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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DISTRICT OF NEVADA
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ANIMAL PROTECTION INSTITUTE OF
AMERICA, INC., et al.,

CV-R-85-365-HDM

6 Plaintiffs,
7 v.
8 DONALD HODEL, et al.,
9 Defendants.

ORDER AND
JUDGMENT

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11 On March 27, 1987 the Magistrate entered Findings with
12 the Court and recommended that Plaintiffs' Motion for Summary
13 Judgment be denied and that Defendants' Motion for Summary
14 Judgment be granted. On April 10, 1987, plaintiffs filed
15 objections to the Magistrate's Findings and Recommendation.
16 Defendants have responded to the objections and after oral
17 argument this matter has been submitted for decision.

18 The parties have all acknowledged this action should be
19 decided on the pleadings and record before the court and that
20 there are no issues of material fact to be litigated. The
21 parties have also stipulated that all issues, except one, have
22 been resolved to their mutual satisfaction. The issue remaining
23 before the court is whether defendants should be enjoined and
24 restrained from permitting adoptions of wild horses under the
25 Wild and Free-Roaming Horse and Burro Act of 1971 under
26 circumstances where defendants know the horses are being adopted

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1 for commercial slaughter or exploitation. While defendants
2 initially moved to dismiss this action as moot, they now appear
3 to concede that adoptions are ongoing and this issue should be
4 resolved in this lawsuit.

5 In 1971 Congress enacted the Wild and Free-Roaming Horse
6 and Burro Act, (the Act) 16 U.S.C. § 1331. Congressional intent
7 is clearly articulated in the policy statement of the Act in
8 which Congress declares:

9 It is the policy of Congress that wild free
10 roaming horses and burros shall be protected
11 from capture, branding, harrassment or death;
12 and to accomplish this they are to be
13 considered in the area where presently found,
14 as an integral part of the natural system of
15 the public lands.

16 Congress granted broad powers to the Secretary of the Interior to
17 protect and manage the wild free-roaming horses and burros. The
18 Act provides for a procedure under which the Secretary may remove
19 excess animals from the range to achieve appropriate management
20 levels and specifically provides that:

21 (A) The Secretary shall order old, sick, or
22 lame animals to be destroyed in the most
23 humane manner possible;

24 (B) The Secretary shall cause such number of
25 additional excess wild free-roaming horses and
26 burros to be humanely captured and removed for
27 private maintenance and care for which he
28 determines an adoption demand exists by
29 qualified individuals, and for which he
30 determines he can assure humane treatment and
31 care (including proper transportation,
32 feeding, and handling). Provided, That, not
33 more than four animals may be adopted per year
34 by any individual unless the Secretary
35 determined in writing that such individual
36 is capable of humanely caring for more than
37 four animals, including the transportation of
38 such animals by the adopting party; and

1 (C) The Secretary shall cause additional
2 excess wild free-roaming horses and burros for
3 which an adoption demand by qualified
4 individuals does not exist to be destroyed in
the most humane and cost efficient manner
possible. (Emphasis added).

5 16 U.S.C. § 1333(b)(A)(B)&(C).

6 When the animals are adopted, Congress has established a
7 mechanism by which title to the animal passes from public to
8 private ownership:

9 Where excess animals have been transferred to
10 a qualified individual for adoption and
11 private maintenance pursuant to this Act [16
12 USCS §§ 1331 et seq.] and the Secretary
13 determines that such individual has provided
14 humane conditions, treatment and care for such
animal or animals for a period of one year,
the Secretary is authorized upon application
by the transferee to grant title to not more
than four animals to the transferee at the end
of the one-year period.

15 16 U.S.C. § 1333(c). The animals lose their status as wild
16 free-roaming horses and burros upon passage of title:

17 Wild free-roaming horses and burros or their
18 remains shall lose their status as wild free-
19 roaming horses or burros and shall no longer
be considered as falling within the purview of
this Act [16 USCS §§ 1331 et seq.]-

20 (1) upon passage of title pursuant to
subsection (c) except for the limitation of
subsection (c)(1) of this section; or

21 (2) if they have been transferred for
22 private maintenance or adoption pursuant to
this Act [16 USCS §§ 1331 et seq.] and die
of natural causes before passage of title;
or

23 (3) upon destruction by the Secretary or his
24 designee pursuant to subsection (b) of this
section; or

25 (4) if they die of natural causes on the
26 public lands or on private lands where
maintained thereon pursuant to section 4 [16
USCS §§ 1334] and disposal is authorized by
the Secretary or his designee; or

1 (5) upon destruction or death for purposes
2 of or incident to the program authorized in
3 section 3 of this Act [this section];
4 Provided, That no wild free-roaming horse or
burro or its remains may be sold or trans-
ferred for consideration for processing into
commercial products.

5 16 U.S.C. § 1333(d).

6 The plaintiffs, Animal Protection Institute of America,
7 Inc. and the Fund for Animals, Inc., have moved for summary
8 judgment permanently enjoining defendants from permitting or
9 allowing "fee waiver" or reduced fee adoptions of wild horses and
10 burros when defendants know or should know that the prospective
11 adopter of such animals would exploit such animals for commercial
12 purposes. Defendants oppose the motion and in their cross-motion
13 for summary judgment contend the Secretary has duly promulgated
14 regulations permitting adoptions of such animals and that as long
15 as the animals are humanely cared for during the one year period
16 provided for in 16 U.S.C § 1333(c) and title passes, the
17 Secretary has no authority or obligation in connection with the
18 animals.

19 The parties, in a stipulation filed with the court, have
20 admitted the following:

21 1. As to adoptions under a reduced or waived fee, as
22 provided by 43 C.F.R. 4750.4-3(b), it is the policy of Bureau of
23 Land Management (BLM) to inquire into a prospective adopter's
24 ability to provide humane care for otherwise unadoptable wild
25 horses for one year, prior to passage of title to the adopter.

26 2. It is the BLM's policy to require the signing of a

1 Private Maintenance and Care Agreement, setting forth
2 restrictions on use of wild horses prior to passage of title.

3 3. The BLM interprets the statute and applicable
4 regulations as not requiring inquiry into any disposition or use
5 of horses after title passes.

6 4. The BLM acknowledges that, in some instances, horses
7 adopted under a reduced or waived fee have, after passage of
8 title to private individuals, been sold for commercial purposes.

9 5. In some instances the BLM knew, prior to the
10 placement of wild horses, that wild horses adopted under a
11 reduced or waived fee would, after passage of title, be put to
12 commercial use.

13 Defendants concede that wild horses are placed out for
14 adoption when, the BLM is aware, prior to the passage of title,
15 that such animals will be commercially exploited. Defendants
16 argue that once title to the animals pass, they no longer have
17 jurisdiction over the use or disposition of the animals. The
18 court does not disagree. But, the inquiry does not, as
19 defendants would suggest, stop there. The waiting period
20 prescribed by Section 1333(c) is designed to ensure that the BLM
21 will have a reasonable time (one year) to satisfy itself that the
22 prospective adopter will treat the animals in a humane manner and
23 not exploit them. If during that period, the BLM becomes aware,
24 as it has on several occasions set forth in this case, that the
25 only purpose for the adoption is to enable the adopter to exploit
26 the animals for a commercial purpose, the transfer of title

1 should not occur. Defendants seem to suggest they are bound by
2 some unwritten requirement to issue title to a prospective
3 adopter after the passage of one year, regardless of any actual
4 knowledge defendants may have that the horses will be
5 commercially exploited once title passes. Such a position defies
6 logic and common sense and is contrary to legislative intent.
7 The adoption portions of the statute were designed to ensure a
8 suitable home for the animals. The Secretary may not abdicate
9 responsibility to place the animals with "qualified" individuals.
10 A "qualified" individual in the adoption context means someone
11 who will care for the animals, not someone who will exploit or
12 destroy them. Excess animals are to be destroyed in a humane
13 manner by the Secretary, not by someone else. 16 U.S.C. §
14 1333(2)(C). This power may not be delegated to another. Prior
15 to passage of title, the Secretary cannot ignore what a person
16 expresses as his or her intent regarding the animals. If the
17 adopter expresses an intent to commercially exploit the animals
18 once title is transferred, the adoption should not be
19 consummated.

20 This case does not pose the more difficult question of
21 whether the Secretary has an affirmative duty to ascertain the
22 transferees' intent where it is not expressed prior to the
23 transfer of title. That issue is not reached here because the
24 defendants admit the Secretary had actual knowledge the
25 transferees' intent to exploit the animals for commercial
26 purposes upon transfer of title.

1 Therefore, this decision does not, contrary to the
2 suggestion of the defendants, require the Secretary to determine
3 the intent of the potential adopter with respect to the uses they
4 will make of the horses after title passes. This decision also
5 does not require the Secretary to reclaim horses where title has
6 already passed. Nor does this decision address the question of
7 inquiry notice and the potential resulting costs of enforcement
8 and detection of violators. Those are matters more appropriately
9 addressed by Congress, not this court. What this decision does
10 address are those limited circumstances stipulated to here, where
11 the Secretary knows in advance of the transfer of title that an
12 animal will be exploited for commercial purposes once title
13 passes. Under such circumstances, the Secretary has an
14 affirmative duty to reject the potential adopter as unfit and to
15 refuse to transfer title. While this may ultimately result in
16 the destruction of the animals by the Secretary, that is an
17 obligation imposed on the Secretary by Congress and it cannot be
18 delegated absent legislative authorization.

19 This decision may result in fewer mass adoptions of wild
20 horses by removing from the Secretary's "qualified" list those
21 who expressly intend to commercially exploit the animals.
22 However, if it does so, it will not defeat congressional intent
23 to restore a "thriving natural ecological balance to the range,
24 and protect the range from the deterioration associated with over
25 population." That is so because the Secretary will continue to
26 seek those "qualified" individuals who wish to adopt the animals

1 for humane purposes.

2 It was clearly congressional intent that the "ecological
3 balance" be achieved in such a way that the wild horses and
4 burros are protected from commercial exploitation and slaughter.
5 16 U.S.C. § 1333. Congress perceived a need for the humane
6 removal of some animals from the public lands in order to achieve
7 and maintain a "thriving natural ecological balance on the public
8 lands."

9 To achieve this delicate balance, the BLM under the
10 enabling legislation, was authorized by the Secretary to adopt
11 animals out to qualified applicants. Under the provisions of 43
12 C.F.R. § 4740.4-3 (1985), a BLM officer may allow volume adoption
13 of horses by a single adopter provided the adopter is deemed
14 capable of humanely caring for the animals. The BLM officer has
15 the discretion to reduce or waive the adoption fee when he
16 determines it is in the public interest to do so. If a BLM
17 officer determines an animal is being commercially exploited or
18 inhumanely treated the officer may take immediate repossession of
19 the animal. 43 C.F.R. § 4740.40(e).

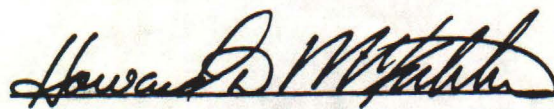
20 To the extent that placement is not possible, Congress
21 has directed the Secretary to destroy excess animals in the most
22 humane and cost efficient manner possible. The Secretary may not
23 delegate or transfer this obligation to others through the
24 placement of horses with unqualified persons in the adoption
25 program.

26 Therefore, Plaintiffs' Motion for Summary Judgment is

1 GRANTED. The Defendants' Motion for Summary Judgment is DENIED.
2 The Defendants are hereby enjoined and restrained from
3 transferring the titles of wild free-roaming horses and burros to
4 individuals who have, prior to the expiration of the one year
5 "probationary period" prescribed by 16 U.S.C. § 1333(c),
6 expressed to the Secretary an intent, upon the granting of title,
7 to use said animals for commercial purposes.

8 IT IS SO ORDERED.

9 DATED this 8th day of July, 1987.

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13 UNITED STATES DISTRICT JUDGE
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