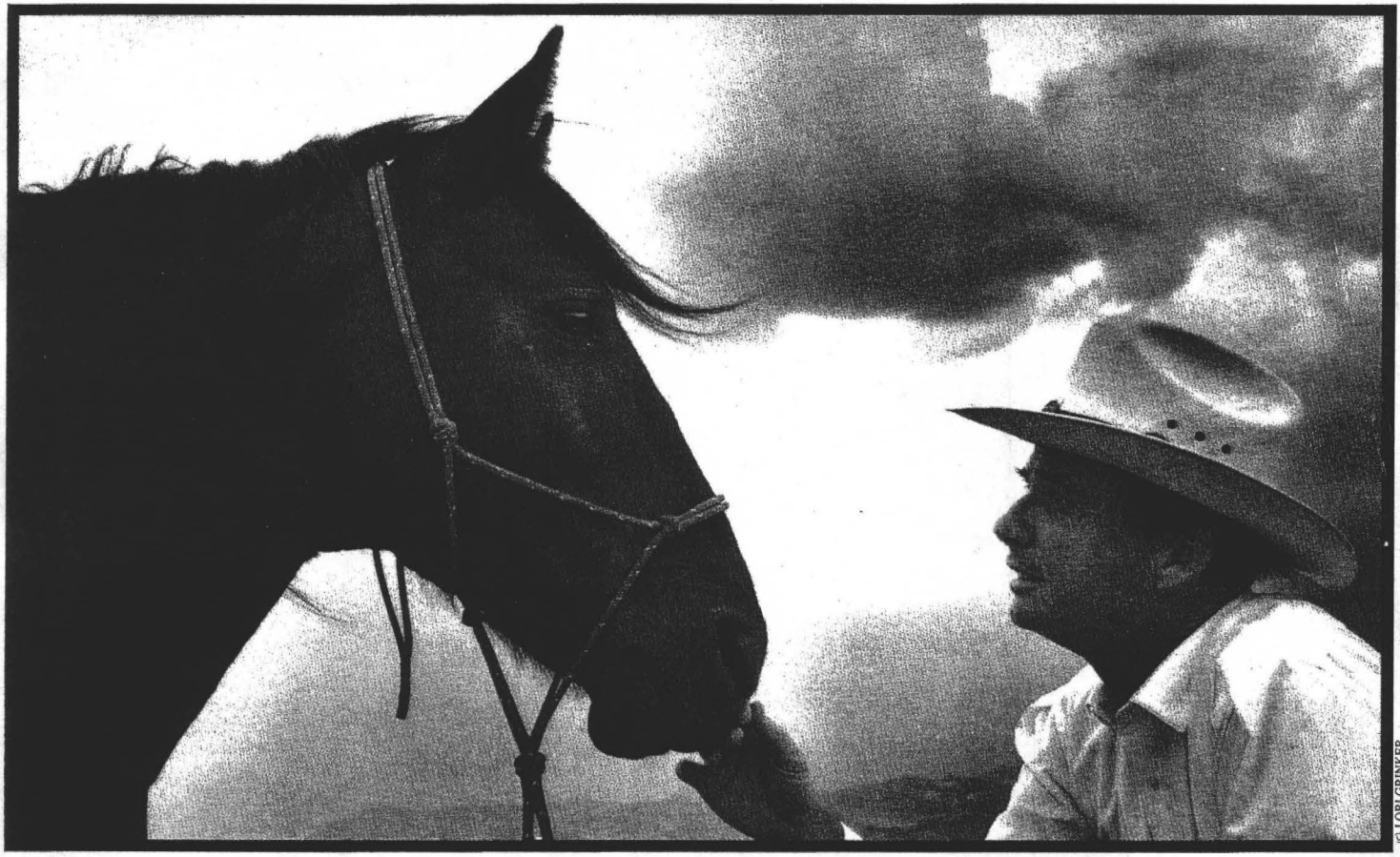

HORSE NUMBER 1202 AND MICHAEL BLAKE

HORSE NUMBER 1202

Twenty years on the open range
Twenty years of running
Twenty years a stallion

Answering to no one

Now he is horse number 1202
Prowling a circular pen of steel
Moving lightly over the soft earth
Sniffing
Waiting
And moving again

Unbowed

He is forced to acknowledge
The man and woman
Inside the pen
Avoiding them perfectly
As he travels
Around and around

He looks through
The people crowded in the stands
The children pushing toy trucks on the packed ground
The square, white lunch truck standing in the back

He cares nothing for the flying flags
Or the video cameras
Or questions from the audience
Or for what's missing
From between his legs

It is the horizon

That is what holds his attention
The meeting place of sky and earth
Is the only destiny
He has ever known

A gate opens
And he swings his magnificent, black body
Around to face it
Now he treads carefully out
Dancing on air
His wise head
Low for danger
His flowing tail arched
His monstrous neck
Rippling with power

In city traffic
I remember his eyes
So dark and wet

10-13-93

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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, Plaintiffs, v. **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, Defendants.	Civil Action Case No. 93-276RCL Judge R.C. Lamberth

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR A PRELIMINARY INJUNCTION

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR A PRELIMINARY INJUNCTION

Plaintiffs Michael Blake, Timothy Wilson and Public Lands Resource Council ["PLRC"] respectfully submit this memorandum, together with the affidavit of Anna Charlton in support of this application, sworn to on October 8, 1993 ["Charlton Aff."], the affidavit of Michael Blake, sworn to on July 16, 1993 ["Blake Aff."], and the affidavit of Timothy Wilson, sworn to on July 20, 1993 ["Wilson Aff."], in support of their application for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules

of Civil Procedure, enjoining the further implementation of 43 C.F.R. § 4770.3(c), the "full force and effect" regulation, pending a hearing on and adjudication of plaintiffs' motion for 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.

SUMMARY OF ARGUMENT

This action arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340 ["Act"]. 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 ["BLM"] which administers programs for the protection and management for wild horses on public lands pursuant to the Act.

In the present case, the BLM has overstepped its rulemaking authority under the Act, by promulgating a regulation, 43 C.F.R. § 4770.3(c) that allows "authorized officers" of the BLM to place in immediate "full force and effect" decisions to remove excess wild free-roaming horses and burros from public or private land:

> The authorized officer may place in full force and 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.

Id.

This regulation is not consistent with the Act under which it was promulgated, and is therefore invalid. The regulation violates the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702, as it is in excess of and contrary to the authority granted by Congress relating to the management of wild horses. On April 8, 1993, plaintiffs filed this action, seeking a declaratory judgment that the regulation was invalid and seeking a permanent injunction against its further implementation. Plaintiffs and defendants have filed cross-motions for summary judgment that are pending before this Court.

The plaintiffs have suffered irreparable harm in the past from the implementation of this regulation by the BLM. Recent actions by the BLM have caused the plaintiffs grave concern that this regulation will be implemented in a way that constitutes an immediate threat of further irreparable harm. To obviate these threats, plaintiffs are forced to seek a preliminary injunction preventing the BLM from causing such irreparable injury until this Court determines the merits of the plaintiffs' and defendants' cross-motions for summary judgment.

As will be set out below, and is described in the affidavit of Anna Charlton accompanying this application, the BLM is placing round-up decisions in full force and effect in a manner that strategically denies aggrieved parties any means of filing an effective appeal before the Interior Board of Land Appeals ["IBLA"]

or a federal court. Moreover, these actions by the BLM do not serve any justifiable function for rangeland management. A BLM memorandum appended as "Exhibit C" lists dates of future round-ups for which final decisions have not yet been approved. The memorandum indicates that upcoming decisions will be put into full force and effect to meet this schedule throughout this fall and winter round-up season. The BLM has also cited this regulation as authority for placing round-up decisions that are presently stayed on appeal to the IBLA, into full force and effect by impermissible administrative fiat, see Charlton Aff. ¶¶ 7-8 and Charlton Aff. Exhibits A and B, rather than submitting a motion to the Board requesting that the decision be implemented immediately. BLM is thus using the full force and effect regulation to deny plaintiffs the opportunity to appeal wild horse removal decisions before the horses are removed, and to effectively divest IBLA of its authority over pending appeals. These uses of the regulation represent an illegal grasp of power by the BLM and pose a grave, alarming, and immediate threat of irreparable harm to the plaintiffs and the wild horses for whom they are concerned.

In their motion for summary judgment, plaintiffs have challenged this regulation on several grounds. First, the regulation improperly gives local lower-level BLM officials the power to immediately remove excess wild horses and burros from public land. It is clear from the plain language of the Act, as well as from its legislative history, that Congress expressly intended that only the Secretary of the Interior should have the

power to immediately remove excess wild horses and burros.

Second, the regulation's unwarranted expansion of the authority of local BLM officials is also at odds with the Congressional mandate in the 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. 19652 (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 Act. 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 wild horse management 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. 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 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.[1] 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.[2] This bias contravenes the public policy of affording protection to wild horses as part of a thriving ecological balance on the public lands.

Fourth, it is clear that the BLM intended this regulation to enable its local officials to be able to remove horses without that removal decision being subject to effective review on appeal. See 57 Fed. Reg. 29,652 (July 6, 1992). Even if the amended regulation governing appeals, 43 C.F.R. § 4.21(c) is interpreted, as urged by defendants, to allow judicial review of a full force and effect decision without the necessity of an appeal before the Interior Board of Land Appeals, the regulation remains an unauthorized extension of power to local officials, which is being wielded in a

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[1] The General Accounting Office has written a series of reports that heavily criticized BLM management programs, see General Accounting Office, GAO/RCED-92-51, Report to the Committee on Interior and Insular Affairs, "Rangeland Management, Interior's Monitoring Has Fallen Short of Agency Requirements (1992); General Accounting Office, GAO/RCED-64, Report to the Honorable Alan Cranston, U.S. Senate, "Public Land Management, Attention to Wildlife is Limited" (1991); General Accounting Office, GAO/RCED-90-110, Report to the Secretary of the Interior, "Rangeland Management, Improvements needed in Federal Wild Horse Program" (1990)

[2] As noted in Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, 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.

manner that guarantees that an aggrieved party cannot seek review of such a decision before any reviewing body. See Charlton Aff. The horse round-ups are underway or finished by the time the BLM official notifies interested and aggrieved parties of the final decision to remove horses, a manipulation of the administrative process that 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.

Plaintiffs therefore seek a preliminary injunction preventing the further implementation of this full force and effect regulation pending this Court's ruling on plaintiffs' and defendants' cross-motions for summary judgment. Plaintiffs face an imminent threat of irreparable harm from the further implementation of this regulation, which is in contravention of the Wild Free-Roaming Horses and Burros Act pursuant to which it was promulgated, and is therefore null and void. Plaintiffs further request that defendants be permanently enjoined from applying 43 C.F.R. § 4770.3(c).

Argument

A preliminary injunction may be granted in this circuit when the plaintiffs demonstrate that they have met the four-part test articulated in Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977): (1) that they have a substantial likelihood of success on the merits; (2) that

irreparable injury will result in the absence of a preliminary injunction; (3) that no other parties will be harmed of the injunction is entered; and (4) that the public interest favors entry of the injunction. These four factors being satisfied by the plaintiffs in this action, the court should enter a preliminary injunction enjoining defendants from applying 43 C.F.R. § 4770.3(c) as enacted.

POINT 1

PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED BECAUSE THEY ARE ENTITLED TO RELIEF AS A MATTER OF LAW

A. Plaintiffs have Demonstrated a Likelihood of Success on the Merits of their Motion for Summary Judgment.

This Circuit has developed a standard for the issuance of a preliminary injunction which control this Court's discretion to grant a motion for a preliminary injunction:

> the likelihood that the plaintiff will prevail on the merits, the degree of irreparable injury that the plaintiffs will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). In the event that the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the legal merits of the case. Washington Metropolitan Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

Massachusetts Law Reform Inst. v. Legal Services, 581 F. Supp. 1179, 1184 (D.D.C. 1984).

Washington Metropolitan made clear that this Court is not

required to find that the movant have shown a mathematical probability of success on the merits. Washington Metropolitan explicitly rejected the view that "a lesser showing of, say, a chance of prevailing that is only fifty percent or less is insufficient even though the "balance of equities" as determined by a consideration of the three other factors, clearly favors a stay." Washington Metropolitan, 559 F.2d at 843. Rather,

> a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ... may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Id.

As shown in plaintiffs' Complaint and Memoranda and Affidavits in Support of their Motion for Summary Judgment and Opposing Defendants' Motion for Summary Judgment, the movants in this case have made a very strong showing of probability of success on the merits. Because they will advance strong arguments infra, to show that they have satisfied the other elements of this test, movants request that this Court grant their application for a preliminary injunction.

B. The Statutory and Regulatory Scheme at Issue

In plaintiffs' Complaint and Motion for Summary Judgment and

supporting Memoranda and Affidavits, plaintiffs have established that they have a substantial likelihood of success on the merits in this case.

The full force and effect regulation at issue in this case, 43 C.F.R. § 4770.3(c), constitutes an improper delegation of power to officials of the BLM to administer the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-40. The regulation states:

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

This regulation violates the rule that 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). This regulation 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.

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 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 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. See Blake Aff., Wilson Aff. In light of the dispute over the number of horses remaining on public lands, the ability of parties who are aggrieved by the decision to remove horses to challenge the Bureau of Land Management's decision to remove wild horses is extremely important.

In 1978, Congress amended the Act 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).[3]

The BLM has granted itself new powers that effectively give local officials the power to effect immediate removals, which

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[3] 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.

Congress has restricted explicitly and unambiguously to the Secretary of the Interior under the Act. When determining 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.

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. The full force and effect regulation is in clear contravention of the intent of Congress, because it grants BLM local officials powers that are reserved for the Secretary under the Act. While the Act makes 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 a preliminary injunction be granted in all respects.

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[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).

c. The Full Force and Effect Regulation Delegates Authority to Agents of the Bureau of Land Management that is Contrary to the Intent of Congress.

The BLM's full force and effect regulation is in violation of and subverts the intent of Congress as articulated in the Wild and Free Roaming Horses and Burros Act. It facilitates BLM's implementation of invalid wild horse Herd Management Area Plans, including the unauthorized removal of wild horses, while leaving persons who have standing to challenge such decisions without a voice before the IBLA or in the courts.

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 had an administrative remedy before the roundup began. If the administrative appeal were successful, the roundup and its harmful effect on the horses would be averted.

Under the new full force and effect regulation, a decision to remove horses can be put into immediate 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. See Charlton Aff. at ¶¶ 14-18. This affords the appellant challenging such a decision no real or effective 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 seek a stay or a temporary restraining order.

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. 29652 (1992) (emphasis added).

A comparison of the language of the Act and the regulation demonstrates that congressional intent has been thwarted and perverted by the agency's delegation of this important responsibility to immediately remove horses to officials other than the Secretary to whom Congress explicitly delegated this authority. Id. at 1333(b)(2).

Congressional intent in the Act is clear. 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.[5] The full force and effect regulation's delegation of authority is, therefore, contrary to the intent of Congress and invalid.

Administrative law decisions rendered by the Interior Board of Land Appeals demonstrate that the IBLA recognizes that authority for certain actions can only be delegated so far down the chain of command. The presence or absence of the signature of the Secretary, Deputy Secretary or Assistant Secretary on an agency decision is the determining factor in deciding whether an agency decision is "final." See Blue Star, Inc. Atomic Western, Inc. Fremont Energy Corp. Ivor Adair, 41 IBLA 333 (1979), The IBLA has recognized that it has no jurisdiction to hear an administrative appeal from a final agency decision: such decisions must be challenged in court. Decisions made by lower officials are not final and appellants therefore have the administrative appeal avenues open to them. Id. at 335 (decisions made by the Secretary or one of the various Assistant Secretaries are not appealable to the IBLA "since the full authority of the Secretary would have been

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[5] 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).

exercised).

The administrative appeal route must remain open concerning decisions made by lower officials. The District Manager does not act with the authority of the Secretary of the Interior. The full force and effect regulation, however, allows a District Manager to exercise a power that the Act reserves for the Secretary or Assistant Secretary.

This exercise of power through the full force, moreover, effectively 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. 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 granted only to the Secretary and his direct subordinates, which do not include BLM District Managers.[6]

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[6] 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.

In defendants' Memorandum in Support Motion for Summary Judgment at 18, defendants wish to give the impression that this reservation of power to the Secretary would make the efficient administration of the public lands impossible, as decisions would have to made at the highest level:

> The Secretary naturally cannot personally oversee every element of every statute that he has the authority to enforce and must delegate responsibility to the agencies charged with the administration of the affected subject matter.

The disingenuous assertion suggests that plaintiffs would have Mr. Babbitt roaming Herd Management Areas with a ruler to determine whether there was overgrazing of key forage species. In fact, the BLM had a perfectly simply and effective means of preventing round-up decisions which they wished to take place immediately to avoid the delays occasioned by appeals from aggrieved parties.

For example, the final Antelope Wild Horse Herd Management Area Plan in the Ely BLM District of Nevada was recommended by the District Manager, Kenneth Walker, on October 13, 1992, and the State Director, Billy R. Templeton, on October 14, 1992. It was approved by the Assistant Secretary, Land and Minerals Management, on October 19, 1992, which constituted the final decision of the Department of the Interior, and appeal to the IBLA was thus precluded:

> The Assistant Secretary of the Interior signed the final decision for the herd management area plan and supporting capture/removal plans for the Antelope and Antelope Valley herd management areas on October 19, 1992. As such, there is no right of appeal for this decision within the Department of the Interior.

Letter of 12/1/92 from Billy R. Templeton to Gary L. Francione

(Exhibit 1). Final decisions to remove horses under the Act must be made by the Secretary, or one acting with the full authority of the Secretary, and the full force and effect regulation therefore violates the Act.

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

The full force and effect regulation, as noted in Plaintiffs' Memorandum of Law in Support of its Motion for Summary Judgment, further violates the Wild Free Roaming Horses and Burros Act by creating a bias against wild horses as a matter of law that violates that intent of Congress. More roundups of wild horses 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.[7] The full force and effect regulation makes this scenario more likely rather than less likely. BLM's bias in favor of removing horses violates Congressional concern for a "thriving natural ecological balance on the public lands" expressed in the Act. 16 U.S.C. § 1332(f).

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[7] As defendants' concede in their Reply Brief in Support of Motion for Summary Judgment at 3, Congress required wild horse and burro management to be kept at the "minimal feasible level" pursuant to 16 U.S.C. § 1333(a) to reduce costs, prohibit "zoolike" conditions for the horses and ensure that the remaining horses on the range be left to fend for themselves. S. Rep. No. 242, 92nd Cong., Ist. Sess., June 25, 1971, reprinted in [1971] U.S. Cong. & Ad. News 2151-52.

Examination of the regulations of grazing on public lands demonstrates this bias against horses. 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).[8]

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 a grazing decision may be placed in full force and effect clearly illustrates the BLM's bias in

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[8] "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).

favor of removing horses rather than cattle or sheep 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) (emphasis added).

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), the full force and effect regulation concerning wild horses, 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. 43 C.F.R. § 4160.3(c). 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, 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 Wild Free-Roaming Horses and Burros Act.[9]

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

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[9] 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.

intended by Congress when roundups are permitted so easily. It results in substantially less protection for the wild horses that have received so much public concern. The public interest lies in the protection of wild horses from unjustified and unnecessary removals in the process of rangeland management. For this reason, the public interest would be strongly served by the issuance of a preliminary injunction against further use of the full force powers granted under this regulation. Plaintiffs' application for a preliminary injunction should be granted.

POINT TWO

PLAINTIFFS WILL BE IRREPARABLY HARMED BY THE FURTHER IMPLEMENTATION OF THE FULL FORCE AND EFFECT REGULATION IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

The Secretary of the Interior 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.

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 IBLA had determined that BLM's decision to remove 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 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.[10]

The amended regulation provides that the removal decision

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[10] This regulation is not at issue or challenged in Plaintiffs' Motion for Summary Judgment.

"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) 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 regulatory scheme, 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, effective August 5, 1992, whereby "[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."

Under the regulatory scheme in effect at the time the full force and effect regulation went into effect, such a decision was not a final agency decision, however, because it was not signed by the Secretary or his immediate subordinates, and therefore an aggrieved party was forced to 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 had to 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 described how such a decision may be made final: "the Director or an Appeals Board may provide that a decision or any part of a decision shall be in full force and effect immediately." The decision of the local BLM official, therefore, was not a final agency action that might be reviewed by a court. The comments on the proposed regulation at 57 Fed. Reg. 29,652 (July 2, 1992) discussed this anticipated scenario:

> 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.

The full force and effect regulation, however, 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 correct.

Federal defendants assert that a full force and effect decision made by a local official of the Bureau of Land Management ["BLM"] becomes the final decision of the Secretary and is thus "final agency action" for the purpose of seeking judicial review pursuant to the Administrative Procedure Act. They contend:

> (u)nder the new rule, interested persons wishing to appeal a removal decision that is placed in full force and effect may seek a stay of the agency's decision from the IBLA, until the IBLA can make a ruling on the merits of the appeal. 57 Fed. Reg. 29651, 29652 [Exhibit A]. Also a full force and effect decision becomes the final decision of the Secretary and is considered final agency action for the purpose of seeking judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. See 43 C.F.R. § 4.21(c); Southern Utah Wilderness Alliance, 123 IBLA 13 (1993). Thus, interested persons may seek an injunction in a district court.

Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 18. If a full force and effect decision is thus a final decision by the operation of such rules, it should be made in the first instance by an officer with the power to make final agency decisions, as is explicitly required under the Act.

The comments which follow the publication of 43 C.F.R. § 4770.3(c) clearly demonstrate that the drafters of the full force and effect provision intended full force and effect decisions to be appealed within the administrative agency before being considered

"final." In the comment section the BLM stated: "We agree that the proposed rule would require filing a Petition for Stay of a removal decision [with the IBLA] if the appellant wished to stop a planned removal action prior to the IBLA's final decision on the merits of the appeal....Nonetheless, if a Petition for Stay were denied by the IBLA the appellant could request a judicial review of the BLM's removal action in Federal Court." 57 Fed. Reg. 29652 (July 6, 1992) (emphasis added).

"Agency action is not final if it is only 'the ruling of a subordinate official.'" Franklin v. Marshall, 112 S.Ct. 2767, 2773 (1992) (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967)). In order to be a final agency decision, "the action must represent a terminal, complete resolution of the case before the [agency]." Intercity Transportation Company v. United States, 737 F.2d 103, 106 (D.C. Cir. 1984) (citation omitted). Also relevant is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." American Dairy of Evansville v. Bergland, 627 F.2d 1252, 1260 (D.C. Cir. 1980). Since the decisions rendered by local, lower-level BLM officials are subject to review by the IBLA, judicial review by a District Court would disrupt the ordinary appeals process.

The decisions to give horse removal plans full force and effect are clearly made by subordinate officials. Moreover, this decision is not a "complete resolution of the case before the

agency" and appeals of these decisions may be pursued following the administrative appeals procedure. ("Appeals and petitions for stay of decisions shall be filed with the IBLA." 43 C.F.R. § 4770.3(c)). Because of this, appeals taken to the District Court will disrupt the administrative decisionmaking process.

Furthermore, in the Federal Register comments on the full force and effect regulation, judicial review was specifically provided for only when the IBLA denies a petition for a stay: "if a Petition for Stay were denied by the IBLA, the appellant could request a judicial review of the BLM's removal action in Federal court." 57 Fed. Reg. 29652 (July 6, 1992). Only then was the full force and effect decision made final for judicial review purposes.

IBLA case law clearly supports the conclusion that decisions made by lower agency officials and not approved by the Secretary or an Assistant Secretary are not final and thus are subject to the jurisdiction of the IBLA. The full force and effect regulation should not be allowed to operate authorize final decision to be made concerning wild horse removals except by the action of the Secretary of the Interior or his immediate subordinates, as required by the Act.

"Where a decision has been made by an Assistant Secretary of the Interior or at his direction, that decision is not subject to review on appeal to [the IBLA] under the procedures prescribed in 43 C.F.R. Part 4 (Department Hearings and Appeals Procedures), and the [IBLA] has no jurisdiction in the matter." Blue Star, 41 IBLA 333, 335 (1979). However, when "it is not the order of the

Assistant Secretary which is the subject of (an) appeal but, rather, the decision of officials of the BLM...this Board (the IBLA) has specific jurisdiction." Justheim Petroleum Co., 67 IBLA 38, 41 (1982).

This is so because only the Office of Hearings and Appeals and the Assistant Secretaries have been delegated the Secretary's authority to render decisions final. 43 C.F.R. § 4.1 makes the Office of Hearings and Appeals, of which the IBLA is a principal component, an

> authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

Furthermore, the IBLA has held that

> the authority which has been delegated to the Office of Hearings and Appeals and to its Director, for the purpose of its specific functions, is the equivalent of that delegated to each of the several Assistant Secretaries, i.e., 'all of the authority of the Secretary.' Accordingly, each has power to act with finality on matters within his or her own province. It follows that it was not contemplated that one officer who commands all of the authority of the Secretary should employ that authority to invade the province of another such officer who is not under his direct supervision. Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be reviewed in the Office of Hearing and Appeals since the full authority of the Secretary has been exercised.

The Moran Corp., 120 IBLA 245 (1991) (emphasis added).

All other administrative decisions and approvals, however, do not carry the authority of the Secretary's approval and thus must be appealed to the IBLA. 43 C.F.R. § 4.410 governs which cases may be appealed to the IBLA. It states:

> (a) Any party to a case who is adversely affected by a decision of an Officer of the Bureau of Land Management or of an administrative law judge shall have the right to appeal to the Board (IBLA), except--
>
> (3) Where a decision has been approved by the Secretary[.]

Thus, all decisions not approved by the Secretary or officials authorized to represent the Secretary must be appealed to the IBLA.

This conclusion is supported by the IBLA's ruling in Marathon Oil Co., 108 IBLA 177 (1989). In that case, an Assistant Secretary approved a decision by the Director of the Minerals Management Service. The IBLA ruled that this approval rendered the decision "final for the Department and [thus] the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision." Id. Consequently, if an division within the Department of the Interior makes a decision which is not approved by the Secretary of an authorized representative, that decision is not final and is subject to the specific jurisdiction of the IBLA.

If the defendants' wish to have the full force and effect decision construed in such a manner that an aggrieved party has immediate access to federal court to seek review of a round-up decision, the language of the regulation, and the intent of its drafters, is rendered nonsensical. Only the Secretary or his direct subordinates possesses the authority to make final decisions not subject to the review of the IBLA. Only these persons, therefore, and certainly not local BLM officials, can make "full force and effect" decisions under the Act, which final agency

decisions are then immediately subject to judicial review.

Moreover, as set out in Charlton Affidavit in support of this Application for a Preliminary Injunction, the BLM in Nevada is placing decisions in full force and effect following a chronology that effectively denies an aggrieved party the opportunity to seek review of any kind, whether before an administrative body or before a federal court, at a point where the wild horses would remain on the range. The wild horse specialists and other BLM personnel are notified of the round-up decision and date so that they may be present in the field during the operation. The contractor is notified of the decision and date so that the helicopter and other round-up equipment and the contractors' team can be present at the site.

These activities take place after the District Manager makes what James Elliot, District Manager of the Carson City District of the BLM in Nevada, characterized to Anna Charlton as a "decision to make a decision." Charlton Aff.1 at ¶ 25. The only interested party not informed of the impending round-up when this "decision to make a decision" has been made, is the aggrieved party who would wish to seek a stay or injunction against the round-up, but who must await notification of the final decision which is made as late as the day on which the round-up operation is commenced. Aggrieved parties are thereby deliberately enmeshed in a procedural limbo, unaware of when an appealable decision is made, and denied thereby any possibility of a remedy that would protect the horses.

The BLM District BLM offices proffered no management concern

that would justify this extreme "brinksmanship." Charlton Aff.at ¶¶ 22-23. By deliberately delaying the final decision to authorize the round-up and notify interested parties by regular mail, until the contractor is prepared to conduct the capture, BLM officials have ensured that their decisions to remove horses are immune to challenge.

The Charlton affidavit describes several instances in which the BLM delayed making the official decision to conduct a round-up, although the information that it asserted justified the removal of wild horses from public lands that had been in its possession for a period of several months. The decisions were delayed until the contractor had been notified and made preparations for the commencement of the removal, and BLM representatives had been dispatched to the round-up sites. The threat of repetition of such situations following the chronology proposed in the BLM Memorandum, attached as Exhibit 2, constitutes an immediate threat of immediate harm against which plaintiffs seek this injunction.

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.

Such practices foreclose the possibility that an aggrieved party can seek effective review in any forum of a decision to round-up horses. This is a grant of power to the BLM that has no statutory authority, and which directly contravenes the public policy of protecting wild horses and is devastating and sometimes deadly for the wild horses. There is no effective challenge to the BLM's round-up decisions before the animals undergo the trauma of being rounded up by helicopter and transported to the adoption facility, and before BLM undertakes the expense of a wild horse roundup.

In such a situation, BLM conducts a wild horse round-up; it is subsequently determined that the horses 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. 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 an appeal is pursued, the 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. Some horses have dies while being transported to adoption sites.[11] 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

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[11] Four wild horses died from stress-induced salmonella as a result of being transported to New Jersey for a planned adoption day on August 11, 1993. The adoption was canceled and the animals trucked on another harrowing journey to Tennessee. This event caused BLM to suspend adoptions in 31 states pending investigation of such stress. BLM is now apparently satisfied that this event, which followed similar deaths in Ithaca, New York, this Spring, will not be repeated and has resumed the practice of trucking wild horses across country.

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.

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 (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. This concern 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 the concern that wild horses not be individually harassed or harmed that is explicit in the language of the Act and central to its intent. The full force and effect jeopardizes the protections afforded to wild horses under the Act, and plaintiffs request that its further implementation be enjoined.

POINT THREE

DEFENDANTS WILL NOT BE HARMED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION

In contrast to the real threat of continued danger, harassment, danger and death of wild horses by the further

implementation of the full force and effect regulation, defendants cannot show that they will be injured in any way by the issuance of a preliminary injunction.

In the comments on the proposed regulation, it was alleged that the delay of the IBLA in rendering a decision on appeal of a challenged round-up interfered with effective management of wild horses. 57 Fed. Reg. at 29,651-3. 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, and so defendants can in no way be harmed by the issuance of the preliminary injunction requested by plaintiffs.

POINT FOUR

THE PUBLIC INTEREST FAVORS THE ISSUANCE OF AN INJUNCTION

The Wild Free Roaming Horses and Burros Act was passed in 1971 after great public outcry at the killing and harassment of wild horses on public lands. The Congressional findings and declaration of policy which constitute the preamble to this legislation state:

> Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and

> pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses are fast disappearing from the American scene. It is the policy if Congress that wild free-roaming horses and burros shall be protected from capture, branding harassment and death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

16 U.S.C. § 1331.

Indeed, Congressional commitment to the protection of these horses has remained so strong that Congress has refused to appropriate any funds for the destruction of healthy, but unadoptable wild horses. See supra n.3. This commitment to the protection and preservation of herds of wild horses is subverted by the full force and regulation which makes the improper and unauthorized removal of wild horses much more likely. It is in the articulated public interest that these horses be preserved, in a wild and free state, on public lands. The full force and effect regulation effectively silences those who advocate for their protection and unnecessarily jeopardizes the continued freedom of wild horses.

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.

Because BLM's implementation of this regulation presents an immediate threat of grave and irreparable harm to plaintiffs, it is respectfully requested that plaintiffs' application for a preliminary injunction be granted. Plaintiffs also request that their the motion for summary judgment in their favor and against the defendants on plaintiffs' first and second claims for relief should, in all respects, be granted and defendants' cross-motion for summary judgment should be denied.

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: October 11, 1993

Respectfully Submitted,

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4700 (NV-960)

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Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

DEC 1 1992

Dear Mr. Francione:

This letter is to inform you that we are in receipt of your Notice of Appeal dated November 16, 1992.

Your letter refers to a gather and/or round-up of approximately 250 wild horses and/or burros in the Ely and Elko Districts in Nevada, commencing in late November or early December of 1992. The only capture operations which will occur in these districts during the time periods you mention are in the Antelope herd management area and Antelope Valley herd management area.

The Assistant Secretary of the Interior signed the final decision for the herd management area plan and supporting capture/removal plans for the Antelope and Antelope Valley herd management areas on October 19, 1992. As such, there is no right of appeal for this decision within the Department of the Interior.

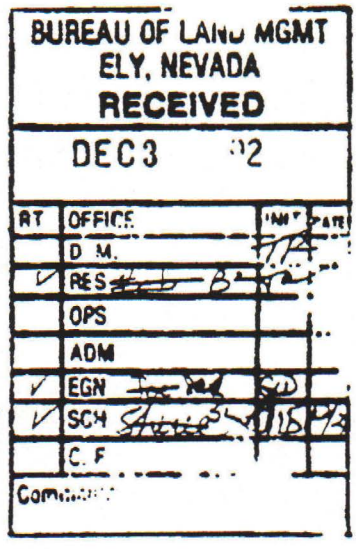
Questions concerning appeal procedures may be directed to:

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

Sincerely,

/s/ BILLY R. TEMPLETON

Billy R. Templeton
State Director, Nevada



cc: NV-010
NV-040
IBLA w/Antelope/Antelope Valley HMAPs
TPogacnik:jan:11/23/92:iblablak

Memorandum
Exhibit 1

FY 1993			
02	Checkerboard	600/500	6/17-7/09
04	Butte	215/150	7/12-7/21
05	Gold Butte	100/100B	7/26-7/31
03	Garfield Flat (research)	150/0	7/26-8/02
03	Clan Alpine Desatoya Flanigan Dogskin Mtn Granite Peak	600/280	8/01-8/21
04[1]	Wilson Ck/Dry Lake	408/335	8/22-8/31
05	Nellis Air Force Range	2,000/1,000	9/1-9/30
FY 1994 05	Caliente Fire emergency	120/100	10/1 - 10/8
01	Spruce Pequop	150/135	10/01-10/08
01	~~Maverick/Medicine~~ Goshute ~~Cherry Spring (FS)~~	~~800/475~~ 200/100	10/10-10/24
06	Callaghan	368/323	10/30-11/15
06	Reveille Hot Creek Sand Springs	378/310	11/15-11/30
05	Spring Mtn (FS)	460/370	12/1-12/10
02	Little Owyhee	750/425	12/10-12/25
02	Calico Mtn Warm Springs Canyon Black Rock Range (East & West)	3,500/2,000	12/25-2/28
Total	FY 1993 FY 1994	4,073/2,365 6,406/4,038	

Attachment 1-1

[1] Dependent on IBLA ruling

Memorandum
Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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, Plaintiffs, v. **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, Defendants.	Civil Action No. 93-276RCL Judge R.C. Lamberth

AFFIDAVIT OF ANNA CHARLTON IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

ANNA CHARLTON, being solemnly sworn, deposes and says:

1. I am an attorney and co-director of the Animal Rights Law Clinic at Rutgers Law School in Newark, New Jersey. I am a graduate of the University of Pennsylvania Law School and a member in good standing of the bar of the State of New York. I am fully

familiar with all the facts and circumstances set forth herein. I make this affidavit in support of Plaintiffs' Motion for a Preliminary Injunction.

2. As stated in my Affidavit in Support of Plaintiffs' Motion for Summary Judgment, sworn to on August 6, 1993, I have studied intensively, since October, 1992, the Bureau of Land Management's ["BLM"] programs to manage wild horses on the public lands in Nevada. I have read every Herd Management Area Plan circulated to interested parties for public comment by the Bureau of Land Management's Nevada District Offices during that time. I have studied every plan to capture wild horses and the associated environmental assessments.

3. As the result of my review of materials circulated by the BLM, and extensive conversations with individuals familiar with the situation of the wild horses in Nevada, I have become convinced that BLM is improperly concluding that there are "excesses" of horses in many Herd Management Areas that must be removed from public lands in order to achieve and maintain a thriving natural ecological balance on public lands in that state.

4. Because I have concluded that the Nevada offices of the BLM have improperly concluded that the alleged existence of an "excess" of wild horses gives them the authority and obligation to remove wild horses, I have been particularly concerned that the "full force and effect" regulation, 43 C.F.R. § 4770.3 (c) permits the immediate removal of wild horses pursuant to the authorization of lower-level officials of the Bureau of Land Management, a power

reserved to the Secretary of the Interior or his immediate subordinates. This regulation violates the Administrative Procedure Act, §§ 553 and 702, because it is in excess of and contrary to the authority granted by Congress relating to the management of wild horses.

5. The full force and effect regulation is being implemented by the BLM to deprive parties aggrieved by a decision to immediately remove wild horses of any meaningful remedy in either the administrative process or federal court.

6. I have recently read two documents that indicate that the BLM intends to use the full force and effect regulation in the immediate future in order to deprive aggrieved parties of their right to appeal BLM decisions to remove horses from public lands.

7. First, a copy of a decision of the Jack Kelly, BLM Area Manager of the Landen District in Wyoming was provided to me on October 7, 1993. [Exhibit A attached]. It purports to place into full force and effect a decision to remove wild horses from several herd management areas that was made on February 25, 1993, but not put into full force and effect at the time of the initial decision. The Animal Protection Institute, which had submitted comments opposing the removal proposal, was aggrieved by the decision to conduct the round-up and filed an appeal with the Interior Board of Land Appeals. This decision is pending, and is under the jurisdiction of the IBLA.

8. The BLM Area Manager of the Landen District incorrectly interprets a decision of the IBLA, Michael Blake et al. (127 IBLA

109) [Exhibit B attached], a case brought by the plaintiffs in the instant action before this Court, as giving the ability to place a decision -- that was not initially issued pursuant to the full force and effect regulation -- into full force and effect even though the appeal remains under the jurisdiction of the IBLA. This is a misinterpretation of the IBLA case and the pertinent regulations. Michael Blake concerns only the situation where an Area Manager places his initial removal decision in full force and effect, not the situation where the appeal of such a decision is pending before the IBLA.

9. Plaintiffs are not a party the appeal of the decision in Wyoming. However, the fact that the BLM has interpreted the regulation to allow such activity presents a serious threat of irreparable harm to plaintiffs. A Nevada Area Manager may take a similar unauthorized step in a case where plaintiffs' appeal of Nevada wild horse removal decision is pending before the IBLA. For example, plaintiffs have appealed the wild horse removal plan in the Callaghan Herd Management Area. The appeal is pending before the IBLA. The BLM round-up schedule lists the Callaghan gather for October 10 to October 24, 1993. In light of this reckless and unauthorized action on the part of the BLM in Wyoming, plaintiffs are very concerned that the Nevada BLM district offices would effect immediate removals pursuant to an illegal full force and effect decisions in instances where appeals are pending before the IBLA. It is important, therefore, that this Court issue a preliminary injunction preventing the further implementation of the

regulation until a decision is rendered on plaintiffs' motion for summary judgment.

10. Second, a tentative schedule of wild horse round-ups provided by the Nevada State Office of the BLM lists planned dates for removals this Fall [Exhibit C attached]. In October and November, the schedule evidences plans to remove a total of 733 horses from several Herd Management Areas. Plaintiffs object to all of these round-ups, and have filed appeals of the removal decisions which are pending before the IBLA. BLM's intention to remove horses from these HMA's by full force and effect decisions presents an immediate threat of irreparable harm to plaintiffs against which this Court should issue a preliminary injunction.

11. Plaintiffs' representative requested to be included as an interested party on the distribution lists of all Nevada BLM district offices. Since October 1992, plaintiffs' have received and commented on many round-up proposals from the district offices. Plaintiffs learned recently, however, that they had not been sent round-up decisions for the Little Owyhee, Spruce Pequop, or Goshute Herd Management Areas in Nevada. BLM has not offered any explanation for "dropping" plaintiffs from their interested party list and thereby effectively precluding them from challenging these wild horse removals. This conduct is particularly outrageous because plaintiffs have actively participated in many decisions this year, and are known to the district managers to have a keen interest in wild horse management.

12. On or about September 17, 1993, I called Kathy McInistry,

wild horse specialist in the Elko District Office of the BLM and told her that I had not received the Goshute capture plan. On September 23, 1993, she mailed a copy to me at Rutgers Law School. Plaintiffs will submit comments opposing this capture plan. Comments are due on October 15, 1993. As the Goshute gather is tentatively scheduled for October on the BLM memorandum, it is likely that the decision will be placed in full force and effect.

13. As I noted in my affidavit of August 6, 1993, the process by which BLM places wild horse removals into full force and effect will deny plaintiffs any effective appeal of such a decision.

14. For example, on January 6, 1993, the BLM distributed to interested parties a notice of a proposed round-up of horses in the Buffalo Hills and Granite Range Herd Management Area in the Winnemucca District.

15. On Wednesday, February 3, 1993, I telephoned Bud Cribley, the BLM 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. He stated that the decision would be placed into full force and effect at the time that it was signed.

16. 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 me that the removal of horses began on February 9, 1993.

17. The final removal decision was mailed to interested parties. The copy mailed to plaintiffs' representative was postmarked February 9, 1993. 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. As the contractor had already been given notice of the time that the removal would take place, and sufficient time after that notification to make preparations for the round-up, it is clear that the official date of the authorization of the round-up plan, after which notification is sent by ordinary mail to aggrieved interested parties, is not the true date on which the decision to proceed with a round up is effectively made.

18. Defendants admitted in their answer that the decision to remove horses from this Herd Management Area had proceeded according to this chronology. (Defendant's Answer ¶¶ 24-27). Because the removal had already been completed at the time that the plaintiffs, as aggrieved parties, learned of the decision to remove the horses, the plaintiffs were denied the opportunity to seek to appeal this decision, whether in the administrative context or in federal court, because the horses had already been removed, and the capture plan approved by the District Manager had already been concluded.

19. On April 8, 1993, plaintiffs filed this action before

this Court, seeking a Declaratory Judgment that the full force and effect regulation was an ultra vires grant of power to the local BLM officials that should have been limited to the Secretary or those acting with the full powers of the Secretary, and an injunction against the further use of that provision. On July 26, 1993, plaintiffs and defendants served cross-motions for summary judgment in this case.

20. On Thursday, August 5, 1993, two final wild horse capture plans were received at my office at Rutgers Law School. Both were approved by James Elliot, the District Manager of the Carson City District office of the BLM in Nevada. Both were postmarked on July 30, 1993, although the enclosed letters addressed to Professor Gary Francione of Rutgers Law School both bore the BLM date stamp of August 2, 1993.

21. The first of these two final capture plans concerned the Clan Alpine Herd Management Area in the Carson City District. The draft of this plan was circulated to interested parties in December, 1992. Gary Francione, representing the plaintiffs in the instant action, submitted comments opposing this round-up in January 1993. The Carson City District did not approve the round-up plan until over six months later, when James Elliot signed his approval on July 27, 1993. He did not inform Gary Francione, as plaintiffs' representative, until August 2, by ordinary mail.

22. On August 5, 1993, I called the Carson City BLM office. None of the wild horse specialists could answer my questions as they were all in the field. Concerned that the round-up was

already taking place, I spoke to Karl Kipping, the Associate District Manager, to inquire whether some emergency had arisen that prompted the decision to place the round-up decision in full force and effect, as BLM had taken no action on the plan during the previous six months. Mr. Kipping stated that the round-up was not necessitated by any sudden emergency, but was placed in full force and effect as part of normal range management efforts.

23. Because I believed that the use of the full force and effect regulation to carry out normal management activities did not comply with the guidelines of the BLM "Policy for Placing Wild Horse and Burro Removal Decisions in Full Force and Effect: Instruction Memorandum" [Defendant's Memorandum in Support of Motion for Summary Judgment: Exhibit C], I telephoned James Elliot on August 5, 1993. I asked Mr. Elliot if we could now expect the full force and effect power to be invoked to implement normal management plans. He indicated that the full force and effect power would not be reserved for emergency situations.

24. I stated that I was concerned that the practice of making arrangements for the contractor to be present at the round-up site before the final plan was approved or aggrieved parties were notified, effectively denied aggrieved parties any opportunity to seek administrative review of the round-up decision, or even an injunction in federal court.

25. Mr. Elliot stated that he could not comment on the appeals process because he was not a lawyer, but stated that there were essentially two decisions to be made: the "decision to make

a decision," as he characterized it, and the final signed decision of the District Manager. I stated that an aggrieved party could not appeal a "decision to make a decision" and asked at what time the contractor was informed that the round-up would take place. Mr. Elliot stated that a message that the round-up would take place was faxed to the contractor at some time before Mr. Elliot signed his approval of the round-up plan. As happened in the Buffalo Hills and Granite Range round-up in February, the helicopters were ready to go in execution of the round-up decision before the final round-up decision was made.

26. A very similar procedure was followed with respect to the second final capture plan received in my office on August 5, 1993. The Desatoya Herd Management Area Plan and Capture Plan was circulated in December 1992. Plaintiffs' representative, Gary Francione, submitted comments opposing the draft plan in January 1993. Mr. Elliot did not give his approval to the final plan until July 27, 1993, at which time his decision was placed in full force and effect. Plaintiffs, as parties aggrieved by this decision, were not notified until Mr. Elliot's letter of August 2, 1993, at which time the contractor had begun the round-up from the Clan Alpine and Desatoya Herd Management Areas.

27. Mr. Elliot also stated that a herd management decision would be placed in full force and effect on the following week in Flannigan Herd Management Area and that it would be implemented around the middle of this week. Plaintiffs have received no notification of this decision.

28. These chronologies, to which I was a witness, indicate that the decision of the lower level officials of the BLM are essentially immune from effective review in any forum, because they are being put into effect before any person with standing to challenge them is notified that the decisions have been made. These practices therefore underscore the importance that such decisions, that are final for the horses rounded up pursuant to such decision, and final because they effectively evade review in the administrative process or in the federal courts, must be made by a person having the full authority of the Secretary of the Interior to make final decisions for the agency.

29. The gather in the Goshute HMA in the Elko District will remove 100 horses between October 10-24, 1993. In the Callaghan HMA in the Battle Mountain District, three hundred and twenty three horses are scheduled for removal. These removals would cause irreparable harm to plaintiffs.

30. Contrary to defendants' assertion (Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 14), this would not involve the Secretary in the minutiae of daily administration of the wild horse Herd Management Areas, but would reserve the need for his attention to matters where there was a true emergency on the range.

31. If the final decision to remove horses from the Clan Alpine and Desatoya Herd Management Areas, which had not been substantially modified from the draft proposals circulated over seven months before, could wait for such a long period before

implementation, there is no need for the use of the full force and effect powers of the Secretary or any lower official. If BLM management practices were more efficient and more responsive to range conditions, the Secretary's authorization of immediate removals would be reserved for very few instances where the BLM wished to react to an emergent, unforseen situation. The use of the full force and effect regulation to prevent interested parties from challenging ordinary management practices is in contravention of the letter and spirit of the Wild and Free-Roaming Horse and Burros Act.

32. As an academic intensely interested and involved in the question of wild horse management on public lands in Nevada, I have witnessed the use of the full force and effect regulation by local officials in a manner that prevents review of such decisions. I urge the Court to grant plaintiffs' motion for Summary Judgment and deny Defendants' motion for summary judgment.

Dated: Newark, New Jersey
October 8, 1993

Anna E. Charlton

Sworn to before me this
8th day of October, 1993

Lewis H. Kerman
Lewis Kerman
Notary Public

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Lander Resource Area
P.O. Box 589
Lander, Wyoming 82520-0589

[redacted]

Notice of Final Decision
To Remove Excess
Wild Horses From The
Lander Herd Management Areas

This decision places into full force and effect portions of the February 25, 1993 Decision Record issued by the Bureau of Land Management's Lander Resource Area on Environmental Assessments WY-036-EA3-010 and WY-036-EA3-013 dealing with removal of excess wild horses from the Green Mountain, Muskrat Basin, Dishpan Butte, Rock Creek Mountain, and Conant Creek Herd Areas in accordance with the Lander Wild Horse Capture Plan.

Implementation of the February 25, 1993 Decision Record began July 13, 1993 and continued through August 20, 1993 with removal of 359 excess wild horses from the Green Mountain Herd Area. Implementation was initiated based on the authorized officer's interpretation that the decision would become effective after the time during which an adversely affected person could file a notice of appeal unless a petition for a stay was also filed. The interpretation was based on our understanding of the revised regulations at 43 CFR 4.21(a) issued on January 19, 1993. No petition for stay was filed in the Animal Protection Institute's April 5, 1993 appeal (IBLA 93-308) of the Bureau's February 25, 1993 Decision Record.

However, the August 12, 1993 decision of the Interior Board of Land Appeals, Michael Blake et. al. (127 IBLA 109) states that the provisions of 43 CFR 4.21(a) govern the effect of a decision pending appeal except as otherwise provided by law or pertinent regulation. Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a). Accordingly, I am at this time, placing the February 25, 1993 Decision of the Lander Resource Area in full force and effect in accordance with 43 CFR 4770.3(c) to complete the removal of excess wild horses within the 5 herd areas. This removal is necessary to ensure that a thriving natural ecological balance is maintained within the 5 herd areas.

This decision is subject to appeal. If you wish to appeal this decision, as provided by 43 CFR 4.4, you must file your appeal in writing within 30 days from the date this decision is served, with the District Manager, Rawlins District Office, P.O. Box 670, Rawlins, Wyoming 82301. This appeal shall state clearly and concisely why you think the decision is in error.

Jack Kelly
AREA MANAGER, LANDER RESOURCE AREA

Sept. 27, 1993
DATE

307-332-7822

Charlton Aff.
Exhibit 2

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO

JUN 30 1993

IBLA 93-352	:	N6-93-07
	:	
MICHAEL BLAKE, ET AL.	:	Wild Horses and Burros
	:	
	:	Motion to Dismiss Denied;
	:	Request for Stay Denied as Moot;
	:	Request for Expedited Review Denied;
	:	Request for Hearing Taken under Advisement

ORDER

By Notice of Appeal dated February 27, 1993, Michael Blake, Tim Wilson, and the Public Land Resource Council (PLRC) appealed "the final decision of officers and agents of the Bureau of Land Management [BLM] and/or other named defendants, rendered on or about January 22, 1993, to gather and/or roundup approximately 197 wild horses from the Callaghan Herd Use Area in the Battle Mountain District in Nevada." The final decision referred to relates to the Callaghan Herd Use Area Wild Horse Removal Plan (Callaghan Removal Plan) which outlines procedures to be used in removing wild horses which have established permanent occupancy outside the boundaries of the Callaghan Herd Use Area. Appellants also state that they appeal "the Environmental Assessment [EA] and Finding of No Significant Impact [FONSI], made on October 26, 1992, and authorized for implementation on January 22, 1993." In their notice of appeal, appellants request a stay of the gather activity as well as request a hearing in this matter.

On March 30, 1993, appellants filed with this Board their statement of reasons (SOR) for appeal, and included therein a request for expedited review of the appeal and a request for stay of BLM's action. In their SOR, appellants assert that the gather plan regarding the Callaghan herd was distributed to interested parties for comment on October 30, 1992; that on November 26, 1992, appellants submitted comments on the proposed gather plan to the Battle Mountain District Office; that on January 22, 1993, the Battle Mountain District Manager approved the gather plan, which was distributed to interested parties on January 27, 1993.

The administrative record transmitted by BLM to the Board includes a memorandum from the Battle Mountain District Manager to the Nevada State Director providing a chronological narrative of the preparation of the Callaghan Removal Plan. His recitation of the chronology is consistent with appellants' assertions regarding their participation in the preparation of the plan. The memorandum from the Battle Mountain District Manager further

Charlton Aff.
Exhibit B

includes a motion that this appeal be dismissed because no appellant is "a party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management" as required by 43 CFR 4.410(a). In support of this argument, the District Manager states that while a draft copy of the gathering plan was sent out for public comment on October 30, 1992, it was not sent to appellants "because they were not on [BLM's] mailing list and have never requested to be included in matters pertaining to the management of wild horses in the Battle Mountain District," and that appellants "have not been involved in the decision making process."

We deny BLM's motion to dismiss this appeal. Appellants submitted comments on the draft gathering plan on November 30, 1992, well before the final gathering plan was approved on January 27, 1993. BLM was placed on notice at that time that appellants wished to be involved in the decision-making process and to have their comments considered by BLM in reaching a final decision. We conclude that appellants have satisfied the requirement of being a party to a case because the record shows that they actively participated in BLM's decisionmaking process prior to final approval of the EA and FONSI.

Review of the administrative record indicates that the authorized officer of BLM did not place in full force and effect the decision to remove horses outside the boundaries of the Callaghan Herd Area. See 43 CFR 4770.3(c). Accordingly, the timely filing of a notice of appeal from that decision invoked the automatic stay provisions of the former 43 CFR 4.21(a), which provided that "a 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." 1/ The former 43 CFR 4.21(a) further provides that "when the public interest requires, the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately." Inasmuch as the Battle Mountain District Manager did not place the Callaghan Removal Plan into immediate force and effect, and there has been no subsequent request that this Board place the decision into immediate force and effect, the removal action contemplated in the plan is already subject to the automatic stay provisions of former 43 CFR 4.21(a) pending our review of this appeal. Accordingly, the request for stay is denied as moot.

1/ Under the amended version of 43 CFR 4.21, which became effective on Feb. 19, 1993, the filing of a notice of appeal does not automatically suspend the effect of the decision appealed from pending resolution of the appeal. 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. See 58 FR 4939 (Jan. 19, 1993). The Battle Mountain District Manager's decision which is the subject of this appeal was issued on Jan. 27, 1993, prior to the effective date of the amended regulation. Accordingly, appellants were not required to request a stay of the decision to approve the Callaghan gather plan.

Given that the District Manager did not place the Callaghan Removal Plan into immediate force and effect, we surmise under 43 CFR 4770.3(c) that immediate removal is not required by applicable law or to preserve or maintain a thriving ecological balance and multiple-use relationship. Accordingly, we deny appellants' request for expedited review of this appeal.

Under 43 CFR 4.415, the Board has the discretion to refer this case to an Administrative Law Judge for a hearing on an issue of fact. Our preliminary review of the record does not disclose an issue of fact which would require a hearing. Because it is sometimes the situation that an appeal involves an issue of fact which is not apparent upon initial review of the record, we deem it appropriate to take appellants' request for a hearing under advisement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss this appeal is denied; appellants' request for stay is denied as moot; their request for expedited review is denied; and their request for a hearing is taken under advisement.

Gail M. Frazier
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

APPEARANCES:

Gary L. Francione
Professor of Law
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

cc: Tom Pogacnik
Bureau of Land Management
Nevada State Office
850 Harvard Way
P.O. Box 12000
Reno, Nevada 89520-0006

DISTRICT	HMA NAME	CAPTURE/REMOVE	STERILIZE	
FY 1993				
02	Checkerboard	600/500		6/17-7/09
04	Butte	215/150		7/12-7/21
05	Gold Butte	100/100B		7/26-7/31
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03	Clan Alpine Desatoya Flanigan Dogskin Mtn Granite Peak	600/280		8/01-8/21
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05	Nellis Air Force Range	2,000/1,000		9/1-9/30
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01	~~Maverick/Medicine~~ Goshute ~~Cherry Spring (FS)~~	~~800/475~~ 200/100		10/10-10/24
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Total	FY 1993 FY 1994	4,073/2,365 6,406/4,038		

Attachment 1-1

[1] Dependent on IBLA ruling

Charlton Aff. Exhibit C