ANIMAL PROTECTION INSTITUTE OF AMERICA

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December 21, 1988

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

IBLA Nos: 88-591, 88-638, 88-648,88679, 89-33

RESPONSE TO FULL FORCE & EFFECT
Request for Denial & Arguments by API

Dear Sirs:

This is in response to BLM's Motion for Full Force and Effect. API argues for denial of the motion and requests IBLA proceed with its consideration of the four points which API has raised for a judicial ruling.

In support of its Motion for Full Force and Effect, BLM has submitted an affidavit quoting the Nevada State Director of BLM, Mr. Ed Spang, a Position Paper, and the Saare Report that assesses the range conditions.

We ask IBLA to refer to API's letter of December 8, 1988 in which we comment on the Saare report and offer arguments on behalf of our request that IBLA rule on four points plus a request that HMAPs be ordered.

The following is our response to Mr. Spang's statement and the Position Paper which we wish to add to our total arguments.

WITH REGARD TO MR. SPANG'S TESTIMONY

With regard to the testimony submitted by Mr. Spang, whose professional judgment we respect, API cannot agree that the range data submitted supports his request for Full Force and Effect in every instance.

It is API's experience in dealing with Nevada BLM that an overall attitude exists which we see as Mr. Spang's basic policy for Nevada. It is that policy requries decisions be based on quantifiable data. The Instructional Memo attached to the Affidavit lists certain exceptions to that basic policy when fixing a number to be used as a starting point to begin monitoring in order to determine the proper number of wild horses to be managed in a Herd Management Area.

API interprets that memo and policy as saying:

> When range studies or other quantifiable data identify a need to begin monitoring with a specific number and those studies show that only by reducing wild horse population numbers will a specific resource problem be corrected then that specified number can be used as an appropriate management level. Or, if CRMP or Management Plans (HMAPs) dictate a number agreed upon as AML that number can be used. Otherwise the current population is to be used as a starting point number to begin monitoring in order to determine AML.

In its original appeals, API argued for the supporting range data that demonstrates the need to reduce current numbers and which specify the resource problem the reduction addresses.

BLM argued in Dahl v. Clark that they cannot remove horses unless damage exists:

> "Defendants (BLM) argue that the laws require them to remove wild horses only if actual ongoing substantial damage to the range is occuring because of an excess number of wild horses using it."
>
> "Defendants now also contend that there is no evidentiary or factual basis to remove any of the wild horses on the three allotments because the range is in adequate condition to support the present numbers of livestock and wild horses using it and there is no substantial ongoing resource damage."

BLM has now chosen to submit the Saare Assessment Report, rather than Nevada BLM's own data, to support the full force and effect motion. API's letter of December 8 clearly indicates that the Saare Report

supports only one of eight removals. The ninth area assessed in the Saare Report is Buffalo Hills. API asked that this area be dealt with separately because of extenuating circumstances. One of those circumstances is the contradiction between the Saare assessment of the Buffalo Hills HMA and BLM's own range data. On clarification of this contradiction, it is suggested that the Saare team of range inspectors assessed a portion of the Buffalo Hills grazing allotment that lies east of the Granite Mountains which is actually the Calico Mt. HMA whereas the HMA in question (named Buffalo Hills) lies west of the mountains. API did not appeal the Calico Mt. HMA roundup. Mr. Spang's testimony might be applicable to the conditions supporting the Calico Mt. removal plan. API suggests that his testimony is only applicable to Desatoya in the present instance because the data submitted supports the removal decision.

The outside consultants' range assessment, which BLM chose to submit in support of its motion, lists only the Desatoya HMA as having a range condition that would support a decision to remove horses. Only the data submitted for Desotoya suggest that a removal is consistent with the purpose of removal as stated in Dahl v. Clark (e.g., to achieve a thriving ecological balance of the natural system) and confirmed by API v Hodel, which states:

> "It was clearly congressional intent that the 'ecological balance' be achieved in such a way that the wild horses and burros are protected from commerical exploitation and slaughter. Congress perceived a need for the humane removal of some animals from the public lands <u>in order to achieve and maintain a 'thriving natural ecological balance on the public lands.</u>"

The Congressional intent for a removal, twice confirmed in court, is NOT to reduce to a number set in the land use plans. This particular justification was introduced by BLM policymakers in Washington in the December 1984 rulemaking action. (See API's Dec. 8 letter an attachments.) When the rulemaking was finalized in March 1986, that justification was eliminated. But not before some 30,000 horses had been removed using it.

This same December 1984 rulemaking action created the bogus adoption scheme purposely to circumvent the law

that is the subject of the API v Hodel ruling quoted above. A ruling that required a Contempt of Court Order to force BLM to comply.

API believes Mr. Spang's arguments for the full force and effect can be applied only to the Desotoya removal plan.

WITH REGARD TO THE POSITION PAPER

API wishes to note that we do not argue with the range data generated by BLM professionals in the field. We respect the expertise of these professional range conservationists and specialists. We believe they are highly qualified, trained, and experienced and that their judgments--supported by data--do serve as the nation range experts. What we demand of them, what we believe the law demands of them, what their own Nevada State policy demands of them--and that is that their data show horses cause the damage when a removal is proposed. We demand that the justification of the removal be a remedial action to achieve a thriving ecological balance of the natural system. We argue over and over that it makes no sense to remove horses when the data show that uneven distribution of cattle causes the damage. Our position on that is supported by Dahl v. Clark and it is supported by Mr. Spang's policy statement and memo.

It is not supported by the order out of the Washington BLM that says Nevada shall have 10,000 wild horses by hook or by crook (See API's Dec. 8 letter). It is not supported by an arbitrary declaration that the number listed in the Resource Management Plans or the MFP-III as the 1982 or 1983 or perhaps the 1981 population is an appropriate management level or that that number serves as the legal justification for reducing current populations.

The Paper states that API contends BLM is obligated to demonstrate that a biological or resource related problem exists before wild horse populations can be adjusted to a proper management level. API contends that the law, the courts and BLM's own policy stated in the instruction memo require that removal of horses be based on range data which shows horses cause or substantially contribute to damage.

The Paper suggests that the appropriate management level for horses is socio-political as well as biological and resource related. In fact, the National Academy of

Sciences explored the socio-political and economic component of determining when there is an excess of horses. Congress considered their study and chose to

define excess specifically and put it in the statute. BLM policymakers disagree with that statutory definition, they attempted to change it in the December 1984 rulemaking. Mr. Spang's Instructional memo attached to the Affidavit explains when land use decisions based on CRMP committee or special agreements or court orders dictate management numbers.
The Paper fails to specify exactly what congressional mandate they refer to, exactly what section of the law they imply is applicable, exactly what "new legal mandates result from contemporary litigation."

On page 3, the Paper says

> "In addition, the Wild Horse and Burro Act directs the Secretary to undertake those studies of the habitats ...necessary to carry out the provisions of the Act. These studies include the monitoring studies currently being conducted by BLM."
>
> API does not refute that statement.
>
> "Maintaining the population of large herbivores at a relatively constant level and concurrently monitoring the effects of the number of herbivores on the ecology is an accepted management practice and has been affirmed in both NRDC v. Hodel and Dahl v. Clark."
>
> API does not refute the statement although we might ask that it be clarified as to its meaning, relevance and significance in meeting the statutory requirements for wild horse management.

The next sentence, which runs on for eight lines, API interprets (sans the excess words and auxilary clauses and phrases) to mean [this is not a quote]:

> Maintaining wild horse populations at an appropriate management level is particularly critical when viewed in relation to the components that are the basis of that appropriate management level due to the fact that maintaining a specific number is important if that number needs to be changed.

That literally makes no sense whatsoever, perhaps IBLA can dicipher a more intelligent meaning from the

sentence.

The Paper goes on to say that

> "This is accepted practice supported by the Saare Report."
>
> API suggests that the discussion section of the Saare Report and this position paper flow from the same pen and the same circuitious logic unsubstantiated by fact, evidence, or law.

On Page 4, the Paper states that the alternative is to allow starvation and disease. API consistently argues for imposing Section 4710.5 of Regulations (Closure to Livestock) as an alternative. We consistently argue for selctive removal that skews the population by age/sex ratios to control the population increase rate. We have never argued for the cessation of removals.

On Page 5, the Paper states

> Its action, appealed by API, is to remove excess animals.
>
> API argues that BLM fails to meet the statutory criteria for determining excess. They are, therefore, not removing excess animals.
>
> BLM fails to meet the Dahl v. Clark and API v Hodel court interpretation for the purpose and justification of a removal.
>
> The removal plans for the appealed roundups fail to meet NEPA requirements that alternative actions be assessed, that the actual action be environmentally assessed. (The definition of excess refers to "in a given area" which further stresses the need for a site specific environmental assessment not covered in the broad assessment of the Resource Management Plan.)
>
> We argue that the numbers listed in the Resource Management Plans are the 1982 population which is the starting point to determine AML and the range data submitted in the Saare Assessment Report does not support a reduction of the current population but rather that in the majority of cases the range
>
> supports the number of horses now there and the current in most cases is an appropriate management

number.

There is no evidence to support the removals, and there is no evidence to support the Motion for Full Force and Effect. We urge the IBLA to deny the Motion and proceed with its rulings on the four points we raise and to order BLM to write Herd Management Area Plans before further roundups are allowed based on the arguments submitted in our December 8 letter.

Sincerely,

Nancy Whitaker
Program Assistant