public range.

6. Concluded that Section 3(b)(2) of the Act contains the sole and exclusive authority for BLM to remove wild horses from the public range.

7. Concluded that it is not necessary to prepare a Herd Management Area Plan (HMAP) as a basis for ordering the removal of wild horses, so long as the record otherwise substantiates compliance with the statute.

8. Found no fault with the proposed removal of wild horses from designated horse-free areas, and from outside herd management areas, including "problem animals" intruding on private property.

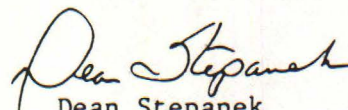
Incorporating these conclusions, findings, and interpretations into guidance requires significant changes in existing policies and procedures. Attached are draft revisions to Manual Sections 4710 - "Management Considerations" and 4720 - "Capture and Removal" that reflect modifications necessitated by the IBLA decision. Please review the draft Manual Sections and changes to glossary listed below and provide your comments to the Director (250), Premier Building, Room 901, by November 3, 1989.

BLM Manual 4700, Glossary

The term "Appropriate Management Level" is redefined as follows: the optimum number of wild horses and burros that provides a thriving natural ecological balance on the public range.

The term "Thriving Natural Ecological Balance" is added to the glossary and defined as follows: The condition of the public range that exists when resource objectives related to wild horses and burros in approved land use and/or activity plans have been achieved.

The term "Monitoring" is added to the glossary and defined as follows: The periodic and systematic collection of resource data to measure progress towards achieving objectives that provide a thriving natural ecological balance on the public range.


Dean Stepanek
Deputy Director

2 Attachments:

- 1 - 4710 - Management Consideration (12 pp)
- 2 - 4720 - Capture and Removal (6 pp)

4710 - MANAGEMENT CONSIDERATIONS

1. Explanation of Material Transmitted: This release transmits a revised Manual Section describing the authorities, objectives, and policies that guide the protection, management, and control of wild free-roaming horses and burros on public lands and on other lands that are adjacent to or intermingled with public land and that serve as habitat for wild horses and burros.
2. Reports Required: None.
3. Material Superseded: Manual Section 4710
4. Filing Instructions: File as directed below.

REMOVE:

4710

INSERT:

4710

(Total: 12 Sheets)

Assistant Director for Land
and Renewable Resources

4710 - MANAGEMENT CONSIDERATIONS

Table of Contents

- .01 Purpose
- .02 Objectives
- .03 Authority
- .04 Responsibility
- .05 References
- .06 Policy

- .1 Protection
 - .11 Observation
 - .12 Investigation
 - .13 Enforcement

- .2 Land Use Planning
 - .21 Consultation
 - .22 Resource Management Plans
 - .23 Record of Decision
 - .24 Activity Plan

- .3 Management Areas
 - .31 Herd Areas
 - .32 Herd Management Areas
 - A Wild Horse and Burro Ranges

- .4 Herd Management
 - .41 Minimum Feasible Level of Management
 - .42 Census
 - .43 Methods of Population Control

- .5 Habitat Management
 - .51 Inventory (Reserved)
 - .52 Improvements
 - A. Vegetation (Reserved)
 - B. Water (Reserved)
 - C. Structures

- .6 Monitoring Herds and Habitat

- .7 Research (Reserved)

Handbook

H-4710-1 - Census (Reserved)

4710 - MANAGEMENT CONSIDERATIONS

.01 Purpose. This Manual Section describes the authorities, objectives, and policies that guide the protection, management, and control of wild free-roaming horses and burros on the public lands and on other lands that are adjacent to or intermingled with public land and that serve as habitat for wild horses and burros.

.02 Objectives. The objectives of the Bureau relating to this Manual Section are:

A. To protect wild free-roaming horses and burros on the public lands from unauthorized capture, branding, harassment, and destruction.

B. To manage herds of wild horses and burros and their habitat under the principle of multiple use.

C. To maintain current data about wild horse and burro populations and their habitat.

D. To determine if a thriving natural ecological balance exists on the public lands through resource monitoring.

E. To determine periodically, for each herd management area, the optimum number of wild horses and burros compatible with maintaining a thriving natural ecological balance in that area.

(or adjust as necessary - see E above)

F. To reach appropriate management levels as soon as practical and to maintain them thereafter.

G. To use the planning process to establish herd management areas and to identify objectives that will provide a thriving natural ecological balance among wild horses and burros, wildlife, livestock, and the vegetation and other resources.

.03 Authority. (See BLM Manual Section 4700.)

.04 Responsibility. (See BLM Manual Section 4700.)

.05 References. (See BLM Manual Section 4700 and 4730.)

.06 Policy. (See BLM Manual Section 4700.)

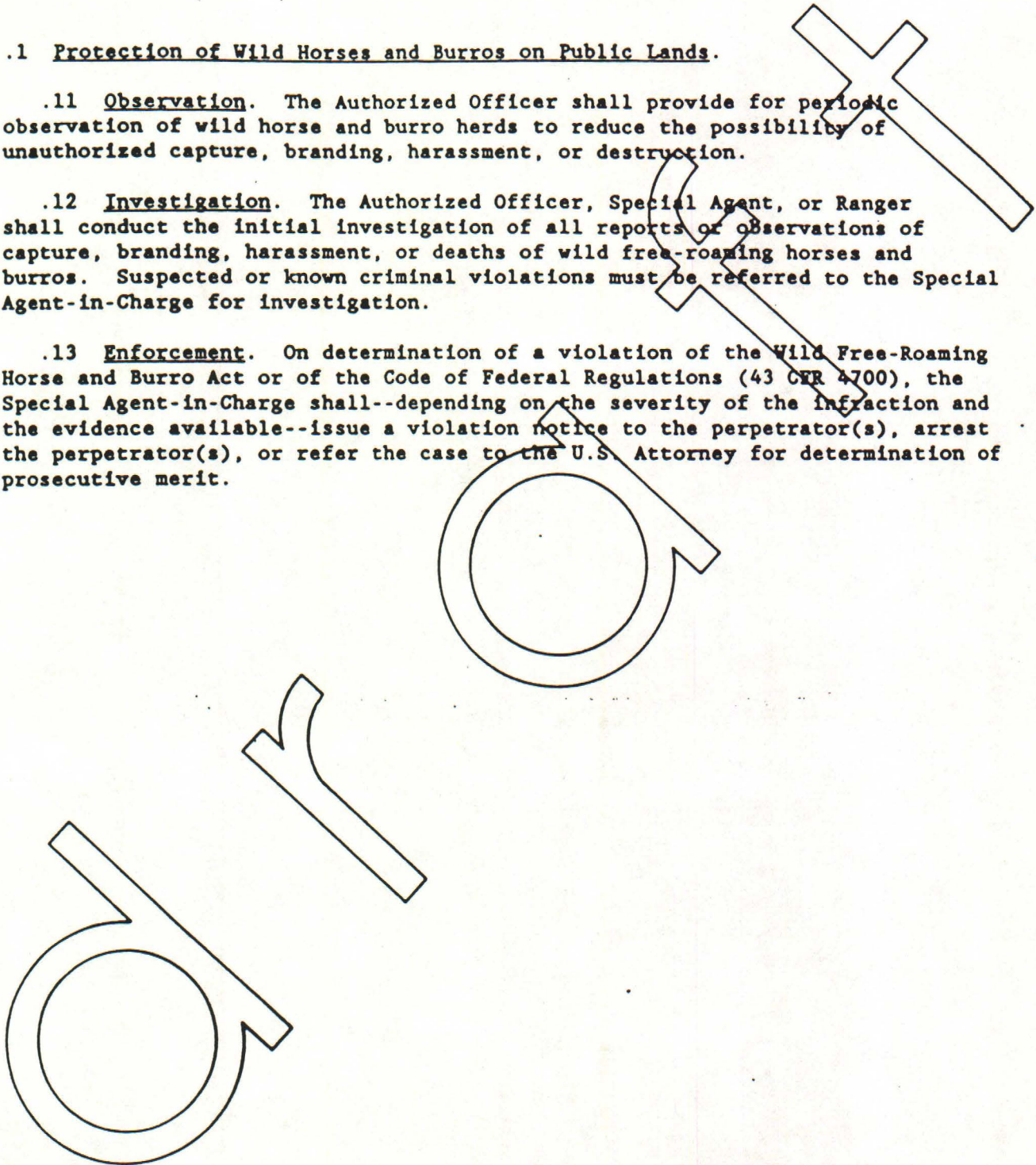
4710 - MANAGEMENT CONSIDERATIONS

.1 Protection of Wild Horses and Burros on Public Lands.

.11 Observation. The Authorized Officer shall provide for periodic observation of wild horse and burro herds to reduce the possibility of unauthorized capture, branding, harassment, or destruction.

.12 Investigation. The Authorized Officer, Special Agent, or Ranger shall conduct the initial investigation of all reports or observations of capture, branding, harassment, or deaths of wild free-roaming horses and burros. Suspected or known criminal violations must be referred to the Special Agent-in-Charge for investigation.

.13 Enforcement. On determination of a violation of the Wild Free-Roaming Horse and Burro Act or of the Code of Federal Regulations (43 CFR 4700), the Special Agent-in-Charge shall--depending on the severity of the infraction and the evidence available--issue a violation notice to the perpetrator(s), arrest the perpetrator(s), or refer the case to the U.S. Attorney for determination of prosecutive merit.



4710 - MANAGEMENT CONSIDERATIONS

.2 Land Use Planning.

.21 Consultation. The Bureau shall consult and cooperate with the Forest Service, Federal and State wildlife agencies, other affected Government agencies, applicable advisory committees, concerned public and private organizations, individuals with special expertise, and affected interests in the development of plans for wild horses and burros.

.22 Resource Management Plans. Section 202 of Public Law 94-579, directs the Secretary to ". . . develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." Decisions regarding the use of public lands by wild horses and burros shall be made through the planning process. Areas identified as wild horse and burro habitat in 1971 shall be the only areas considered in the planning process for establishment of herd management areas.

A. The Resource Management Plan shall contain quantifiable and measurable objectives for wild horses and burros, wildlife, livestock, and the vegetation and other resources that when achieved provide a thriving natural ecological balance on the public range.

B. Alternatives formulated in the planning process shall identify a range of possible combinations of wild horses and burros, wildlife, and livestock that could be maintained on the public range to achieve objectives that provide a thriving natural ecological balance.

C. Specific planning determinations and associated resource management plan standards for wild horses and burros are set forth in BLM Manual 1622.4, Supplemental Program Guidance for Renewable Resources. General planning process requirements and procedures, including those for public participation, alternative formulation, analysis, and documentation, are prescribed in BLM Manual Sections 1601 through 1617 and in associated regulations.

.23 Record of Decision (ROD). Decisions about management of the public lands that result from the planning process shall be documented in the ROD. For wild horses and burros, decisions documented in the ROD include: herd areas where wild horses and burros will be maintained (herd management areas), the number of wild horses and burros that will be maintained on each herd management area, and the objectives that provide a thriving natural ecological balance on the public range.

A. In herd areas where the land ownership pattern is such that agreement with the private landowner is necessary to establish a herd management area but agreement cannot be reached, the ROD shall note that, if the ownership pattern should improve and/or agreement with the landowner can be reached and forage is available, a wild horse or burro management area shall be established.

4710 - MANAGEMENT CONSIDERATIONS

.24 Activity Plan. A Herd Management Area Plan (HMAP) shall be prepared as soon as possible where the decision made through the land use planning process is to manage wild horses or burros on a herd area and management actions are planned. The purpose of the plan is to (1) document and place a priority on planned management actions to achieve herd and habitat objectives, (2) establish a time line for implementing the actions, and (3) estimate the cost of implementing the actions for budgetary purposes.

A. The HMAP shall include herd and habitat objectives, planned range improvements, population control strategies, monitoring methods and schedules, and criteria for selective removal of animals, if any. A map which shows the boundary of the herd management area, migration routes, water sources, existing or planned improvements, and other relevant data shall be a part of the plan. The environmental impact of the plan shall be evaluated.

B. An HMAP is not a prerequisite to removal of excess wild horses and burros.

4710 - MANAGEMENT CONSIDERATIONS

.3 Management Areas.

.31 Herd Areas. The geographic areas of public lands that were used as habitat for wild horses and burros in 1971 shall be delineated on maps and placed in a permanent file. If these original herd area boundaries are found to be inaccurate and must be redrawn, both old and new maps shall be maintained in a permanent file, together with an explanation of the reason for the change. If a decision is made in resource management planning not to manage wild horses and burros in a herd area because of resource problems or conflicts, eventual resolution of those problems or conflicts may allow for reconsideration of the decision.

.32 Herd Management Areas. The Bureau shall manage wild horses and burros within herd management areas as integral components of the public lands on the basis of multiple use and in a manner that ensures a sustained population of healthy, free-roaming animals. Where integral or extensive portions of herd areas that are suitable for long-term management are privately controlled, the Bureau shall seek to provide for wild horse and burro habitat needs and protection through cooperative agreements with owners of contiguous or intermingled private lands.

A. Wild Horse and Burro Ranges. A herd management area shall be considered for designation as a wild horse or burro range only if there is a significant public value present, such as a unique and interesting characteristic in the herd or an outstanding opportunity for public viewing and interpretation of the herd and its habitat. The nomination of a herd management area for designation as a range shall be considered in the BLM planning process to assess the impact on other resources and the degree of public acceptance.

4710 - MANAGEMENT CONSIDERATIONS

.4 Herd Management.

.41 Minimum Feasible Level of Management. The Wild Horse and Burro Act directs that management of the animals be at the minimum feasible level and that management activities be carried out in consultation with the wildlife agency of the State in order to protect the natural ecological balance of all wildlife species which inhabit the land, particularly endangered wildlife species. To carry out the direction established by Congress, wild horses and burros shall be managed with the least amount of population manipulation and habitat improvement necessary to achieve objectives stated in approved land use or activity plans.

.42 Census. Wild horse and burro herds shall be counted using methods recommended by the National Academy of Sciences (NAS) Committee on Wild Free-Roaming Horses and Burros to estimate herd size, distribution, composition, and rate of increase. The NAS Committee reported that it did not appear that annual censuses are necessary; rather a census every 2 or 3 years can provide information necessary "to maintain annual appraisals of herd size in order to know when to carry out herd reduction and to make annual forage allocations" Census methods recommended by the NAS shall be used until new technologies for counting wild animal populations are developed, accepted by the scientific community, and approved by BLM. When new census techniques are approved, they will be included in the census handbook. The purpose of the census is to make determinations whether and where wild horses and burros are in excess of the appropriate management level (AML) on public lands and how the AML should be achieved if excess animals exist. The census data also serve as a base line for habitat monitoring and measurement of progress towards objectives.

.43 Methods of Population Control.

A. Natural Methods. To an unknown extent, the rate at which wild horse and burro herds increase on the public lands is affected by the nutrient value of the forage consumed, climate, disease, and predators. When these methods, acting alone or in combination, are not sufficient to maintain the population of wild horses and burros at the AML, artificial methods to control the population shall be employed.

B. Artificial Methods.

1. Capture and Remove. Wild horses and burros shall be captured and removed in the following order and priority:

a. Old, sick, or lame animals shall be humanely captured and destroyed in the most humane manner possible. (See BLM Manual Section 4730.)

4710 - MANAGEMENT CONSIDERATIONS

b. Additional excess animals shall be humanely captured and made available for private maintenance and care. (See BLM Manual Section 4950.)

c. Healthy excess wild horses and burros for which an adoption demand by qualified individuals does not exist shall be captured and destroyed in the most humane and cost efficient manner possible, except that BLM has maintained a moratorium on destruction of healthy excess wild horses or burros since 1982, and this method of removal shall not be used until such time as the moratorium is lifted. (See BLM Manual Section 4730.)

2. Fertility Control. (Reserved)

DECLASSIFIED

4710 - MANAGEMENT CONSIDERATIONS

.5 Habitat Management.

.51 Inventory. (Reserved)

.52 Improvements. See BLM Manual Section 1740 - Renewable Resource Improvements and Treatments.

A. Vegetation. (Reserved)

B. Water. (Reserved)

C. Structures. See BLM Handbook 1741-1 - Fencing.

DROR

4710 - MANAGEMENT CONSIDERATIONS

.6 Monitoring Herds and Habitat. The purpose of monitoring wild horse and burro herds and their habitat is to collect and analyze the data necessary to evaluate progress towards meeting objectives listed in approved land use or activity plans and to develop herd management area plans.

A. Decisions about the management of the herd and their habitat, including those that affect the determination of the existence of a thriving natural ecological balance, shall be based on data and information. Minimum information requirements and data needs shall be documented in a monitoring plan established for each herd area. The intensity and frequency of monitoring shall be at a level commensurate with the complexity of the management decision involved.

B. Before a decision is made to obtain the necessary data through monitoring of herd areas, data contained in the most recent inventory of lands, environmental impact statements, completed land use plans, research studies, or other available information shall be examined. Only if the data are not of the type, quality, or quantity necessary to determine if a thriving natural ecological balance exists shall monitoring of area be undertaken.

C. The data shall be analyzed to determine if a thriving natural ecological balance exists among wild horses and/or burros, wildlife, and livestock, and the vegetation. Only when the analysis concludes that the objectives have not been or cannot be achieved shall an adjustment in the level of use by wild horses or burros be permitted. Wild horses and burros shall not be removed from the range to establish a baseline population for study purposes or to achieve a population level established through the land use planning process without regard to the optimum number of wild horses and burros that provides a thriving natural ecological balance.

D. Because of substantial dietary overlap between cattle and wild horses, actual use studies shall be conducted in addition to utilization and trend to monitor vegetation in wild horse management areas whenever cattle also use the area. Details on monitoring vegetation can be found in Handbook 4420-1, Rangeland Monitoring and Evaluation. Vegetation studies and their results shall be coordinated with other users of the vegetation, adjacent landowners, universities, advisory boards, Federal and State agencies, and private organizations.

E. Other habitat variables, i.e., water, climate, shelter, or effect of other uses on wild horses and burros, shall be monitored as necessary to ensure the safety and well being of the animals.

F. Procedures for the collection, recording, and storage of herd and habitat data shall be established to ensure the quality of the data collected, consistency of data collection methods, uniformity in recording data, and retrieval capability of stored data.

.7 Research. (Reserved)

draft

4720 - CAPTURE AND REMOVAL

1. Explanation of Material Transmitted: This release transmits a revised Manual Section describing the authorities, objectives, and policies that guide the capture and removal of wild horses and burros from the public lands and other lands that are adjacent to or intermingled with public land.
2. Reports Required: None.
3. Material Superseded: Manual Section 4720.
4. Filing Instructions: File as directed below.

REMOVE:

4720

INSERT:

4720

(Total: 6 Sheets)

Assistant Director for Land
and Renewable Resources

4720 - CAPTURE AND REMOVAL

Table of Contents

- .01 Purpose
- .02 Objectives
- .03 Authority
- .04 Responsibility
- .05 References
- .06 Policy

- .1 Capture
 - .11 Capture Plan
 - .12 Capture Techniques
 - .13 Capture and Release
 - .14 Capture of Privately Owned Horses or Burros
 - .15 Capture of Adopted Animals That Escape

- .2 Removal
 - .21 Removal From Herd Management Areas
 - .22 Removal From Non-Management Areas
 - .23 Removal From Private Land
 - .24 Removal of Selected Animals
 - .25 Public Notification

Illustration

- 1. Unmarked Wild Horse and Burro Record (Form 4710-13)

Handbook

H-4720-1 - Capture (Reserved)

4720 - CAPTURE AND REMOVAL

1. Approved research projects.
2. Relocation to other herd areas.
3. Treatment of an injured animal or prevention of a contagious disease.
4. Marking for identification.
5. Manipulation of herd characteristics in conformance with planning decisions.
6. Life-threatening situations.
7. Fertility Control.

B. If captured wild horses and burros are released into a herd area different from the one they occupied prior to capture, the animals shall be monitored after release to assure they have located food and water.

C. For each animal captured and released, the Authorized Officer shall complete Form 4710-13, Unmarked Wild Horse and Burro Record (see Illustration 1). The data shall also be entered into the Wild Horse and Burro Information System. (See BLM Wild Horse & Burro Information System Users Guide 4700 Series.)

.14 Capture of Privately Owned Horses or Burros. Whenever horses or burros show signs of private ownership, such as branding or gelding, are captured on public land, they shall be turned over to the State as estrays.

.15 Capture of Adopted Animals That Escape. Wild horse or burro adopters agree under the terms of adoption to notify the authorized officer within 7 days after discovery of escape, to pursue animals that escape from their care, and to be responsible for the costs of recapture. Adopted horses or burros that escape shall be recaptured using techniques listed in Manual Section 4720.12.

.2 Removal. Excess wild horses and burros on public land and those that stray onto private land shall be captured and removed as soon as practical. Wild horses and burros may be determined to be excess and removed from the range before resource damage occurs if it can be demonstrated that leaving the animals on the range would lead to range deterioration caused by an overpopulation of wild horses or burros before the next planned removal.

4720 - CAPTURE AND REMOVAL

.21 Removal From Herd Management Areas. Wild horses and burros shall be removed from herd management areas only after a determination has been made that they are excess or for an approved research study.

.22 Removal From Non-Management Areas. Wild horses and burros that stray outside of herd areas and onto other public land shall be considered excess, captured, and removed. When the decision made through the planning process is not to establish a herd management area in an area used as habitat in 1971, wild horses or burros that remain on the area shall be considered excess, captured, and removed.

.23 Removal From Private Land. Wild horses or burros that stray onto private land shall be removed as soon as practical after receipt of a written request from the landowner. The request shall include a legal description of the land the animals strayed onto, the date(s) the animals occupied the land, and any special requirements that should be included in the capture plan.

.24 Removal of Selected Animals. When the herd management area plan identifies certain characteristics in the herd to be perpetuated through retention of animals with those characteristics, the selective removal of animals without those characteristics shall be permitted. If there is no objective in the herd management area plan that identifies herd characteristics to be perpetuated, excess animals shall be captured by band and removed.

.25 Public Notification. A minimum of 30 days advance notice of any scheduled capture and removal shall be provided to the public to allow time for review of the capture plan and associated environmental documents. (See BLM Manual Section 4740.3 for public hearing requirements associated with use of motor vehicles and helicopters.)

4720 - CAPTURE AND REMOVAL

.01 Purpose. This Manual Section describes the authorities, objectives, and policies that guide the capture and removal of wild horses and burros from the public lands and other lands that are adjacent to or intermingled with public land.

.02 Objectives. The objectives of the Bureau relating to this Manual Section are:

A. To remove as soon as practical, wild horses and burros that stray from public land onto private land and wild horses and burros in excess of the appropriate management level on public land.

B. To effect all captures and removals of wild horses and burros in a safe, humane, and cost effective manner.

.03 Authority. (See BLM Manual Section 4700.)

.04 Responsibility. (See BLM Manual Section 4700.)

.05 References. (See BLM Manual Sections 4700, 4730, and 4740.)

.06 Policy. (See BLM Manual Section 4700.)

4720 - CAPTURE AND REMOVAL

.01 Purpose. This Manual Section describes the authorities, objectives, and policies that guide the capture and removal of wild horses and burros from the public lands and other lands that are adjacent to or intermingled with public land.

.02 Objectives. The objectives of the Bureau relating to this Manual Section are:

A. To remove as soon as practical, wild horses and burros that stray from public land onto private land and wild horses and burros in excess of the appropriate management level on public land.

B. To effect all captures and removals of wild horses and burros in a safe, humane, and cost effective manner.

.03 Authority. (See BLM Manual Section 4700.)

.04 Responsibility. (See BLM Manual Section 4700.)

.05 References. (See BLM Manual Sections 4700, 4730, and 4740.)

.06 Policy. (See BLM Manual Section 4700.)

4720 - CAPTURE AND REMOVAL

.1 Capture.

.11 Capture Plan. A capture plan shall be prepared for any scheduled capture and removal of wild horses and burros. (A written plan is not needed for removals undertaken in response to an emergency situation e.g., fire or adopted animals that escape.) The plan shall address, as a minimum, the following elements: capture method, location, and number of animals involved; procedures to minimize stress to animals during capture operations; transportation of animals from capture site to other locations; and possible need for humane destruction of old, sick, lame, or injured animals at the capture site and disposition of remains. (See BLM Manual Sections 4730 and 4740.) The necessary environmental review shall be accomplished as prescribed in BLM Manual Section 1790 and BLM Handbook H-1790-1.

.12 Capture Techniques. Wild horses and burros shall be captured by helicopter herding, baiting in traps, roping, or by chemicals.

A. The capture of wild horses by using a helicopter to herd the animals is prohibited during the 6 weeks that precede and the 6 weeks that follow the peak foaling period. Helicopters may be used year-round in the removal of wild burros. (See BLM Manual Section 4740.1.)

B. The capture of wild horses and burros by using bait (i.e., food, water, salt, or sexual attraction) to lure animals into a trap is the method least stressful to the animals and shall be used whenever practical.

C. A wild horse or burro may be captured by roping from horseback. Care should be taken to avoid the possibility of choking the animal or otherwise causing it undue stress or injury.

D. The use of chemicals to sedate or immobilize wild horses and burros to enable their capture shall be permitted when other methods have proven to be impractical or ineffective, when necessary to capture a sick or injured animal, or when needed for an approved research study. Only veterinarians, qualified researchers, or trained Bureau employees shall be authorized to use chemicals for sedating or immobilizing wild horses or burros. In each situation, the choice of the immobilizing agent and the method of delivery shall be determined based on considerations of humaneness and efficiency.

.13 Capture and Release. Wild horses and burros may be captured for reasons other than removal from the public lands and then may be released on herd areas. Unless the capture and release are the result of an emergency, a capture plan is required.

A. Appropriate reasons for the capture and subsequent release of wild horses and burros are:

4720 - CAPTURE AND REMOVAL

1. Approved research projects.
2. Relocation to other herd areas.
3. Treatment of an injured animal or prevention of a contagious disease.
4. Marking for identification.
5. Manipulation of herd characteristics in conformance with planning decisions.
6. Life-threatening situations.
7. Fertility Control.

B. If captured wild horses and burros are released into a herd area different from the one they occupied prior to capture, the animals shall be monitored after release to assure they have located food and water.

C. For each animal captured and released, the Authorized Officer shall complete Form 4710-13, Unmarked Wild Horse and Burro Record (see Illustration 1). The data shall also be entered into the Wild Horse and Burro Information System. (See BLM Wild Horse & Burro Information System Users Guide 4700 Series.)

.14 Capture of Privately Owned Horses or Burros. Whenever horses or burros show signs of private ownership, such as branding or gelding, are captured on public land, they shall be turned over to the State as estrays.

.15 Capture of Adopted Animals That Escape. Wild horse or burro adopters agree under the terms of adoption to notify the authorized officer within 7 days after discovery of escape, to pursue animals that escape from their care, and to be responsible for the costs of recapture. Adopted horses or burros that escape shall be recaptured using techniques listed in Manual Section 4720.12.

.2 Removal. Excess wild horses and burros on public land and those that stray onto private land shall be captured and removed as soon as practical. Wild horses and burros may be determined to be excess and removed from the range before resource damage occurs if it can be demonstrated that leaving the animals on the range would lead to range deterioration caused by an overpopulation of wild horses or burros before the next planned removal.

4720 - CAPTURE AND REMOVAL

.21 Removal From Herd Management Areas. Wild horses and burros shall be removed from herd management areas only after a determination has been made that they are excess or for an approved research study.

.22 Removal From Non-Management Areas. Wild horses and burros that stray outside of herd areas and onto other public land shall be considered excess, captured, and removed. When the decision made through the planning process is not to establish a herd management area in an area used as habitat in 1971, wild horses or burros that remain on the area shall be considered excess, captured, and removed.

.23 Removal From Private Land. Wild horses or burros that stray onto private land shall be removed as soon as practical after receipt of a written request from the landowner. The request shall include a legal description of the land the animals strayed onto, the date(s) the animals occupied the land, and any special requirements that should be included in the capture plan.

.24 Removal of Selected Animals. When the herd management area plan identifies certain characteristics in the herd to be perpetuated through retention of animals with those characteristics, the selective removal of animals without those characteristics shall be permitted. If there is no objective in the herd management area plan that identifies herd characteristics to be perpetuated, excess animals shall be captured by band and removed.

.25 Public Notification. A minimum of 30 days advance notice of any scheduled capture and removal shall be provided to the public to allow time for review of the capture plan and associated environmental documents. (See BLM Manual Section 4740.3 for public hearing requirements associated with use of motor vehicles and helicopters.)



United States Department of the Interior



NOV -6 AM 8:00

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

IN REPLY REFER TO:

NOV 7 1989

CRAIG C. DOWNER

IBLA 89-33

Decided October 31, 1989

Appeal from a decision of the Nevada State Office, Bureau of Land Management, approving the Ely/Elko Wild Horse Gather Plan. N 04-88-2.

Dismissed in part, affirmed in part.

1. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from a herd management area will be set aside where the removal decision is not properly based on a finding supported by the record that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

2. Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal.

3. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from an area outside a herd area will be sustained where it is consistent with the regulation at 43 CFR 4710.4.

APPEARANCES: Craig C. Downer, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a decision of the Nevada State Director, Bureau of Land Management (BLM), approving the final plan for the Ely/Elko

NUMBER RECEIVED		
Routing	Initial	Date
SD		
ASSOCIATE SD		
EEO		
PUBLIC AFFAIRS		
MINERAL RES.	C	
LANDS & REN. RES.		
OPERATIONS	C	
ADMINISTRATION		
ACTION		
FILE		
LIBRARY	C	

Wild Horse Gather which would remove approximately 1,045 wild horses from portions of the public lands (NV-04-88-2). Of the seven areas covered by the plan, appellant objects to removal of horses from six: the Monte Cristo Herd Management Area (HMA); the Cherry Springs Wild Horse Territory (WHT); a "horse free" portion of the Egan Resource Area not designated an HMA; and HMAs identified as Diamond Hills South, Butte, and Maverick-Medicine. Appellant objects to the removal of wild horses from these areas because the plan calls for fewer than 500 wild horses to remain in each. More specifically, he states that:

500 should be considered the minimum viable herd population in each herd area according to population biology assessments. Maintaining adequate population levels is especially important among species with harem social structure, where one male may do most of the breeding, as occurs in many of the wild horse bands.

The State Director's decision approving the Ely/Elko Wild Horse Gather Plan was also the subject of a prior appeal (IBLA 88-679) filed by the Animal Protection Institute of America (APIA). BLM filed a motion requesting that both appeals, and three other appeals filed by APIA from decisions to remove wild horses from the public lands, be consolidated and expedited.

By order dated February 16, 1989, the Board consolidated the four APIA appeals and granted expedited consideration. As had been requested by BLM, the Board also placed into full force and effect BLM's decision to remove horses from four areas not involved in the present appeal. By order dated February 17, 1989, the Board declined to consolidate Downer's appeal with APIA's appeals because we found that Downer had raised distinct questions. We granted expedited consideration.

The Board's decision on the consolidated APIA appeals has recently been issued. Animal Protection Institute of America, 109 IBLA 112 (1989). Our review of the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (codified at 16 U.S.C. §§ 1331-1340 (1982)) and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984), led us to conclude that 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." 109 IBLA at 126. The statute states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information available to him

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[.]

16 U.S.C. § 1333(b)(2) (1982).

[1] In examining the statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public lands: "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, supra at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; Dahl v. Clark, supra at 595; see 16 U.S.C. § 1332(f) (1982).

We found that in most instances the AML's used as a basis for the removal actions approved by the BLM decisions had been taken from land use plans and other documents which set forth previously current wild horse and burro population statistics. We concluded that BLM had used current numbers in these documents for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Animal Protection Institute of America, supra at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." Id. Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Id. at 119.

With respect to the Monte Cristo HMA and the Cherry Springs WHT we found that the analysis undertaken to establish the numbers set forth in the wild horse management plans prepared in 1977 was consistent with the statutory criteria. Id. at 123. However, we also determined that the decision to reduce wild horse herds to the numbers set by these plans was neither in accord with the directive of 43 CFR 4720.1 that a decision to remove wild horses or burros be based on current information nor supported by a record which established that removal was necessary to restore the range to a thriving ecological balance and prevent deterioration. Id.

Because the AML's under review in Animal Protection Institute of America, supra, did not reflect determinations by BLM as to the optimum number of horses which would result in a thriving natural ecological balance and avoid a deterioration of the range, we set aside and remanded the

BLM decision to approve the Ely/Elko Wild Horse Gather plan as it applied to removal of wild horses from five of the six areas challenged by appellant: the Monte Cristo HMA, the Cherry Springs WHT, and the HMA's identified as Diamond Hills South, Butte, and Maverick-Medicine. ^{1/}

[2] In regard to these areas, the result of our setting aside of the BLM decision to remove wild horses is that no further relief can be provided. Consequently, the appeal has become moot with respect to the Wild Horse Gather Plan for these areas and the appeal is properly dismissed as to them. See *Blackhawk Coal Co. (On Reconsideration)*, 92 IBLA 365, 369, 93 I.D. 285, 287 (1986). This leaves for consideration only the appeal of BLM's decision to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA.

The Removal Plan for the Ely/Elko District Wild Horse Gather indicates that the decision to remove wild horses from the "horse free" area was based on the Egan Resource Management Plan and Egan Resource Area Record of Decision. The latter document states: "Wild horses will not be maintained outside of 1971 use areas." Thus, it appears that BLM regarded areas outside designated HMA's as areas which were to be "horse free."

[3] The Wild Free-Roaming Horses and Burros Act, as enacted in 1971, set forth the congressional policy that wild horses and burros "are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1982). In implementing the statutory mandate, BLM has promulgated regulations at 43 CFR Part 4700. Pursuant to the regulations, a "herd area" is defined as the "geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d); see 43 CFR 4710.2. Further, the regulations provide that: "Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas." 43 CFR 4710.4.

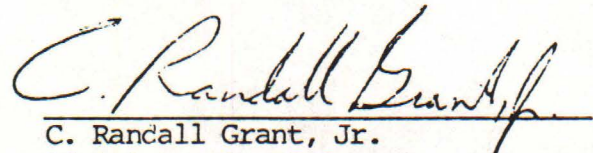
Under the statute, the Secretary is "directed to protect and manage wild free-roaming horses and burros as components of the public lands" and is authorized to "designate and maintain ranges on public lands as sanctuaries for their protection and preservation." 16 U.S.C. § 1333(a) (1982). A designated range is the "amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use

^{1/} We affirmed BLM's decision to remove wild horses from four HMA's because BLM had made a showing "that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, despite the fact that it has not shown that the AML's were properly established * * *." *Id.* at 123. We also affirmed BLM's decision to remove "problem animals" intruding on private property and to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA. *Id.* at 127.

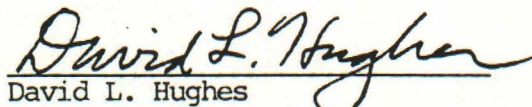
management concept for the public lands." 16 U.S.C. § 1332(c) (1982). This is reflected in the regulations which provide that HMAs may be established for the maintenance of wild horse and burro herds. 43 CFR 4710.3-1. Further, HMA's may be designated as wild horse or burro "ranges" to be managed principally, but not necessarily exclusively, for wild horse or burro herds. 43 CFR 4710.3-2.

The sole argument appellant presents concerns viable herd populations. Although, as BLM appears to recognize, the size of a herd necessary to sustain a viable population is relevant to the determination of AML's, it would not be dispositive in decisions concerning wild horses which have migrated to previously "horse free" areas outside herd areas, HMAs, or designated ranges. In such areas, other uses of the land may require reducing the number of horses to that compatible with such uses or removing them entirely. We find the BLM decision to remove wild horses from the "horse free" area is consistent with the regulation at 43 CFR 4710.4. For this reason, appellant's argument does not present a basis on which to overturn our previous decision to affirm the removal of wild horses from the "horse free" gather area designated in BLM's decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed in part.


C. Randall Grant, Jr.
Administrative Judge

I concur:


David L. Hughes
Administrative Judge



LAND MANAGEMENT
STATE OFFICE

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

IN REPLY REFER TO:

NOV 17 1989

CRAIG C. DOWNER

IBLA 88-678

Decided October 31, 1989

NUMB	TAKE
Routing	PRIDE IN AMERICA
SD	
ASSOCIATE	
EEO	
PUBLIC AFFAIRS	
MINERAL RES.	
LANDS & REN. RES.	
OPERATIONS	
ADMINISTRATION	
ACTION	
FILE	
LIBRARY	

Appeal of a decision of the Nevada State Director, Bureau of Land Management, approving final plans for removal of excess wild horses. N 2-88-2.

Set aside and remanded.

1. Rules of Practice: Appeals: Timely Filing

An appeal will not be dismissed as untimely when the record fails to establish that the decision was served upon the appellant more than 30 days prior to the date the notice of appeal was filed. The period for filing a notice of appeal is measured from "the date of service" of a decision rather than the date the decision is mailed. In the absence of a certified return receipt card or other evidence establishing when the decision was served, the appeal cannot be dismissed as untimely.

2. Wild Free-Roaming Horses and Burros Act

16 U.S.C. § 1333(b)(2) (1982) contains the sole and exclusive authority for BLM to remove wild horses from the public range. The statutory term "appropriate management level" has a very specific meaning in regard to removing wild horses or burros from the public range. It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration. The number of "excess" animals the Secretary is authorized to remove is that which exceeds the appropriate management level, which is the optimum number of wild horses and burros that results in a thriving natural ecological balance and avoids a deterioration of the range.

3. Wild Free-Roaming Horses and Burros Act

An "appropriate management level" established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be

sustained under 16 U.S.C. § 1333(b)(2) (1982). The statute does not authorize the removal of wild horses to achieve an appropriate management level which was established for administrative reasons rather than in terms of the optimum number of animals which results in a thriving natural ecological balance and avoids a deterioration of the range.

APPEARANCES: Craig C. Downer, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a July 22, 1988, decision of the Nevada State Director, Bureau of Land Management (BLM), approving the Wild Horse Removal (Gathering) Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas (N 2-88-2). The plan calls for the removal of approximately 1,117 wild horses from five Herd Management Areas (HMA's). Appellant objects to removal of wild horses from two of the five areas—the Granite Range HMA where 280 horses are to be removed and 176 remain, and the North Stillwater HMA where 107 horses are to be removed and 82 remain. Appellant, a wildlife biologist, states that "the numbers to remain are too low and will result in inbreeding and the decline of the population." Appellant refers to material he previously submitted to the BLM state office as "justifying why I consider such levels as these to be substandard and non-viable." 1/

When BLM forwarded the notice of appeal and the decision record to the Board, it included a cover memorandum from the District Manager discussing the merits of the appeal. There was no indication that the memorandum had been served on appellant. Because 43 CFR 4.27(b) prohibits written communication between a party and the Board concerning the merits of an appeal unless a copy is furnished all parties, we served a copy upon appellant by order dated February 8, 1989. He has responded by a letter received March 24, 1989.

Prior to addressing the substantive issues raised by the appeal, we must consider the assertion in BLM's memorandum that the appeal was not timely filed and should be dismissed. BLM states that a copy of the proposed action was mailed to appellant on August 9, 1988, but that the appeal was not filed in the Winnemucca District Office until September 13, 1988. BLM argues that the appeal was filed beyond the 30 days allowed by 43 CFR 4.411(a).

1/ It is not clear what materials appellant is referring to as they are not included in the record. Cases appealed to the Board are decided based on the administrative record or case file received from BLM and the submissions of the parties on appeal to the Board. See 43 CFR 4.24. Incorporation by reference of documents not filed as a part of the record in the case file at issue will not avail the parties to the extent these documents are not a part of the case file.

[1] The regulation cited by BLM requires that: "A party served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." 43 CFR 4.411(a). When a notice of appeal is not timely filed, the Board lacks jurisdiction to consider the merits of the appeal and must dismiss it. Stewart L. Ashton, 107 IBLA 140, 141 (1989); Ahtna, Inc., 100 IBLA 7 (1987).

The regulation, however, measures the period for filing a notice of appeal from "the date of service" of a decision rather than the date the decision is mailed. As a general rule, the regulations provide that where the mails are used to send a notice to a person, receipt will be deemed to have occurred when it is received by him at his last address of record with BLM. 43 CFR 1810.2(b). Thus, it is the date of receipt rather than the date of mailing which initiates the running of the appeal period. See F. Howard Walsh, Jr., 93 IBLA 297 (1986); Joan L. Harris, 37 IBLA 96 (1978).

Further, an appeal will not be dismissed as untimely when the record transmitted with the appeal fails to establish that the decision was "served" upon the appellant more than 30 days prior to the date the notice of appeal was filed. Jean Emanuel Hatton, 107 IBLA 47, 49 (1989); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 174-76 (1986). The present case record contains no certified return receipt card or other evidence indicating when BLM's decision was served on Downer. In the absence of such evidence, we could not dismiss his appeal as untimely.

Finally, in any event, there is no doubt that Downer's appeal was timely filed. BLM's cover letter accompanying the Wild Horse Removal Plan is dated August 9, 1988, which BLM states is also the date it was mailed. Thus, Downer could not have received BLM's decision prior to August 10, 1988. 2/ The envelope in which the notice of appeal was sent to BLM bears a postmark of September 9, 1988, which would have been within the 30-day period for filing an appeal even if the decision had been served on August 10. 3/ The regulations provide a "grace period" for waiver of any delay in filing "if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR

2/ It is likely that Downer did not receive BLM's decision until some days later. The decision was mailed to appellant at a post office box in Minden, Nevada. In his response to BLM's memorandum, appellant states that the decision "had to be forwarded to me at a distant location," apparently Ellicott City, Maryland. Since delivery to Downer was probably delayed several days by the forwarding, it is very possible that Downer's notice of appeal, which was filed on Sept. 13, 1988, was actually received by BLM within 30 days of the date he was served with BLM's decision.

3/ To determine where the 30-day filing deadline falls, one begins counting the day after the date of service. Luella S. Collins, 102 IBLA 399, 400 (1988). Thus, the filing deadline here was no earlier than Sept. 9, 1988.

4.401(a). Since Downer's notice of appeal was mailed no later than the last day of the 30-day appeal period and received by BLM within 10 days of the earliest date it could have been due, his notice of appeal is properly deemed timely.

The record on appeal consists of a series of documents prepared by BLM which formed the basis for the Wild Horse Removal Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas. As explained in the removal plan, a land-use plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas was completed in 1982. A portion of the planning process was the preparation of the Sonoma-Gerlach Grazing Environmental Impact Statement which led to the issuance of a Management Framework Plan Step III Decisions document (MFP-III) for the Sonoma-Gerlach Resource Area. The MFP-III was approved by the state director on July 9, 1982. One decision included in the MFP-III was that "[e]xisting/current WH&B [wild horse and burro] numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes" except when one of five specified conditions exist. The MFP-III also lists the existing number of wild horses and burros in 15 subdivisions of the Sonoma-Gerlach Resource Area. Other documents in the record concern the Lahontan Resource Management Plan (RMP) which includes a portion of the North Stillwater HMA.

The Wild Horse Removal Plan challenged by appellant lists the 1988 estimated population of wild horses and burros, the "appropriate management level," and the proposed number to be removed for each of the five HMA's. The next section of the removal plan, titled "Justification," after reporting the decision of the MFP-III and the five conditions, states: "None of the above five conditions are applicable to this proposed plan of removal, and the existing/current numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes."

The Board has previously had occasion to review BLM decisions to remove wild horses from the public range in a similar context. In Animal Protection Institute of America, 109 IBLA 112 (1989), the appellant contended that BLM decisions to remove wild horses had failed to properly determine that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological balance and protect the range from the deterioration associated with overpopulation, as required by the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (16 U.S.C. §§ 1331-1340 (1982)), and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984).

[2] Our review of the Act in that case led us to conclude that the provision referred to by the appellant, 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." Animal Protection Institute of America, *supra* at 126. That provision states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information available to him

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[.]

16 U.S.C. § 1333(b)(2) (1982).

In examining this statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public range. "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, supra at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; see 16 U.S.C. § 1332(f) (1982). The court in Dahl v. Clark held that: "[T]he test as to appropriate wild horse population levels is whether such levels will achieve and maintain a thriving ecological balance on the public lands." 600 F.Supp. at 595.

The record before us in Animal Protection Institute of America indicated that the AML's used as a basis for the removal actions approved by the BLM decisions had been established as a result of directions contained in Instruction Memorandum (I.M.) No. NV-82-305 issued by the Nevada State Director on June 8, 1982. Id. at 115-16; see also Dahl v. Clark, supra at 589-90. The I.M. set forth a series of "conditions" for determining the numbers for wild horses and burros used in developing land-use plans. It stated that, if none of the conditions "are applicable in establishing a starting point for monitoring, the current wild horse and burro numbers will be used." Animal Protection Institute of America, supra at 116-17.

[3] We found that in most instances the decisions on appeal had taken the previously current wild horse and burro population statistics set forth in land-use plans and other documents and made them the AML's to which wild horse herds were to be reduced by the proposed removal actions. We concluded that BLM had originally used the then-current numbers for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Id. at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." Id. Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Id. at 119.

It is clear that the AML's in the decision now on appeal were also taken from land-use planning documents and other documents which adopted the then current wild horse and burro population numbers for reasons of administrative convenience. The AML's for the Granite Range, Calico Mountains, and Fox and Lake Range HMA's are identical to the population figures set forth in the RMP-III. The AML for the North Stillwater HMA is the sum of the RMP-III number and that found in the Lahontan RMP. Accordingly, we find that we are bound by our prior holding in Animal Protection Institute of America, supra, and, hence, we set aside and remand the decision appealed from.

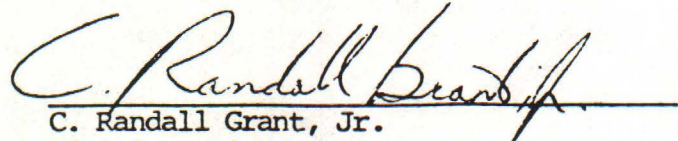
As in our prior decision, the problem we perceive in the case before us is not that BLM chose to use, for reasons of administrative convenience, then current population statistics in its land use plans, the RMP-III, or the other documents prepared prior to issuing a decision to remove wild horses. The Act requires BLM to maintain an inventory of wild horses and burros. 16 U.S.C. § 1333(b)(1) (1982). Consistent with this, the RMP-III used current numbers "as a starting point for monitoring purposes." Rather, the problem is that BLM's decisions to remove wild horses converted these numbers into AML's. Inventory numbers chosen for administrative convenience as a starting point for monitoring purposes are not AML's within the statutory meaning of the term. As stated in the statute, the purpose for maintaining an inventory is to allow the Secretary to

make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals or other options (such as sterilization, or natural controls on population levels). [Emphasis supplied.]

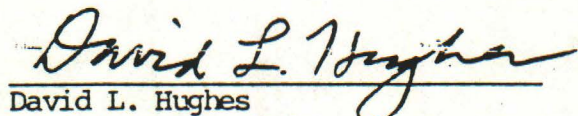
16 U.S.C. § 1333(b)(1) (1982). The inventory is to provide information which, along with other information gathered from monitoring and studies (see 16 U.S.C. § 1333(a), (b)(1), (b)(3) (1982)), will allow the Secretary to determine the optimum number of wild horses and burros that will allow a thriving natural ecological balance and protect the range from deterioration. The inventory itself does not constitute that determination.

Because we find the AML's in BLM's decision to be improper, we need not address appellant's argument as to viable herd populations. As BLM appears to recognize, the size of a herd necessary to maintain a viable population is relevant to the determination of AML's. Included in the record submitted to the Board is Information Bulletin (I.B.) No. 88-144 which includes the report of a study of "Wild Horse Parentage and Population Genetics" made under contract from BLM. The I.B. states that the report is "being forwarded to the National Academy of Science's Committee on Wild and Free-Roaming Horses and Burros for review and interpretation" and that the review should "result in recommendations on the application of these results to herd management."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.


C. Randall Grant, Jr.
Administrative Judge

I concur:


David L. Hughes
Administrative Judge