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7-18-95

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:

COMMISSION FOR THE PRESERVATION OF WILD HORSES, ET AL.

IBLA 94-163, et al. Decided July 18, 1995

Appeals from a Record of Decision of the Acting Area Manager, Surprise Resource Area (SRA), California, Bureau of Land Management, establishing appropriate management levels (AML) for wild horses and providing for removal of excess horses. CA-028-93-03.

Appeals dismissed in IBLA 94-163 and 94-165; decision affirmed.

1. Rules of Practice: Appeals: Timely Filing--Rules of Practice: Appeals: Dismissal

   The timely filing of a notice of appeal is jurisdictional and an appeal filed more than 30 days after receipt of the decision under appeal is properly dismissed. When the 30th day falls on a day when the office is closed, the appeal period is extended to the close of the next day on which the office is open.

2. Wild Free-Roaming Horses and Burros Act

   A decision determining the appropriate management level for wild horses based on monitoring of forage condition, range usage, an inventory of wild horse numbers, and application of a desired stocking formula to determine grazing capacity may be affirmed where the record supports a finding that removal of horses in excess of the appropriate management level is necessary to restore the range to a thriving ecological balance.

APPEARANCES: Catherine Barcomb, Executive Director, Commission for the Preservation of Wild Horses; Dawn Y. Lappin, Director, Wild Horse Organized Assistance; Allen T. Rutberg, Senior Scientist, The Humane Society of the United States; and J. Anthony Danna, Area Manager, Surprise Resource Area, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

In an October 8, 1993, Record of Decision (ROD), the Acting Area Manager, Surprise Resource Area (SRA), California, Bureau of Land Management (BLM), established the current appropriate management levels (AML) for the number of wild horses that will be permitted to graze in

all or a portion of four herd management areas (HMA), i.e., Bitner, East of Canyon Home Range of High Rock, Nut Mountain, and Wall Canyon, all within the Black Rock/Massacre wild horse range in Washoe and Humboldt Counties, Nevada. The ROD also provided for the immediate gathering and removal of excess numbers of wild horses in order to achieve those AML's. This action was taken pursuant to section 3 of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333 (1988), in order to restore the range to a thriving natural ecological balance and protect it (especially riparian areas and canyon bottoms) from the deterioration associated with overpopulation.

The ROD was based on a June 22, 1993, environmental assessment (EA) (CA-028-93-03), that was prepared to address the environmental consequences of the proposed action and alternatives thereto. The ROD also contained a finding that no significant environmental impact would result from adoption of the proposed action as modified. See ROD at 9. The decision was placed in full force and effect pursuant to the regulation at 43 CFR 4770.3(c). See ROD at 7. 1/ In conjunction with issuance of the ROD, the Acting Area Manager issued an October 8, 1993, letter/decision responding to protests of the proposed action set forth in the EA.

The Commission for the Preservation of Wild Horses (Commission), Wild Horse Organized Assistance (WHOA), and Humane Society of the United States (HSUS) have each appealed from the ROD. 2/ By memorandum dated December 6, 1993, BLM requested the Board to dismiss all of the appeals because they either were not filed timely, in accordance with Departmental regulations, or are frivolous. The Commission and WHOA have each opposed that motion. HSUS has filed no response thereto.

[1] The relevant Departmental regulation provides that a notice of appeal from a BLM decision must be filed with BLM "within 30 days after the date of service [of the decision]." 43 CFR 4.411(a); see 43 CFR 4770.3(a). Failure to timely file a notice of appeal requires dismissal of the appeal since, in that event, the Board is without jurisdiction to decide the appeal. See 43 CFR 4.411(c); Ahtna, Inc., 100 IBLA 7 (1987); Ilean Landis, 49 IBLA 59 (1980).

According to the record, copies of the October 1993 ROD, along with the Acting Area Manager's October 8, 1993, letter/decision, were mailed (certified mail, return receipt requested) to the Commission and WHOA, since they had submitted protests to the proposed action set forth in

1/ The record indicates that, between Oct. 13, and Nov. 5, 1993, BLM gathered and removed wild horses and returned some of the horses with respect to all of the HMA's. This resulted in the removal of a total of 119 wild horses, as of Nov. 26, 1993.
2/ The appeals are docketed as follows: Commission (IBLA No. 94-163); WHOA (IBLA No. 94-164); and HSUS (IBLA No. 94-165).

the EA. Return receipt cards establish that these copies were received by the Commission and WHOA on October 12 and 15, 1993, respectively.

The 30-day period for the Commission to file a notice of appeal expired on November 12, 1993, since November 11 (Veteran's Day) was a legal holiday. See 43 CFR 4.22(e). The fact that the BLM office was closed on the holiday (thus extending the filing period to November 12) effectively moots the Commission's contention that the decision was not actually received until October 13, 1994. 3/ It should be noted, however, regardless of the fact that the decision was not actually received by appellant on October 12, the copy of the October 1993 ROD was mailed by BLM to the Commission's address of record provided on the Commission's July 26, 1993, protest. BLM properly mailed its October 1993 decision to that address. Delivery of the decision at that address constituted service upon the Commission, and began the running of the appeal period. See 43 CFR 1810.2(b); Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984); Lloyd M. Baldwin, 75 IBLA 251, 253 (1983). Accordingly, the period for the filing of an appeal by the Commission commenced on October 12, 1993. Under the circumstances of this appeal (the November 11 holiday), the appeal period expired on November 12, 1993, a Friday.

The Commission's notice of appeal was admittedly mailed on November 15, 1993, and received by BLM on November 17, 1993. See Affidavit of Catherine Barcomb, dated Dec. 22, 1993 (attached to Letter to Board, dated Dec. 27, 1993). Thus, the notice of appeal was not filed within the appeal period. We recognize that the regulations also provide a 10-day grace period for filing a notice of appeal whereby an appeal will be deemed timely filed when the notice "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 4.401(a). The Commission cannot take advantage of this regulation since, although its notice of appeal was filed within the 10-day grace period, it was not transmitted before the end of the original appeal period. See Ilean Landis, supra at 62. Therefore, the Commission's appeal must be dismissed as untimely.

The 30-day period for WHOA to file its notice of appeal from the October 1993 ROD expired on November 14, 1993, a Sunday. Departmental regulation 43 CFR 4.22(e) provides that,

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3/ The Commission states that the copy of the October 1993 ROD was not received by it "until October 13, 1993" (Letter to Board, dated Dec. 27, 1993, at 1). The Commission explains that the decision was received in the "State mailroom" in Carson City, Nevada, on October 12, 1993 (a fact which is borne out by the return receipt card), but was not received by the Commission's office in Reno, Nevada, until Oct. 13, 1993. Id. These facts are supported by a Dec. 22, 1993, affidavit by the Executive Director of the Commission.

> [I]n computing any period of time prescribed for filing * * * a document, * * * [t]he last day of the period * * * is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day.

Thus, the 30-day appeal period for WHOA expired on November 15, 1993, a Monday. Further, as noted above, 43 CFR 4.401(a) provides a 10-day grace period for filing a notice of appeal. WHOA's notice of appeal was mailed on November 15, 1993, within the appeal period, and received by BLM on November 17, 1993, within the 10-day grace period. Thus, the appeal must be deemed timely. For this reason, BLM's motion to dismiss WHOA's appeal for failure to file timely a notice of appeal must be denied.

Appellant HSUS, on the other hand, was not mailed a copy of the ROD, apparently because it had not submitted a comment to the EA or otherwise indicated its interest in receiving the ROD. Nonetheless, HSUS acknowledges in its notice of appeal that it received the ROD "on October 13, 1993" (Notice of Appeal at 1). The 30-day appeal period is properly deemed to run from the date of actual receipt of the decision appealed from. Animal Protection Institute of America, 124 IBLA 231, 233 (1992). Thus, the deadline for filing a notice of appeal was November 12, 1993, a Friday. HSUS' notice of appeal was mailed on November 15, 1993, and received by BLM on November 17, 1993. Therefore, the notice was neither filed with BLM within the 30-day appeal period, nor mailed within that period such that HSUS could take advantage of the 10-day grace period. Its appeal must be deemed untimely. Further, it appears from the record that appellant lacks standing to appeal the BLM decision. As a general rule, standing to appeal a decision of BLM to the Board requires that an appellant be both a party to the case and adversely affected by the decision below. 43 CFR 4.410. The lack of any evidence of participation by appellant HSUS in this case prior to issuance of the BLM decision indicates it was not a party to the case and, hence, lacked standing to appeal. National Wildlife Federation, 126 IBLA 48, 52 (1993); The Wilderness Society, 110 IBLA 67, 72 (1989); Edwin H. Marston, 103 IBLA 40 (1988). Accordingly, BLM's motion to dismiss the HSUS appeal is granted.

Finally, WHOA has requested the Board to order a hearing, pursuant to 43 CFR 4.415, to resolve "[n]umerous factual issues" (Response to Motion to Dismiss, dated Dec. 27, 1993, at 2). WHOA does not identify these factual issues. A hearing will only be ordered where there is a material issue of fact that, if proven, would alter the disposition of the appeal. See Woods Petroleum Co., 86 IBLA 46, 55 (1985). In the absence of a showing of such an issue, WHOA's request for an evidentiary hearing is properly denied.

In reviewing the record to resolve the procedural challenges set forth above, we find it appropriate to address the merits of WHOA's appeal at this time. On appeal WHOA asserts that the EA is inadequate in that it did not consider the gather of only adoptable animals and restructuring of

the affected herds. Appellant contends that the removal of younger horses (less than 9 years old) will increase mortality rates and decrease recruitment in the surviving herds. Further, WHOA argues that the ROD is biased against wild horses in that it failed to address use of the allotments by livestock and wildlife. Appellant asserts that the failure to include livestock actual use data in the EA precluded a determination of carrying capacity for livestock, wildlife, and wild horses along with the allocation of that capacity. Additionally, WHOA contends that the wild horse herds are jeopardized by the small numbers left after removal of horses.

An answer to WHOA's appeal has been filed on behalf of BLM. It is pointed out that the EA discusses herd restructuring and its impacts. BLM asserts that of 80 horses returned to the range, 21 were less than 5 years old and 59 were more than 4 years old. It is contended by BLM that the analysis of AML in the EA was not biased against wild horse use as calculations were based on the currently reduced livestock use numbers which are less than the active preference use. Further, BLM notes that carrying capacities were analyzed and AML's established using the most recent monitoring data. With respect to WHOA's challenge to the lack of simultaneous adjustment of livestock and wild horse usage, BLM explained that livestock grazing on the Surprise Resource Area has a greater impact than wild horse use and, hence, greater flexibility is necessary in livestock adjustment where changes are made annually and sometimes in midseason. Regarding WHOA's challenge to the small number of horses left after removal, BLM asserts that the HMA's are part of a larger wild horse area where horses mix freely in winter range and genetic diversity is insured. Finally, BLM contends that herd management is not done arbitrarily. Traits which appear desirable are sought in horses returned to the range and the HMA's are not dumping grounds for unadoptable horses.

Upon review of the record, we find the record does not support WHOA's challenge on the ground that the gather entailed only younger adoptable horses, the removal of which would threaten the viability of the herd. "Structured herd management" is defined in the EA as "[s]electing horses for return to the HMA which are five years old and older and appear capable of propagating offspring which are well adapted to the herd's habitat" (EA at 4). The October 8, 1993, decision of the BLM SRA Manager denying appellant's protest explained that the HMA's involved in this case are

> four administrative subdivisions of the Black Rock/Massacre wild horse range. This area includes much of the [SRA], the northwest part of the Sonoma/Gerlach Resource Area, and the Sheldon Antelope Refuge. Presently this area has around 5,000 horses. This is the genetic pool containing these HMAs. In the winter of 1992-93 all the horses from the northwestern part of the Black Rock/Massacre area were forced onto the High

> Rock Canyon winter range. There appears to be ample opportunity for genetic diversity.

(Decision at 4). Accordingly, we must reject appellant's contention that the EA was inadequate for failure to consider the impacts of the restructuring of the herds or of the reduction in numbers on herd viability.

Review of the EA discloses that BLM performed a stocking rate analysis (Appendix 2) to determine the current AML's for wild horses on the Bitner, Nut Mountain, and Wall Canyon HMA's. The focus was on key riparian areas because evaluations have shown that these areas have vegetation and hydrologic conditions which are poor and not improving (EA at 31). The key areas analyzed were riparian areas used only by wild horses. The "desired" key management area utilization was taken from the management framework plan (MFP) and the figures for key area utilization came from the 1992 utilization pattern mapping (Appendix 4 to EA). This information was entered into the "desired stocking level formula" in which the ratio of actual use to key area utilization was equated to the ratio of the desired use to the desired key area utilization (EA at 31). This formula was then solved to determine the desired use or maximum appropriate wild horse use in animal unit months (AUM's). The AUM figure was converted to the number of horses which the AUM's would support which in turn was used to derive the AML of horses. 4/

[2] The Secretary is required by statute to maintain a current inventory of wild horses on the public lands and to make a determination of whether and where an overpopulation exists. 16 U.S.C. § 1333(b)(1) (1988). The statute further provides that when the Secretary determines, on the basis of "all information currently 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." 16 U.S.C. § 1333(b)(2) (1988). Thus, the issue generally is whether the record supports a finding that removal of excess horses is necessary to establish a thriving natural ecological balance and preserve a multiple-use relationship in the area. 16 U.S.C. § 1332(f) (1988) (definition of excess animals). This Board has recognized that the use of stocking rate formulas to determine AML may be consistent with monitoring of usage of the public lands by wild horses and livestock and of the condition of the range in terms of forage utilization in order to establish a thriving natural ecological balance. See Animal Protection Institute of America, 118 IBLA 20,

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26-27 (1991). We find that the record in this case supports the AML findings made by BLM and appellant has not shown these to be unreasonable. Although determination of grazing capacity for both livestock and wild horses in a single multiple-use decision has been upheld by the Board, we know of no legal requirement that the AML be set in this manner. Appellant has not shown the BLM decision to be unreasonable in a case such as this where the deteriorating riparian areas at issue are used only by wild horses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of the Commission and HSUS are dismissed and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

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4/ The desired level of use in AUM's was divided by the number of AUM's consumed by a horse in a year to determine the maximum desired number of wild horses. Minimum numbers of wild horses were calculated from the maximum numbers using the average rate of increase for structured wild horse herds, assuming a 4-year cycle of roundups. The AML was then derived by averaging the high and the low numbers. See EA at 31.

26-27 (1991). We find that the record in this case supports the AML findings made by BLM and appellant has not shown these to be unreasonable. Although determination of grazing capacity for both livestock and wild horses in a single multiple-use decision has been upheld by the Board, we know of no legal requirement that the AML be set in this manner. Appellant has not shown the BLM decision to be unreasonable in a case such as this where the deteriorating riparian areas at issue are used only by wild horses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of the Commission and HSUS are dismissed and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge