

# AMERICAN HORSE PROTECTION ASSOCIATION, INC.

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8-1-91

THE ONLY NON-PROFIT ORGANIZATION DEDICATED  
TO THE WELFARE OF HORSES, BOTH WILD  
AND DOMESTIC.

August 1, 1991

Director (140)  
Bureau of Land Management  
Room 5555  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Re: 43 C.F.R. Part 4700  
RIN 1004-AB87

Dear Mr. Jamison:

I am writing on behalf of the American Horse Protection Association, Inc. ("AHPA"), to comment on the proposed amendment to 43 C.F.R. §4770.3, which would allow the authorized office to place in full force and effect decisions to remove wild horses and burros, despite the pendency of an appeal to the Interior Board of Land Appeals.

These comments are endorsed by, and made on behalf of, the following humane organizations interested in the welfare of wild horses and burros: American Humane Association, American Society for the Prevention of Cruelty to Animals, The Humane Society of the United States, Humane Society of Southern Nevada - The SPCA, Nevada Humane Society, and Wild Horse Organized Assistance (WHOA!).

The proposed rule, if adopted, will eliminate the automatic stay of a removal decision once an appeal is filed with the Interior Board of Land Appeals. 43 C.F.R. §4.21(a). Instead, it will require an appellant to apply to the IBLA for a stay of the decision.

The proposed rule is contrary to the Wild, Free-Roaming Horses and Burros Act, and is not necessary to address the concerns discussed in the Federal Register announcement of July 2, 1991. In the first place, it eliminates the Bureau's burden



Director (140)  
Bureau of Land Management  
August 1, 1991  
Page 2

of justifying a proposed removal of wild horses, and will effectively moot every appeal of a wild horse roundup. The Wild Horse Act provides that wild horses may be removed from the public lands only when the Bureau has demonstrated, on the basis of adequate and accurate range monitoring data, that wild horse numbers are excessive and that they must be reduced to preserve or maintain a thriving natural ecological balance and multiple use relationships.

Over the last two years, appeals to the IBLA have demonstrated, in many cases, that BLM does not have the data necessary to justify its removal decisions. These findings are consistent with the General Accounting Office's recent criticisms of the Bureau's removal decisions in its report, "Improvements Needed in Federal Wild Horse Program." Thus, there is good reason to believe that removal decisions are not necessarily meritorious.

Nevertheless, the proposed rule would insulate the Bureau's decision making from any effective review. Putting removal decisions in full force and effect will allow the animals to be removed during the pendency of the appeal. This makes it impossible for the IBLA to grant any effective relief to an appellant whose case is meritorious, and makes the whole appeal process a sham. In fact, it is possible, if not likely, that the IBLA will dismiss appeals as moot once the horses have been removed.

Although the proposed rule allows an appellant to seek a stay of the removal decision from the IBLA, this remedy is ineffective. As a practical matter, most removals are completed in a few weeks, if not a few days. Since the Board's rules do not provide for an expedited consideration of a request for stay, nearly all removals will be concluded before a stay can be issued. Further, the proposed rule does not provide any guidance as to when a stay is appropriate. It is a meaningless concession to those who challenge removal decisions.

The Bureau's rationale for the proposed rule is that the time involved in hearing an IBLA appeal threatens the ecological condition of the range, increases the costs of removal and threatens the health and welfare of the horses themselves. But this is a bootstrap argument: it assumes the truth of the



Director (140)  
Bureau of Land Management  
August 1, 1991  
Page 3

matters at issue in the appeal. Appeals are taken because BLM's rationale for the removal does not appear to be supported by the available range monitoring data (if any), or because the Wild Horse Act does not authorize removals for the reasons claimed. Many IBLA appeals have demonstrated that a given population of wild horses does not threaten the range or the animals.

As the Bureau is aware, most wild horse and humane groups have supported BLM's removal efforts when compelling evidence of habitat destruction is shown, or when horses are threatened with death due to starvation or dehydration. This summer's removals from the Nellis Air Force Range are a case in point.

Furthermore, there is an existing procedure available to the Bureau to put a removal decision in full force and effect despite an IBLA appeal. Section 4.21(a) of the Board's rules of procedure states that "when the public interest requires, the Director [of the Office of Hearings and Appeals] or an Appeal Board may provide that a decision or any part of it shall be in full force and effect immediately." The Bureau has used this provision in a number of wild horse cases in the past when immediate removals were necessary to protect the welfare of horses on the range.

It is revealing that the Bureau makes no mention of this provision (or its past use in wild horse cases) in its rulemaking notice. It is obvious that BLM wants to evade even the preliminary review required by §4.21 to place a removal decision in full force and effect. Yet the Bureau certainly could demonstrate that the public interest requires immediate removals when rangeland resources face significant deterioration from excessive numbers of wild horses, or when the horses themselves were faced with imminent danger.

Additionally, the relatively brief time required to seek a "public interest" determination from the Board is not likely to hinder the Bureau's ability to remove the horses. Although the Bureau discusses the fact that foaling season and weather limit the times available to conduct roundups, its statement that roundups can be conducted during only 5 to 7 months of the year is highly misleading. AHPA is aware of roundups having taken place throughout the year, including the late winter months of January and February. In fact, in some areas BLM prefers to



Director (140)  
Bureau of Land Management  
August 1, 1991  
Page 4

round up horses in late winter, because mountain snows force the animals into more confined ranges at lower elevations. Nor is the foaling season policy ironclad. Section 4720.21 of the BLM Manual expressly provides that helicopter removals are suspended during foaling season, but appears to allow other methods of gathering. Moreover, the policy does not apply to burros.

Despite these facts, if the Bureau remains worried about the time involved in a "public interest" determination under §4.21(a), it could adopt a rule providing for expedited or emergency consideration of such requests, with decisions to be made within an established time period. This rule would address the rangeland and animal welfare concerns discussed in the rulemaking, while at the same time providing for some degree of independent review of removal decisions.

As proposed, the rule simply does not authorize removals "without affecting the right to appeals," as the rulemaking notice contends. The rule eliminates appeals, and appears to have been designed expressly for that purpose. Once the horses have been removed, there is no way to restore them to the range or for the IBLA to grant any effective remedy to a victorious appellant, even assuming the merits of an appeal are heard.

The rule is nothing more than a cynical attempt to frustrate the legal challenges that have stopped wild horse removals during the past several years, and to protect roundup decisions from the judicial review process to which every other BLM decision is subject. Further, the rule cannot be justified on the grounds that it applies only to true emergencies, such as imminent threats to range resources or animal welfare. Its language -- removals "required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationships" -- is similar to the language in the Wild Horse Act and would undoubtedly be used by the Bureau in nearly every decision to involve the full force and effect authority.

It is unfortunate, but typical, that the Bureau has responded to criticisms of its removal decisions not by making better decisions, but by trying to eliminate any effective means to questions those decisions. This reinforces our belief -- and that of the GAO -- that removal decisions are often arbitrary and unsubstantiated.

Director (140)  
Bureau of Land Management  
August 1, 1991  
Page 5

On behalf of our combined constituency of two million members nationwide, we strongly believe the proposed rule is unnecessary, violates BLM's obligations under the Wild Horse Act, and should not be adopted.

Very truly yours,



Robin C. Lohnes  
Executive Director

cc: Adele Douglass, American Humane Association  
Barbara Pequet, American Society for the  
Prevention of Cruelty to Animals  
Paula Jewell, The Humane Society of the  
United States  
Dart Anthony, Humane Society of Southern  
Nevada - The SPCA  
Mark McGuire, Nevada Humane Society  
✓ Dawn Lappin, Wild Horse Organized  
Assistance (WHOA!)