1-29-93

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| MICHAEL BLAKE, X9 Ranch, Vail Arizona 85641; TIMOTHY WILSON, 505 Brown Street, Reno, Nevada 89509; PUBLIC LANDS RESOURCE COUNCIL 243 California Avenue, Suite 4 Reno, Nevada 89509,<br><br>Plaintiffs,<br><br>v.<br><br>BRUCE BABBITT, Secretary of the Interior, 1849 C Street NW, Washington, D.C. 20240; JAMES BACA, Director of the Bureau of Land Management, 1849 C Street NW, Washington, D.C. 20240; in their official capacities,<br><br>Defendants. | Civil Action<br>Case No. 93-276RCL<br><br>Judge R.C. Lamberth |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Michael Blake, Timothy Wilson and Public Lands Resource Council ["PLRC"] respectfully submit this memorandum, together with the affidavits of Michael Blake, sworn to on July 16, 1993 ["Blake Aff."], and Timothy Wilson, sworn to on July 20, 1993 ["Wilson Aff."], in support of their motion (i) for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the plaintiffs and against defendants on plaintiffs' first and second claims for relief; and (ii) for such other relief as the Court may deem proper.

specified regardless of appeal, is fully consistent with the Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (as amended 1978) and the Administrative Procedure Act, 5 U.S.C. § 553.

There are no material facts genuinely in dispute, and Federal Defendants are entitled to judgment as a matter of law. The Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' Motion for Summary Judgment.

## II. STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

The Wild Horse Act, 16 U.S.C. §§ 1331-1340, enacted in 1971, "extended federal protection to wild horses and empowered BLM to manage horses roaming public ranges as a part of the Agency's management of the public lands." American Horse Protection Ass'n v. Watt, 694 F.2d 1310, 1311 (D.D.C. 1982). In time, Congress recognized the need to revise the Wild Horse Act to deal with the overpopulation of wild horses and burros that had resulted since the passage of the 1971 legislation. H.R. Rep. No. 95-1122, 95th Cong., 2d Sess. 23 (1978).

Consequently, Congress amended Section 3 of the Wild Horse Act, 16 U.S.C. § 1333 through the Public Rangelands Improvement Act of 1978 [Rangeland Act], Pub.L. 95-514, 92 Stat. 1803, 43 U.S.C. §1901 et seq.. The purpose of the Rangeland Act was to provide the Secretary of the Interior with a firm and unequivocal mandate to improve the overall conditions and productivity of the

decision signed by the Secretary would be, the aggrieved party cannot seek judicial review at the point that the round-up decision is implemented. Access to federal court, where the aggrieved party could seek a prompt temporary restraining order or preliminary injunction is blocked. The process of administrative review must be exhausted, even though that process cannot provide a remedy to the aggrieved party. An aggrieved party who wishes to challenge the decision of a lower-level official of the BLM is thus deprived of any real or effective remedy, because the horse round-up may well be underway or finished by the time an administrative judge rules upon the aggrieved party's petition for a stay of the round-up decision. The full force and effect regulation thus circumvents the procedural safeguards that otherwise permit persons adversely affected by a round-up decision to seek prompt review before that decision is implemented.

Second, the regulation's unwarranted expansion of the authority of local BLM officials is also at odds with the Congressional mandate in the Wild Free-Roaming Horses and Burros Act that the BLM's management activities of wild horses should be at the "minimal feasible level." 16 U.S.C. § 1333(a). Moreover, BLM's own regulations also require wild horse management to be at "the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans." 43 C.F.R. § 4710.4.

In the comments on the proposed full force and effect regulation, it was noted that:

> The proposed rule would in no way reduce the public's opportunity to file an appeal nor would it increase the appellant's burden of proof to show why the agency's action was incorrect. Nonetheless, unless the appellant is granted a stay of the agency's decision, the excess animals would normally be removed prior to a ruling on the merits of the appeal by the Interior Board of Land Appeals (IBLA). If, on appeal, the IBLA were to subsequently rule that a BLM removal was incorrect, there are at least two courses of action for mitigating the effects of erroneously removing animals. First, a similar number of animals from another herd area could be moved to the area where animals were removed in error. Second... future removals could be deferred until the herd size increases through normal reproduction and population levels are consistent with maintenance of a thriving natural ecological balance. Thus even if a full force and effect removal action was invalidated by the IBLA, an appellant would still receive the full benefit from filing an appeal.

57 Fed. Reg. 29,652 (July 6, 1992)

This very statement shows the danger of the full force and effect regulation, because it virtually guarantees that management of wild horses will not at be at the required minimum feasible level. Removal of horses without a proper determination that an "excess" of horses is present within a Herd Management Area is in violation of the Wild Free-Roaming Horses and Burros Act. The regulatory scheme, as a matter of law, permits removals that are in violation of the statute to proceed before a court can examine the foundation and justification for the removal decision, in clear contravention of the statute.

Third, the full force and effect regulation creates a bias as a matter of law, in favor of removal of horses rather than removal of cattle in order to achieve a thriving natural ecological balance. The danger of the "full force and effect" regulation, 43 C.F.R. § 4770.3(c), becomes clear when viewed in the context of the

BLM's current wild horse management policy, which favors the removal of wild horses from public lands to increase the forage available to commercial ranchers. The flaws in the current BLM management policy for wild horses include inadequate and inaccurate counts of horses, a prioritization of ranching interests over the protection of wild horses, and outdated or nonexistent environmental impact statements. In order to place an decision to remove cattle from the public lands, there must be an "emergency" situation. The fact that a local BLM official can immediately remove horses without showing such an emergency shows an impermissible bias in favor of removing horses, as a matter of law.[1]

The ability of a District Manager or other local BLM official to proceed with the removal of wild horses before an administrative judge has considered the arguments of an interested party aggrieved by the round-up decision greatly increases the likelihood that a management decision will not be at the "minimal feasible level" as required, and that horses will be improperly removed. This flawed and unauthorized program may proceed under the full force and effect regulation without an aggrieved party having any effective way of seeking review and remediation of the process.

Plaintiffs therefore request summary judgment stating that 43 C.F.R. § 4770.3(c) is in contravention of the Wild Free-Roaming

[1] There may be other factual points that evidence this bias in favor of removing horses rather than cattle. These points are not necessary to the determination of this question as a matter of law, however, and do not raise a genuine issue of material fact that would preclude the entry of summary judgment in this case.

Horses and Burros Act and is therefore null and void. Plaintiffs further request that defendants be enjoined from applying 43 C.F.R. § 4770.3(c).

## Argument

## POINT I

## BECAUSE THE FULL FORCE AND EFFECT REGULATION DELEGATES TO AGENTS OF THE BUREAU OF LAND MANAGEMENT AUTHORITY THAT IS CONTRARY TO THAT INTENDED BY CONGRESS, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED

### A. Summary Judgment is Appropriate at this Time Because Plaintiffs Have Established That They Are Entitled to Relief as a Matter of Law.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Landon v. Department of Health and Human Services, 959 F.2d 1053 (D.C. Cir. 1992).

In considering a summary judgment motion, the court shall construe the facts in the light most favorable to the moving party, Anderson, 477 U.S. at 249; Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 117, 121 (D.C. Cir. 1988). A pure

question of statutory interpretation, such as is at issue here, is, however, independent of any factual dispute and may properly be decided as a matter of law under Rule 56. Schering v. Sullivan, 782 F. Supp. 645, 648 (D.D.C. 1992).

Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue, accompanying this Motion, establishes that there are no controverted facts which constitute a genuine issue for trial, and that Plaintiffs are entitled to summary judgment as a matter of law.

B. The Statutory and Regulatory Scheme at Issue

A federal agency's power under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702, is limited to the authority delegated to the agency by Congress. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"). Regulations promulgated by an agency must be consistent with statutory provisions enacted by Congress. See Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931). The regulation, 43 C.F.R. § 4770.3(c) permits lower-ranked officials of the BLM to exercise authority that Congress reserved for the Secretary of the Interior. The regulation permitting an exercise of authority that is in contravention of the statute that the regulations implement is therefore invalid.

This action arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340. Pursuant to this Act, Defendant Secretary of the Interior is charged with the protection and management of wild horses on public lands. The Secretary has delegated certain powers to the Defendant Bureau of Land Management which is likewise responsible for the protection and management programs for wild horses on public lands pursuant to the Wild Free-Roaming Horses and Burros Act.

As part of its program of management, the BLM is required to maintain a thriving ecological balance on public lands where wild horses are found, and to manage wildlife, including wild horses, in such a manner that they can coexist with cattle and sheep which are permitted to graze on public lands. BLM engages in removals from public lands of wild horses deemed to be in excess of the appropriate management level set by the BLM in a designated wild horse Herd Management Area.

Interested parties who would be affected by a decision to remove wild horses from the public lands, are given notice by the BLM of pending removal plans and an opportunity to comment thereon, as part of a process of public consultation regarding decisions to remove wild horses. Comments of interested parties are addressed by the BLM and a final decision is issued regarding the proposed removal. Interested parties who have submitted comments criticizing aspects of the round-up proposal, which comments are not incorporated into the BLM's final round-up plan, are considered aggrieved by the round-up decision. These parties are able to

challenge BLM round-up decisions, at the administrative level, by filing a notice of appeal with the Interior Board of Land Appeals.

Prior to August 5, 1992, the filing of such notice, pursuant to BLM regulation 43 C.F.R. § 4.21(e), would automatically stay the removal decision pending disposition of the appeal. The round-up would not take place until the Interior Board of Land Appeals had determined that the BLM was correct in its determination that a removal of wild horses was necessary.

Under the amended version of this regulation, which became effective on February 19, 1993, the filing of a Notice of Appeal no longer automatically suspends the effect of the decision from which the appeal is taken pending resolution of the appeal. See 58 Fed. Reg. 4939 (Jan. 19, 1993). Rather, an appellant who desires a stay must file together with the Notice of Appeal a petition for a stay that contains sufficient justification as to why a stay should be imposed. Id.[2]

The amended regulation provides that the removal decision "will not be effective during the time in which a person adversely affected may file a notice of appeal" 43 C.F.R. § 4.21(a)(1) as amended. Under this scheme, if the aggrieved party files a Notice of Appeal and Petition for a Stay of the decision to remove wild horses, the Director or the Appeals Board must grant or deny the petition for a stay within 45 calendar days of the expiration of the time for filing the Notice of Appeal. 43 C.F.R. § 4.21(b)(4)

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[2] This regulation is not at issue or challenged in this Motion for Summary Judgment.

as amended. The amended regulation makes explicit that the aggrieved party must exhaust administrative remedies in seeking to prevent a removal of wild horses, but during this period of exhaustion of administrative remedies the removal decision is not implemented. 43 C.F.R.§ 4.21(c). Under this scenario, the aggrieved party is not denied judicial review at the point where the removal decision is implemented.

This scenario is in sharp contrast to that of the full force and effect regulation. In 1992, BLM amended its regulations governing administrative appeals of wild horse removal decisions by the "full force and effect" provision at issue in this case. Pursuant to the amended regulation, 43 C.F.R. § 4770.3(c), effective August 5, 1992, "[an] authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands . . . . Full force and effect decisions shall take effect on the date specified, regardless of an appeal."

Such a decision is not a final agency decision, however, because it is not signed by the Secretary, and therefore an aggrieved party must exhaust administrative remedies to challenge the decision, rather than being able to begin the speedy process of seeking a temporary restraining order and preliminary injunction in federal court.

The aggrieved party must exhaust administrative remedies, because

> [n]o decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board

> shall be considered final so as to be an agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section.

43 C.F.R. § 4.21(b).

The description in 43 C.F.R. § 4.21(a) explicitly describes how such a decision may be made final: "the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately." The decision of the local BLM official, therefore, is not a final agency action that may be reviewed by a court.[3]

The full force and effect regulation, 43 C.F.R. § 4770.3(c), permits "authorized officers" of the BLM to effect "immediate" removals of wild horses. As enacted, 43 C.F.R. § 4770.3(c) is in contravention of provisions of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq., as § 1333(b)(2) of this Act expressly provides that only the Secretary of the Interior may immediately remove wild horses.

The amended regulation effectively denies an interested party a meaningful right of appeal, because the horses will be removed before a determination is made by a reviewing administrative judge that the decision to proceed with the round-up was in accordance with the Wild and Free-Roaming Horses and Burros Act. If the Secretary signs the decision to effect an immediate removal of wild horses, as required by the Wild Free-Roaming Horses and Burros Act, the decision is a final agency decision and the aggrieved party can

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[3] The comments on the proposed regulation, 57 Fed. Reg. 29,652 (July 2, 1992) discussed this anticipated scenario.

seek speedy review in federal court.

Plaintiffs, as parties aggrieved by decisions to remove horses from Herd Management Areas on the public lands, have been injured by the implementation of this regulation. For example, the decision of the Winnemucca District Manager to remove horses in the Sonoma-Gerlach Resource Area was put into full force and effect on February 9, 1993 under 43 C.F.R. § 4770.3(c). The removal of horses from the Granite Range allotment began on February 9, 1993 and was completed by February 20, 1993. The final removal decision was mailed to interested parties. The copy of the final decision mailed to plaintiffs' representative was postmarked February 9, 1993. This was received by certified mail eleven days later on February 20, 1993. Thus, the removal of horses from the Granite Range allotment was completed before interested parties even received notification of approval of the removal plan from which they could appeal. The full force and effect regulation thus circumvents the procedural safeguards that permit persons aggrieved by removal decision to seek prompt review of such decision before their implementation.

The party seeking review of a wild horse removal decision that has been placed in full force and effect by a lower-level decision is trapped in a system of administrative review that cannot provide relief. The requirement that the aggrieved party pursue an illusory administrative remedy prevents that party from seeking review and an injunction in federal court, an avenue that would be available if the Secretary of the Interior, as required by the Wild

Free-Roaming Horses and Burros Act, had made the decision to effect an immediate removal of wild horses. Although the decision of a lower-level BLM official is not a final agency action, it is "final" for the horses who are removed pursuant to that decision. The full force and effect regulation, which contravenes the Act as a matter of law, denies an aggrieved party the means to seek meaningful review of that decision.

C. Congressional Commitment to the Protection of Wild Horses Is Subverted by the Full Force and Effect Regulation.

A federal agency's power under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702, is limited to the authority delegated to the agency by Congress. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress").

In making the determination whether an agency's interpretation of the governing statute is correct, the court must use traditional methods of statutory construction to determine whether Congress had "an intention on the precise question at issue." Chevron, USA, Inc. v. NRDC, 467 U.S. 837 (1984); Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990). In making this determination, the court examines the language of the statute, and if appropriate, the legislative history. Id. If the language of the statute is unambiguous, the interpretation of the agency is entitled to no special deference. Where Congress has clearly spoken on the issue in question, then "that intention is the law and must be given effect." Chevron, 467 U.S. at 843 n.9. The court remains "the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id.; Skinner, at 1368.

In this instance, the intent of Congress is clear and explicit

from the language and legislative history of the Wild Free-Roaming Horses and Burros Act, and the full force and effect regulation is in clear contravention of the intent of Congress. The full force and effect regulation grants BLM local officials powers that are reserved for the Secretary under the Act. While the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq. ["Act"] makes it clear that such drastic action as an immediate roundup can only be undertaken by the Secretary,[4] the new regulation allows such measures to be taken by officials of the BLM without the approval of the Secretary. This regulation thus subverts congressional intent and cannot be upheld. Plaintiffs therefore request that their motion for summary judgment be granted in all respects.

The Wild Free-Roaming Horses and Burros Act was passed in 1971 after Congress found that wild horses and burros were "fast disappearing from the American scene." This legislation reflected the outpouring of constituent concern that the future of wild horses on public lands was seriously threatened by extant policies favoring livestock grazing on public lands. The Act specifically stated, "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered...as an integral part of the natural system of the public lands." 16

[4] "Secretary" is defined as "Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management." 16 U.S.C.A. 1332(a).

U.S.C. § 1331.

Although the 1978 Public Rangelands Improvement Act amended the original Act to make protection of the range from overgrazing an important additional objective, wild horses are still to be managed "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. §1333(a). From the time of the original passage of the Act through its amendments, congressional intent has always included broad protection of the wild horses and burros.

Under the Act, as amended, the Secretary is required to maintain "a current inventory of wild free-roaming horses and burros". 16 U.S.C. §1333(b)(1). A valid determination that there exists an excess of wild horses, the sole justification upon which a decision to remove horses from a Herd Management Area may be based, depends on the accuracy of this inventory. However, the actual number of wild horses now on the range is highly uncertain, and greatly disputed. Before any more roundups are allowed, a current and accurate count of the wild horses remaining on the range must be made. In the interim, interested parties who are aggrieved by a BLM decision to remove horses from public lands may appeal such a decision horses on the ground that a proper determination of the existence of excess horses has not been made.

In 1978, Congress amended the Act, 16 U.S.C. § 1331 et seq., to respond to the deteriorating condition of the public rangelands. The amended Act included a provision that allowed the Secretary of the Interior to immediately remove horses from the range, which

states:

> Where the Secretary determines . . . that an overpopulation exists in 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.A. 1333(b)(2).[5]

The Bureau of Land Management has granted itself new[6] powers that effectively gives local officials the power to effect immediate removals, which Congress has restricted to the Secretary of the Interior under the Act.

The BLM's full force and effect regulation, 43 C.F.R. § 4770.3(c), states that:

[t]he authorized officer may place in full force and

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[5] Congressional commitment to the protection of wild horses remains evident in current legislation despite language in the original legislation which permits the destruction of healthy animals. See 16 U.S.C. § 1333(b)(1)(C). From fiscal year 1988 to the present fiscal year, Congress has refused to appropriate any funds for the destruction of healthy, unadoptable animals. See Pub. L. No. 100-202, 101 Stat. 1329-214 (1987); Pub. L. No. 100-446, 102 Stat. 1774 (1988); Pub. L. No. 101-102, 103 Stat. 701 (1989); Pub. L. No. 101-512, 104 Stat. 1915 (1990); Pub. L. No. 102-154, 105 Stat. 990 (1991); and Pub. L. No. 102-381, 106 Stat. 1374 (1992). The Congressional mandate to protect wild horses is therefore unmistakably clear.

[6] The regulation concerning the ability of authorized officers to order the removal of wild horses that was in effect before the promulgation of the full force and effect regulation stated that, where an excess of wild horses was determined to exist "the authorized officer shall remove the excess animals immediately...". 43 C.F.R. § 4720.1. This "immediate" decision, however, was subject to being stayed during the pendency of an appeal, and did not grant the authorized officer the same powers granted by the later full force and effect regulation. It clearly would not have been necessary to promulgate the full force and effect regulation if such powers were already possessed by lower-level BLM officials. The regulation giving authorized officers the power to order wild horse removals, subject to a stay during the pendency of an appeal by an aggrieved party, is not at issue here.

> effect decisions to remove wild horses or burros from public or private lands if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part.

"Authorized officer" is defined as "any employee of the Bureau of Land Management to whom has been delegated the authority to perform the duties described herein." 43 C.F.R. § 4700.0-5.

Before the passage of the full force and effect regulation, a BLM removal decision would be automatically stayed pending the filing of an appeal:

> A [BLM] decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

43 C.F.R. § 4.21(e). A person challenging a BLM decision to remove horses would have an administrative remedy before the roundup began. If the appeal were successful, the roundup and its harmful effect on the horses would be averted.

Under the new regulation, a decision to remove horses can be put into full force and effect and the roundup begun on the very same day. As plaintiffs noted in their Complaint, and defendants admitted in their Answer, this was the case in the recent Granite Range round-up commencing February 9, 1993, the day upon which the round-up decision was approved by the District Manager. This affords the appellant challenging such a decision no real remedy since the roundup may be well under way or finished before time the

aggrieved party can learn of the approval for the round-up, and certainly before the required petition for an administrative stay has been ruled upon by an administrative law judge.

In its comments on the full force and effect regulation, the BLM admitted that the new rule would lead to removals of horses prior to the hearing of appeals. "[U]nless the appellant is granted a stay of the agency's decision, the excess animals would normally be removed prior to a ruling on the merits of the appeal by the Interior Board of Land Appeals." 57 Fed. Reg. 29,652 (July 6, 1992) (emphasis added).

The comparison of the language of the law and the regulation demonstrates that congressional intent has been thwarted and perverted by the delegation of this important responsibility to immediately remove horses to officials who are too far removed from the true authority in this situation which must rest with the Secretary. Congress specifically put this authority into the hands of the Secretary. Id. at 1333(b)(2).

The Act delineates when actions should be taken by the Secretary alone and when actions or decision-making authority can be delegated. Congress has clearly expressed its ability and intention to differentiate between the powers that are reserved for the Secretary and those which may be delegated to lower level officials. The full force and effect regulation's delegation of authority is, therefore, contrary to the intent of Congress and invalid.

In other parts of the Act, for example, particularly the

sections describing the authority to gather animals that have strayed off public lands and the authority to arrest persons who have tried to steal horses, the Act specifically speaks of delegated duties. The section of the law permitting immediate removals, however, speaks only of the Secretary's decision-making power.

When horses or burros stray off the public land, private land owners are to notify the "agent of the Secretary, who shall arrange to have the animals removed." 16 U.S.C. § 1334 (emphasis added). When a person is suspected of removing a wild horse, "[a]ny employee designated by the Secretary of the Interior . . . shall have power, without warrant, to arrest any person committing (such a violation.)" 16 U.S.C. § 1338(b) (emphasis added).

This exercise of power through full force and effect essentially denies an interested party any effective right of appeal before the IBLA. In the current situation, the appeal route has been narrowed to create a bottleneck. Once a decision is in full force and effect, an interested party may pursue a time-consuming administrative stay before the IBLA, which may be granted after a roundup has already been completed. The appellant may not seek an injunction from a federal district court because he has not exhausted his administrative remedies. 43 C.F.R. 4.21(b). Even if the appellant is granted the stay and wins the subsequent appeal, the damage has been done. Thus, if a lower official can put a removal decision into full force and effect, that official's decision may very well be "final" for the horses and land

management area involved. Such finality of decision has been determined to have been granted only to the Secretary and his direct subordinates, which do not include BLM District Managers. If the Secretary of the Interior signed the authorization to effect an immediate removal of horses from public lands, the person aggrieved by such a decision would have immediate access to the federal court and a swift means of applying for a temporary restraining order and preliminary injunction.

In this situation especially, when the purpose of the legislative amendment to the Act was to respond to an emergency situation involving public rangelands deterioration, see Senate Energy and Natural Resources Comm., Public Rangelands Improvement Act of 1978, S. Rep. No. 95-1237, 95th Cong., 2nd Sess. 6 (1978), reprinted in 1978 U.S.C.C.A.N. 4069, 4070, Congress did not intend to allow lower ranked officials at the Bureau of Land Management to make full force and effect decisions to capture and remove horses when such an action will have such a devastating effect on those animals' lives and futures. Such decisions are explicitly reserved for the Secretary.

D. The Full Force and Effect Regulation Creates a Bias As A Matter of Law For Livestock Grazing That Was Not Intended By Congress.

The full force and effect regulation is also contrary to congressional intent as expressed by Congress in the appropriations bills from fiscal year 1988 to the present. While these bills speak only to refusing to fund the destruction of healthy animals,

the policy behind them is unmistakably clear - Congress will not permit BLM's management programs to further cause the harassment and death of wild horses that the Act explicitly sought to prevent, and will not raise BLM's wish to remove horses from the range to a higher priority than the protection of wild horses.

The full force and effect regulation, on the other hand, works against this intent by allowing roundups to go into effect immediately unless a separate appeal for a stay has been filed and granted. Thus, more roundups are completed and the wellbeing of more horses is put in jeopardy, with no guaranteed adoption places. After a roundup, the only alternative for the horses that are not adopted may be confinement on a designated sanctuary with the cost of food and maintenance being afforded at public expense. The full force and effect regulation makes this scenario more likely rather than less likely.

This regulation creates a bias in favor of removing horses, contrary to the congressional concern for a "thriving natural ecological balance on the public lands" expressed in the Act. 16 U.S.C. § 1332(f). The BLM manages public lands pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 et seq. and the Federal Land Policy Management Act, 43 U.S.C. § 1701 et seq. Under these statutes, the BLM issues grazing permits that authorize use of the public lands for the purpose of grazing livestock. 43 C.F.R. §§ 4100.0-5, 4130.1 et seq. The total number of animal unit months of livestock apportioned to land controlled by a permittee is referred to as the permittee's "grazing preference." 43 C.F.R. § 4100.0-5.

"Active use" refers to a permittee's current authorized livestock grazing use. 43 C.F.R. § 4100.0-5. The interest conferred by the grazing permit is indeed limited, "convey[ing] no right, title, or interest held by the United States in any of the lands or resources." 43 C.F.R. § 4130.2(b). The interest is also a defeasible one as active use may be decreased on a temporary basis due to drought, fire, other natural causes, or overutilization. 43 C.F.R. § 4110.3-2(a),(b).

The regulation pertaining to an appeal of the decision of an authorized officer of the BLM concerning grazing permits or leases, and the circumstances under which the authorized officer's decision may be placed in full force and effect clearly illustrates as a matter of law the BLM's bias in favor of removing horses rather than cattle in its programs to improve the condition of the range on public lands.

> A period of thirty days after receipt of the final decision is provided for filing an appeal. Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. Except where grazing use the preceding year was authorized on a temporary basis under § 4110.3-1(a) of this title, an applicant who was granted grazing use in the preceding year may continue at that level of authorized active use pending final action on the appeal. The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal.

43 C.F.R. § 4160.3(3).

It is clear as a matter of law that when faced with choices about how to manage natural resources on public lands, the implementation of 43 C.F.R. § 4770.3(c) creates a bias in favor of removing horses when compared to the BLM's regulations governing

active use reductions for livestock, 43 C.F.R. § 4160.3(c).

First, the regulations concerning grazing mandate that changes in active use in excess of 10 percent shall be implemented over a 5-year period. 43 C.F.R. § 4110.3-3. Moreover, to place an active use reduction decision into full force and effect to protect resource deterioration requires an emergency. Faced with resource deterioration of the forage on public lands, the BLM may place horse removal decisions in full force and effect merely upon a determination that an excess number of horses exists in an area, 43 C.F.R. § 4160.3(c), a significantly lower threshold than the "emergency" necessary to reduce active use by livestock. Furthermore, there is no mandatory phase-in of decisions to remove more than 10 percent of the horses in a given area.

This preference for livestock grazing and protecting the commercial interests of grazing permittees is contrary to the requirement of Congress explicit in the Act, 16 U.S.C. § 1333(a), that BLM manage wild horses "in a manner that is designed to achieve and maintain a thriving ecological balance on the public lands." More importantly, this preference exalts the position of livestock over that of wild horses, a result contrary to the protective status that Congress expressly accorded wild horses in the Free Roaming Wild-Horses and Burros Act. Wild horses are not crowding out livestock or receiving the majority of AUMs, therefore the BLM's bias in favor of removing horses is not at all defensible. According to a recent report of the United States Government Accounting Office, domestic livestock grazing on public

lands outnumber wild horses by a ratio of almost one hundred to one. GAO/RCED-90-110, Report to the Secretary of the Interior, Rangeland Management, Improvements Needed in Federal Wild Horse Program, at 24 (1990). The report also states that "domestic livestock consume 20 times more forage than wild horses. Even substantial reductions in wild horse populations will, therefore, not substantially reduce total forage consumption." Id. Thus, any additional bias against wild horses can only result in further decreases in the number of wild horses without any improvement in the public rangelands.

While the legislation and the legislative history refer to a "thriving natural ecological balance," nowhere has it been suggested in the regulations that cattle should be removed or that grazing rights should be restricted simultaneously with the determination that a wild horse removal decision should be immediately implemented. The full force and effect regulation results in a situation where no time is allotted for the study intended by Congress when roundups are permitted so easily.

## POINT TWO

**THE FULL FORCE AND EFFECT REGULATION, 43 C.F.R. 4770.3(c), VIOLATES THE REQUIREMENT OF MANAGEMENT AT THE MINIMAL FEASIBLE LEVEL, AS MANDATED BY THE WILD FREE-ROAMING HORSES AND BURROS ACT, 16 U.S.C. §§ 1331-1340.**

The Secretary is required to conduct all wild horse activities at the "minimal feasible level" of management:

The Secretary shall manage wild free-roaming horses and

> burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands. . . . All management activities shall be at the minimal feasible level.

16 U.S.C.A. § 1333(a).

Moreover, BLM management of wild horses must be constrained to "the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans." 43 C.F.R. § 4710.4.

Prior to the enactment of 43 C.F.R. 4770.3(c), BLM decisions to remove excess wild horses and burros which were not yet made final by the signature of the Secretary, were automatically stayed pending appeal:

> A [BLM] decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

43 C.F.R. 4.21(e). Thus, a person who challenged a BLM decision to remove wild horses had an opportunity to be heard in the administrative process before the animals underwent the trauma of being rounded up by helicopter and transported to the adoption facility, and before BLM undertook the expense of a wild horse roundup.

That is no longer the case. With the enactment of 43 C.F.R. 4770.3(c), an authorized BLM officer may place in full force and effect decisions to remove excess wild horses and burros from public and private land. The automatic stay no longer applies to the appeals process, and authorized officers such as district managers have the discretion to proceed with wild horse round-ups

pending appeal. The impact of the full force and effect rule is devastating under certain circumstances. In such a situation, BLM conducts a wild horse round up; IBLA subsequently rules on appeal that animals should not have been removed; then BLM must take remedial measures in an attempt to correct its error. In the process, wild horses have been needlessly removed from the rangelands and replaced as though fungible commodities, rather than being respected as "living symbols of the historic and pioneer spirit of the West," meant to be protected by the Wild Horses and Burros Act from "capture, branding, harassment, or death." 16 U.S.C.A. § 1331.

The statute's minimal feasible level requirement is effectively violated when there is no proper determination of excess. Under the new regulation, no independent, objective determination of excess will be possible for aggrieved parties appealing a removal decision. Instead, removals are allowed to take place immediately while interested parties pursue the time-consuming administrative stay which may or may not be granted while an appeal is pending.

The ability of local BLM officials to place removal decisions in full force and effect greatly increases the possibility that unnecessary removal plans will be implemented. While the stay is being pursued through administrative channels, targeted horses are herded by helicopter towards trap sites. They are forced to run several miles as the helicopters hover above them. Families become separated as they run. Foals and ailing animals often die during

this process. Fetuses may be aborted. The surviving horses are placed in crowded holding pens where many become sick from the constant dust and close confinement. The horses subsequently become susceptible to common domestic diseases to which they previously had not been exposed.

The wild horses are then loaded onto trucks and brought to auction centers. All males are castrated upon arrival. Many the horses are not adopted. Others are eventually are sold to slaughterhouses, contrary to the law. These removals cause trauma and suffering to wild horses from which many do not recover. These facts concerning the effect of an improper removal underscore the importance of a determination that the full force and effect regulation is contrary, as a matter of law, to the requirements of the Wild Free-Roaming Horse and Burros Act. Once the removal has been effected, no "remedy" that was contemplated in the comments on the proposed full force and regulation can prevent the unnecessary infliction of harassment and death on wild horses, whose individual wellbeing is ensured by the Act.

The full force and effect rule will lead to the unnecessary manipulation of wild horses and burros, and thereby violates the Wild Free-Roaming Horses and Burros Act requirement that BLM activities remain at the minimal feasible level of management. 16 U.S.C.A. § 1333(a). The ability of an aggrieved party to seek a stay of the BLM decision to remove horses pending appeal would ensure that the handling and relocation of wild horses are kept to a minimum.

In the supplementary information accompanying final publication of the full force and effect rule, BLM set forth two courses of action which could be taken should IBLA rule on appeal that BLM had erroneously removed wild horses. 57 Fed. Reg. 29,651, 29,652 (July 6, 1992). BLM proposed that it could 1) relocate a similar number of animals from another herd to replace animals removed in error, and 2) future removals could be deferred until herd size returns to the proper level. Id.

The results of an improper removal underscore the importance of the determination that the full force and effect regulation is in contravention of the Act as a matter of law. The proposed remedial courses of action, 57 Fed. Reg. 29,651-52 (July 6, 1992), illustrate the misguided nature of BLM policy, and neither course of action is a satisfactory remedy. With each wild horse removal, the genetic stock of America's wild horses is irreparably altered. The relocation of animals from another herd (which would necessarily impact the herd from which those animals were removed) or the deferral of subsequent round-ups cannot repair the damage done. The Act not only seeks to guarantee that wild horses will thrive in acceptable numbers on public lands, but it protects the interests and wellbeing of individual animals, which "shall be protected from capture, branding harassment or death." 16 U.S.C. § 1331. The concern in the Act for the wellbeing of the horses, not simply for the maintenance of an acceptable total number of animal in each Herd Management Area, was completely overlooked when the regulation was passed.

In the comments on the final regulation, it was stated,

> [E]ven if the IBLA were to ultimately find the BLM removal to be incorrect, animals that were removed in error could either be replaced with animals from another herd area having excess animals or the herd could be allowed to increase through normal reproduction until the population again reached a thriving natural ecological balance. Consequently, no permanent or significant damage would result from failure of the IBLA to hear a Petition for Stay of a Decision prior to completion of a removal action.

57 Fed. Reg. 29,653 (July 6, 1992).

This conclusion is erroneous, as it completely disregards that concern that wild horses not be individually harassed or harmed that is explicit in the language of the Act and central to its intent. An automatic stay pending appeal serves as further insurance that the impact of each round-up is carefully considered.

In the supplementary information, BLM makes much of the several months taken by IBLA to render a decision on appeal of a challenged round-up, which BLM alleged interfered with effective management of wild horses. 57 Fed. Reg. at 29,651-53. The difficulties pointed to by BLM are a reflection of the ineffectiveness of management methods employed by BLM rather than problems associated with delays associated with decisions on appeal. Proper management which avoided the development of "emergency" situations through prudent and thorough planning, and which took into account the period necessary for the pursuit of an administrative appeal, could easily overcome these difficulties. True emergency situations requiring the immediate removal of wild horses could be properly authorized by the Secretary.

## CONCLUSION

The BLM has exceeded its delegated authority in enacting the full force and effect regulation, 43 C.F.R. § 4770.3. Congress never intended the authority to immediately remove wild horses to vest in parties other than the Secretary or his immediate subordinates. The regulation exacerbates BLM's existing impermissible bias against horses in favor of the grazing of livestock. It also increases the potential for management of horses above the "minimal feasible level" contemplated by Congress.

For all the foregoing reasons, it is respectfully submitted that the motion of the plaintiffs for summary judgment in their favor and against the defendants on plaintiffs' first and second claims for relief should, in all respects, be granted. Accordingly, we respectfully request declaratory relief declaring that 43 C.F.R. § 4770.3(c), as enacted, violates the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702 in that it delegates to the BLM more authority than that intended by Congress. Plaintiffs further request a judgment permanently enjoining defendants from applying 43 C.F.R. § 4770.3(c) as enacted; and that the Court should grant other and further relief as it may deem appropriate.

Dated: July 26, 1993

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| MICHAEL BLAKE, X9 Ranch, Vail Arizona 85641; TIMOTHY WILSON, 505 Brown Street, Reno, Nevada 89509; PUBLIC LANDS RESOURCE COUNCIL 243 California Avenue, Suite 4 Reno, Nevada 89509,<br><br>Plaintiffs,<br><br>v.<br><br>BRUCE BABBITT, Secretary of the Interior, 1849 C Street NW, Washington, D.C. 20240; JAMES BACA, Director of the Bureau of Land Management, 1849 C Street NW, Washington, D.C. 20240; in their official capacities,<br><br>Defendants. | Civil Action<br>Case No. 93-276<br><br>Judge R.C. Lamberth |

## STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Federal Rule of Civil Procedure 56(c) and Local Rule 108(h) of this Court, plaintiffs make this statement of material facts as to which there is no genuine issue.

References to the Record relied upon to support this Statement shall be as follows: Complaint ["Comp."]; Defendants' Answer

["Ans."]; Affidavit of Michael Blake ["Blake Aff."]; Affidavit of Timothy Wilson ["Wilson Aff."]

1. Plaintiff Michael Blake is an award-winning author and winner of an Academy Award for his screenplay "Dances With Wolves," based on his book of the same name. Michael Blake has written and lectured widely concerning the preservation of America's wildlife, in particular wild horses. Comp. ¶ 1; Ans. ¶ 1; Blake Aff. ¶ 1. Mr. Blake became interested in the Bureau of Land Management's programs for managing of wild horses in the spring of 1991. He actively promoted the Bureau of Land Management's wild horse adoption program, Comp. ¶ 2; Ans. ¶ 2; Blake Aff. ¶ 8,. and himself adopted two wild horses. As he became more familiar with the Bureau of Land Management's policies and procedures, he realized that wild horse removals and adoption programs were not an effective way to manage wild horses. Comp. ¶ 2; Blake Aff. ¶ 9. In July 1992, Mr. Blake called for an independent count of Nevada's wild horses, and a moratorium on horse round-ups pending development of accurate horse population statistics. Blake Aff. ¶ 10. Mr. Blake provided funding for an aerial census of Nevada's wild horses conducted by plaintiff Public Lands Resource Council. Comp. ¶ 2; Blake Aff. ¶ 10-13.

2. Plaintiff Tim Wilson is a lifelong resident of Nevada. Comp. ¶ 3; Wilson Aff. ¶ 1. He is a location manager for motion pictures filmed in the western United States. He is a contractor for the State of Nevada Department of Economic Development, Motion Picture and Television Division. He frequently is called upon to

feature wild horses in the productions that he manages. Comp. ¶ 3; Wilson Aff. ¶ 3. Mr. Wilson flew on a number of plaintiff Public Lands Resource Council's wild horse census flights. Wilson Aff. ¶¶ 14-15. He is familiar with the condition of wild horses in Nevada and with the Bureau of Land Management's policies and procedures for managing wild horses on public lands in Nevada. Wilson Aff. ¶¶ 4-12.

3. Plaintiff Public Lands Resource Council ("PLRC") is an association whose members include residents of Nevada. PLRC is dedicated to and one of its sole purposes is the promotion of the welfare and protection of wild horses, specifically the survival of America's remaining wild horses on public land. Blake Aff. ¶¶ 10-12; Wilson Aff. ¶ 13. In 1992, PLRC conducted an aerial survey of Nevada's wild horses, following the grid system established by the Bureau of Land Management. Comp. ¶ 6; Blake Aff. ¶¶ 10-11; Wilson Aff. ¶ 14.

4. PLRC's goals are shared by the individually named plaintiffs, Michael Blake and Tim Wilson, both of whom are members of PLRC. Mr. Blake contributed financially to the aerial survey of Nevada's wild horses. Mr. Blake and Mr. Wilson both acted as spokespersons for PLRC when publicizing PLRC's concerns about the true number of wild horses remaining in Nevada. Comp. ¶ 7. Blake Aff. ¶¶ 10-12. Wilson Aff. ¶¶ 13-17.

5. Among the members of plaintiff Public Lands Resource Council are residents of Nevada and nearby states who have in the past and have the right in the future to be users and enjoyers of

the lands, wildlife, and horses affected by the regulation being challenged in this action. Comp. ¶ 8. Blake Aff. ¶¶ 10-12; Wilson Aff. ¶¶ 13-17.

6. Defendant Bruce Babbitt is the Secretary of the Interior. Secretary Babbitt is charged with the management of federally owned public lands. Comp. ¶ 10; Ans. ¶ 10.

7. Defendant James Baca is the Director of the Bureau of Land Management, which is charged with the administration of federal law and policy concerning public lands, specifically the protection and management of wild horses and burros on public lands. Comp. ¶ 11; Ans. ¶ 11.

8. Defendant Secretary of the Interior is charged specifically with the protection and management of wild free-roaming horses and burros on public lands pursuant to the Wild Free-Roaming Horse and Burro Act, 16 U.S.C. § 1331 et seq. Comp. ¶ 12; Ans. ¶ 12.

9. Defendant Bureau of Land Management ("BLM") is responsible for the protection and management programs for wild horses in Nevada pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq. As part of its program of management, the BLM engages in removals from public lands of wild horses deemed to be in excess of the number considered by BLM to be the appropriate management level in a designated herd management area. Comp. ¶ 13; Ans. ¶ 13.

10. Interested parties, i.e., those who would be affected by a decision to remove wild horses, are given notice by the BLM of

pending removal plans. Comp. 14; Ans. ¶ 14. Plaintiff Michael Blake has submitted comments opposing proposed wild horse removals. Comp. ¶ 3; Blake Aff. ¶ 18. Plaintiff Timothy Wilson has submitted comments opposing proposed wild horse removals. Comp. ¶ 5; Wilson Aff. ¶ 22. Comments on proposals to remove horses have also been submitted on behalf of plaintiff Public Lands Resource Council. Comp. ¶ 9.

11. Interested parties aggrieved by a decision of the BLM to remove wild horses, are able to challenge, at the administrative level, by filing a notice of appeal with the Interior Board of Land Appeals. Comp. ¶ 15; Ans. 15.

12. Prior to August 5, 1992, the filing of such notice, pursuant to BLM regulation 43 C.F.R. § 4.21(e), would automatically stay the removal decision pending disposition of the appeal. Comp. ¶ 17; Ans. ¶ 17.

13. In 1992, BLM amended its regulations governing administrative appeals of wild horse removal decisions. Comp. ¶ 18; Ans. ¶ 18. Pursuant to the amended regulation, 43 C.F.R. § 4770.3(c), effective August 5, 1992, "[An] authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands . . . . Full force and effect decisions shall take effect on the date specified, regardless of an appeal."

14. The practical consequence of 43 C.F.R. § 4770.3(c) is to permit "authorized officers" of the BLM to effect "immediate" removals of wild horses. Comp. ¶ 19; Ans. ¶ 19.

15. Plaintiffs have challenged this regulation, 43 C.F.R. § 4770.3(c) on the grounds that it is in contravention of provisions of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq., as § 1333(b)(2) of this Act expressly provides that only the Secretary of the Interior may immediately remove wild horses.

16. On January 6, 1993, the Bureau distributed to interested parties a notice of a proposed round-up of horses in the Buffalo Hills and Granite Range Herd Management Area. Comp. ¶ 24; Ans. ¶ 24.

17. On Wednesday, February 3, 1993, plaintiffs' representative contacted Bud Cribley, the Bureau of Land Management's Area Manager in the Sonoma-Gerlach Resource Area of the Winnemucca District, to ascertain if a final decision to remove horses had been made. Mr. Cribley stated that he had signed the recommendation for the final removal plan, and that Ron Wenker, the District Manager, would sign the decision on February 9, 1993, which decision would be placed into full force and effect. Comp. ¶ 25; Ans. ¶ 25.

18. On February 9, 1993, Mr. Wenker signed the decision to remove horses, and placed that decision in full force and effect under 43 C.F.R. § 4770.3(c). Mr. Cribley confirmed by telephone to plaintiffs' representative that the removal of horses began on February 9, 1993. Comp. ¶ 26; Ans. ¶ 26.

19. The final removal decision was mailed to interested parties. The copy mailed to plaintiffs' representative was postmarked February 9, 1993. Comp. ¶ 27; Ans. ¶ 27. This was

received by certified mail some eleven days later on February 20, 1993. The removal of horses from the Granite Range was completed on February 20, 1993. Thus, the Bureau of Land Management had completed the removal from the Granite Range Allotment before interested parties even received notification of approval of the removal plan from which they could appeal.

Respectfully submitted,

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