

12/8/88



ANIMAL PROTECTION INSTITUTE OF AMERICA

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CLAUDE
Countess of Kinnoull

December 8, 1988

Interior Board of Land Appeals
Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, VA 22203

Re: IBLA Nos. 86-648, 88-638,
88-67, N-6-88-18, N-04-88-1,
and 88-591

Dear Sirs:

This is in response to the range assessment report received from the Solicitor with a Motion for more time. We are asking IBLA to deny the Motion for Time. We request (by Motion) that IBLA

A) separate Buffalo Hills. IBLA No. 85-591, from the other appeals because there are unique and extenuating circumstances involved; and

B) consolidate all others because the same four basic points on which we seek rulings apply to all and each of them.

The following is (1) an argument to support our request for the denial of time, (2) a response to the range assessment report, (3) our comments on behalf of the four points with supporting documents, and (4) a request that IBLA order BLM to write Herd Management Area Plans before further roundups are allowed.

1. DENIAL OF MOTION

The Nevada BLM is moving ahead with their 1989 roundup schedule and the same four basic points on which we have appealed the 1988 roundups continue to apply to these. API feels duty bound to our membership to continue to seek a ruling on these four points. This requires that we protest the 1989 roundups and appeal the final decision thus adding to the number of cases pending with IBLA. Our staff believes we have submitted data and evidence, much of it now duplicated, in abundance while all that is forthcoming from the BLM are requests that time be extended. We believe continual requests for time serve no purpose

but to increase the number of appeals. We request your permission to submit this as our final argument on the removal appeals (excepting Buffalo Hills).

2. RESPONSE TO REPORT: Saare, et al: "Condition Assessment of Selected Nevada Wild horse Herds and Herd Areas.

We wish to state for the record that API has not enjoined roundups.

Buffalo Hills HMA

We ask that this portion of the range report be set aside to be addressed in connection with Buffalo Hills.

Granite HMA

"While horse numbers currently exceed management levels, there appears to be little or no problem with adequate forage supplies." (Page 9, Line 14-16)

This range assessment does not support a removal, and suggests the AML should be the current population of 563 head not 176.

Maverick-Medicine HMA

"Considerable standing forage is available on the west side of the area with good stands of Basin wildrye grass virtually ungrazed around springs that are used by horses for watering." (Page 10, Line 14)

This range assessment clearly does not support a removal. It even suggests that the current number may even be far less than the number listed as appropriate by management.

Butte HMA

"Apparent ecological condition is mostly satisfactory to good, with considerable standing forage. The area has good water distribution...There are 202 horses using the area. Body condition of observed wild horses was good. Although current grazing use appears moderate there is a potential for shortage if numbers continue to increase."

This range assessment does not support thea removal of horses. It suggests that 202 head at minimum could be considered AML.

Buck and Bald HMA

The information for this area is unusual. Typically horses would be where forage is available unless obstructed from

getting there by fences. The assessment indicates that there is little remaining forage and 60 percent current use on winterfat in the Newark Valley portion of the HMA where horses were "confined" to this portion of the HMA. In other portions of the Buck and Bald forage reserves appeared "adequate if not abundant and the nutritional characteristics of the forage plants should provide a satisfactory maintenance for over wintering horses and others."

The range assessment shows that something other than forage availability is a problem here. API believes this needs further investigation to find out why the horses are "confined" in an area that is becoming overgrazed while abundant forage exists in the HMA. Our experience with the Nevada BLM is that they are usually very cooperative and supportive with regard to attempting to guarantee the free-roaming nature of wild horses and have agreed with protection groups that horses should have full utilization of their designated habitat area.

The data do not support a removal but a relocation to where the forage is "abundant." It does not suggest a reduction in numbers but a re-evaluation of what should be considered AML based on relocation.

New Pass Ravenswood HMA

"The species of forage plants generally common on this HMA should provide adequately for the nutritional needs of horses and other grazers." Also the report states that summer ranges and riparian zones were heavily grazed and winter ranges overstocked.

The authors of the independent report suggest the need of management attention before major problems develop.

API is currently part of the CRMP process for grazing adjustments on the Gilbert Creek Allotment which lies within this HMA. Uneven distribution of cattle is a major problem here and throughout the state of Nevada. API agrees from studying the range conditions reported by BLM that severe grazing adjustments are due for this area. API has argued consistently that simply reducing horses does not address the cause of damage if cattle cause the damage. Where range data clearly indicates that horses cause damage, we do not oppose reductions in the number of horses in the area. But this is typically not the case because of the nature of the grazing habits of wild horses and domestic livestock. The spatial overlap of wild horses and cattle is minimal. The photo showing a stud pile near a water hole with the surrounding area badly overgrazed does not prove overgrazing by horses. Wild horses build stud piles near water holes and on trail intersects as part of their inner-band communication. Bands of five or six horses may come in to drink at this water hole and move out again back into the hills. They would build a stud pile at the water hole. But

they may graze up to 5-7 miles from the water. (Information on the grazing patterns of horses and stud-pile building as part of the complex communication system of horses has come from Nevada State BLM's wild horse specialist in response to past inquiries by API regarding the nature and needs of wild horses.) On the otherhand, cattle--by their nature--congregate near water. This uneven distribution of cattle is also the major problem contributing to overgrazing. In order to evaluate the photo, one needs to know how many cattle were there.

Desatoya HMA

The range data here indicates that a reduction in the current population of horses might be justified.

Monte Cristo

"Current forage utilization .. is moderate to light. Much winter forage remains ungrazed... Horse condition is at least satisfactory. Current feed supplies suggest that there is no eminent disaster awaiting horses or other grazers in this HMA."

The range assessment does not support the removal plan. It indicates the current number of horses is an appropriate level at this time.

Clover Mountains HMA

"Current forage use is light to moderate throughout the area. There was some fall green-up of cheatgrass, bluegrass and wheatgrass. Water is available throughout the area and use around water was light to moderate."

There is no indication that a removal of horses is needed. The data do not support the removal plan.

Discussion Section of Saare Report

This is sheer rhetoric. Page 21, Line 3: "The young animals from our herds of livestock are gathered each year and removed from the range. So it must be with the wild horse." This does not read like an objective third party statement, we object to it. The laws clearly directs BLM to protect wild horses and burros, to protect habitat, to save the land from destruction and overusage, and to limit livestock usage by number and season of use through the permit system. It does not limit wild horse management to a system based on fixed numbers or season of use. There is nothing in the law that even remotely suggests "so it must be with horses."

Page 21, Line 5: "The wild horse has no effective natural predator except man..." As a matter of fact, BLM's Winnemucca District has postponed a proposed roundup (October 1988) in the North Stillwater HMA because the population is stable. It is suspected that the area has a population of mountain lions built up in rocky areas. This information was obtained from the Winnemucca District by telephone. There is a study underway in the Montgomery Pass area by Dr. John Turner on mountain lion predation. His Report on this study is attached as Exhibit X. The discussion statement is without support.

Rather than refute the discussion line for line, API requests that the discussion portion of the Saare Report be stricken from the records as unsubstantiated by fact or evidence and let the data speak for themselves.

The data in the range report do not support the removals in seven of the eight HMAs assessed.

We agree with the findings of this range assessment that about one/eighth of the number of HMAs from which BLM plans a removal is supported by range data pointing to the need for a removal. Nearly fifty thousand horses have been removed in the past four years and our suspicion is that the same percentage would have applied.

The fact that BLM has chosen to submit range data at this time appears to us to be conceding one of the four points with regard to the need for range data on which to base a removal decision and to establish the proper management level. We would still like to have IBLA address all four points we have raised.

3. THE FOUR POINTS ON WHICH API REQUESTS RULINGS PLUS SUPPORTING DOCUMENTATION

The four points that are consistent throughout all our appeals and on which we seek rulings are these:

1. The failure of BLM to meet the statutory criteria for the determination of excess;
2. The failure of BLM to environmentally assess the decision to remove horses;
3. The decision to remove horses fails to meet the Dahl v. Clark benchtest that says removals are to achieve a thriving ecological balance;
4. The numbers that are listed in the removal plans and in the land use plans as the "Appropriate

Management Level" (AML) are not AML, as claimed, but are, in fact, starting points for the purpose of beginning range monitoring in order to determine AML.

A brief summary of the sequence of events on which these four points are based and on which API's staff developed the arguments for our protests of roundups will show IBLA that the removal of horses from 1985 through 1988 was the result of an agenda to destroy the wild horse program and when ordered down-the-line forced BLM staff to rationalize and justify to find a logic to back the policy. But the logic used was not based on the law or the intent of Congress it was on the agenda of the Administration--which was in keeping with the objectives of livestock interests to reduce the wild horse population to the 1971 level.

The sequence of events begins in September 1984 when it was apparent that an amendment to the Act (PL 92-195) to allow sale authority would die with the end of the Congressional session.

A Continuing Resolution for the 1985 budget was amended in committee (SEE EXHIBIT B) to include earmarked funds for the roundup of 34,000 horses--this number was cut in half in the Conference Committee.

The Administration called these earmarked funds a "mandate" from Congress to cut the wild horse population by half.

EXHIBIT B includes a 1987 letter from the Acting Director of BLM to Senator Sarbanes in which it explains--page 2--that BLM is using funds for the purpose intended as expressed in the appropriation acts. This is an example of the kind of double-talk that went with the earmarked funding.

It is API's contention that by providing funds to remove excess horses, Congress was not dictating that the wild horse population be cut in half but funding the implementation of the law in the belief excess would be legally determined and the statutory criteria on removals met. Hopefully the IBLA will concur that Congress was not funding a violation of the law or saying here's the money disregard all statutory constraints.

In that same 1987 letter please note, on page 1, it states "the determination of what constitutes excess wild horses or burros on a given area of the public lands is arrived at through the BLM's resource management planning process." Our contention is there are statutory constraints, criteria, and restrictions that must be met in the determination of excess. We believe that wild horse management enters the land use planning process with conditions attached in the same way Threatened and Endangered Species enter it with conditions attached. We believe BLM knew this and that is why they attempted to change the definition of excess in Regulations.

In December 1984, a rulemaking action proposed changing the definition of excess and included a definition of AML. (EXHIBIT C)

In February 1985, the Dahl v. Clark ruling was made public. Dahl v Clark was seen as being a test case backed by livestock interests and their spokesmen in the Washington BLM. The test was that the law protected ONLY the number of horses in existence in 1971. [Another case that was seen as a test case (Fallini on Reveille) was whether the law protects horses ONLY in those specific areas where they existed in 1971.]

In Dahl v. Clark. the local BLM assigned to assist the Justice Department argued too well. The case was won. Of special concern to us was the clear interpretation on removals referred to in this case as a benchtest. This "benchtest" said removals were to achieve a thriving ecological balance of the natural system. This has subsequently been stated ~~even~~ more succinctly by the court in API's suit on the mass adoptions (page 8). We submit that ruling. We have previously submitted the Dahl v. Clark ruling. Our point is that the courts agree on the purpose of removals as being to achieve a thriving ecological balance of the natural system. (EXHIBIT D)

BLM's removal plans during 1985-86 used the proposed definitions of excess and AML from the proposed rulemaking to justify removals. (EXHIBIT E).

That proposed rulemaking sat pending for fifteen months before being finalized. In March 1986, when the rulemaking became final, BLM was forced to go back to the statutory definition of excess. They dropped the new definition of AML. (EXHIBIT F).

BLM could not use the new definition of excess to justify removals. The federal budgets for FY-1985, 1986, and 1987 all were by Continuing Resolution. These carried over year by year the earmarked funds despite the fact the House twice voted no funds for roundups.

The BLM Report to Congress--June 1986--listed the Administration Agenda to reduce the wild horse population to a total of 20,000 on the 44 million acres of public land designated as wild horse use areas (EXHIBIT G). API believes that figure of 20,000 was based on the full expectation of losing Dahl v. Clark which would have then enabled BLM to claim they were ordered by the court to reduce to the 1971 level (which is believed by BLM to be between 17,000-21,000 horses). We find no other explanation for the 20,000 quoted since the law requires criteria be met for the determination of excess; it requires removals be based on range data showing that the action will achieve a thriving ecological balance; and it requires that the appropriate management level be based on range data in order to accomplish the other two.

When BLM was forced to use statutory language for the determination of excess, they justified removals saying they were management decisions made in the Resource Management Plans in the land use planning process. But the law requires site-specific (e.g. "in a given area") decisions and actions, RMPs are broad and general for the entire area.

The RMPs list the 1982 population and call this "the appropriate management level." This is an arbitrary and capricious number. In actuality a directive dated 1982 suggests the "current population be used a starting point to begin monitoring in order to determine AML." (EXHIBIT H includes a copy of the field manual pages on removal plans, the instructional memo on factors to be considered in establishing AML, and the directive on using the current population as a starting point.)

API had begun challenging removal plans in late 1985 using both the failure to meet statutory criteria for the determination of excess and the Dahl v Clark benchtests as our argument to refute the justification for the roundup. We now added the argument on the site specific requirements, saying it was not met and referred to the 1982 figure as a starting point not AML. We asked BLM to invoke the Regulation 4710.5 entitled "Closure to Livestock" where uneven distribution of livestock was a major problem and to assess it as an alternative action. The law suggests (but does not compel) BLM to consider all options before removals are made. API saw 4710.5 as a valid and viable management option. These requests were virtually ignored.

In response, BLM changed its format. They no longer called it a "Removal Plan" but a "Capture Plan" saying the decision to remove had already been made. They said the AML was a "management decision." They quoted the law as saying they were required to reduce to AML. We argued that NEPA requires that the actual decision be environmentally assessed, an alternative action be assessed, and a FONSI accompany the go-ahead. We argued that the actual decision was not how horses were to be captured but if an excess exists in a given area and whether removal was the appropriate action.

In Summer of 1988, we began to appeal each removal decision to IBLA on these four basic points. We felt the arguments put forth by BLM to support their decision to remove were not based on the law and a third party intervention was needed. We believe the many requests for time by the solicitor is an indication that there is no logic based on law to support BLM's side.

4. ARGUMENT FOR AN ORDER TO WRITE HMAPS BEFORE ROUNDUPS ARE ALLOWED.

The writing of HMAPs is an integral part of the land use planning process and the Records of Decisions from all Districts refer to their being written. The Report to Congress

(EXHIBIT G.) page 2 states:

"Once it has been determined that an area is to be a herd management area or territory, the administering Agency prepares a management plan detailing the size of the herd to be managed, specific objectives for the herd and its habitat, and management methods that will be used to reach the objectives. The Forest Service has completed 25 management plans for its 45 designated territories. BLM has prepared herd management area plans for 108 of the 151 herd management areas identified to date."

We submit as EXHIBIT I a computer printout from Nevada BLM that lists the number of Herd Management Area Plans completed in that state. Wyoming has not even completed its Resource Management Plans. We believe there is a gross and purposeful misstatement of fact in the report to Congress.

Because most HMAPs are not yet written, the question of when they're written is simply a matter of priority or what comes first livestock management plans or wild horse management plans. EXHIBIT J is pages from the Nevada State Manual on wild horse management. These pages lay forth what, API believes, should and would be the backbone of a sound wild horse management program. The section on HMAPs lists the things that need to be considered such as habitat requirements, biotic needs, and what is a viable herd in an HMAP. Management objectives such as development of water sources in an HMA or removal of fences to guarantee free-roaming would be included. Established boundary lines would be clearly understood--countering the ambiguity of the quote from the Report, page 2.

"Removal of a herd from a herd area MAY be appropriate if Federal control of the lands constituting the herd area is not sufficient to ensure long term integrity of the habitat; if access to critical parts of the habitat, such as water or seasonal use cannot be ensured; or if OTHER PLANNED USES OF THE AREA WOULD PRECLUDE MANAGEMENT OF THE HERD IN A GENUINELY WILD AND FREE-ROAMING STATE."

API staff uses the attached BLM manual pages as the basis of its own demands for what BLM should consider in order to fulfil its affirmative responsibility to wild horses and we believe they need to be in document form to make them a reality.

The current agenda is to pursue grazing allotment plans first. In these, wild horse numbers would be determined as a spin off of livestock considerations which will make that above underscored quote a practiced reality.

We ask that IBLA reverse the priorities and order HMAPs be written before further removals are allowed.

In conclusion, we believe the facts show a policy was undertaken by the Administration to get around the law not implement it and that the funding by Congress was granted to implement the law meeting all statutory requirements. We believe that the numbers listed in RMPs as "AML" are arbitrary numbers without data to support them; that the Secretary has failed to determine if an excess exists in areas from which horses have been removed; that the removals fail to achieve a thriving ecological balance in keeping with the courts interpretation of the purpose of a removal; and that by calling a removal plan a capture plan does not change the decision or the action in need of environmental assessment.

Sincerely,

Nancy Whitaker
Nancy Whitaker
Program Assistant

NW:bms

Attmts

PROOF OF SERVICE

The following Response from API dated December 8 which is a document requesting a denial of BLM's Motion for time plus other items including (1) an argument to support API's request for the denial of the Motion for Time, (2) a response to the Saare: Range Assessment Report (3) arguments on behalf of the four points with supporting documents, and (4) a request for an order to write Herd Management Area Plans has been sent by certified mail to the following parties:

IBLA
4015 Wilson Boulevard
Arlington, VA 22203

Burt Stanley
Regional Solicitor
2800 Cottage Way
Sacramento, CA 95825

Ed Spang
Director
Nevada State BLM Office
850 Harvard Way
Reno, NV 89520

Copies have also been mailed to the District Managers in Nevada.

This _____ day of _____ 1988

by:
