

12-27-93

December 27, 1993

Interior Board of Land Appeals  
Office of the Secretary  
4015 Wilson Blvd.  
Arlington, VA 22203

RE: WHOA Appeal of the Bitner, High Rock, Nut Mountain, and  
Wall Canyon Herd Management Area Gathers

Dear Mr. Secretary,

This letter is in response to a memorandum to you from the Area Manager of the Surprise Resource Area dated December 6, 1993. In his memorandum, the Area Manager asks for the dismissal of an appeal filed by Wild Horse Organized Assistance (WHOA). The appeal was from a wild horse gathering and removal decision on the Bitner, High Rock, Nut Mountain, and Wall Canyon Herd Management Areas. WHOA opposes the dismissal of the appeal for the following reasons.

1. Timeliness of Appeal.

The first basis for dismissal cited by the Area Manager is the untimeliness of the appeal. He states that the decision was received by WHOA on October 14, 1993, and that the appeal was received by the BLM by fax on November 15, and by mail on November 17, more than 30 days from receipt.

WHOA received this decision on October 14, 1993, therefore the beginning day for calculating the running of time for appeal should be October 15, 1993. 43 C.F.R. 4.22(e). Thirty days from October 15, was November 14, a Sunday. Interior regulations provide that the "last day of the period so computed 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." 43 C.F.R. 4.22(e). The application of this regulation to the instant appeal results in a deadline which fell on Monday, November 15.

A grace period is provided at 43 C.F.R. 4.401 (a), so that an appeal which is timely transmitted will not be rejected if it is received in the proper office within ten days thereafter. The Area Manager concedes the appeal was transmitted to him by fax on November 15. The appeal was also mailed on November 15. The Area Manager admits he received the appeal on November 17, which is within the ten day grace period. Therefore the appeal was timely filed, and should not be dismissed.

2. Substantive bases for dismissal.

The response of the Area Manager also addresses the substantive points raised by WHOA, and asks for dismissal based on the frivolous nature of WHOA's arguments.

At the outset, the grounds for summary dismissal set forth at 43 C.F.R. 4.402 do not include "frivolity."

Secondly, the issues raised by WHOA are not frivolous. Without attempting to exhaustively list them, the disputed issues include (1) whether removing horses less than nine years of age impacts herd survivability when the average lifespan of a wild horse is twelve years; (2) whether reductions in unrealistic active preference AUM's without affecting livestock actual use, and concurrently with significant herd reductions, is legally consistent with the requirement for a thriving ecological balance; (3) whether the BLM was arbitrary when it established carrying capacities for horses but failed to establish carrying capacities for livestock on the same resource basis; (4) whether livestock use has been adjusted to protect resources on an annual basis, as alleged; (5) whether the BLM actually used livestock use data portrayed in the EA to determine carrying capacities for livestock; (6) whether herd structuring is arbitrary; (7) whether the BLM, even if it has "ample regulation, policy, guidance, and expertise to manage the public lands in an environmentally sound manner and to balance the concerns of the various interests," has in fact done so in this case.

Moreover, the responses of the Area Manager are inaccurate in various respects, and WHOA requests an opportunity for hearing, pursuant to 43 C.F.R. 4.415, in order to present evidence and argument in support of its appeal. Numerous factual issues require deliberation and resolution to decide this appeal; to this end, WHOA respectfully requests a hearing by an impartial administrative law judge.

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Sincerely,

DAWN Y. LAPPIN  
Director

cc: Burton Stanley, Regional Solicitor  
Tony Danna, Area Manager