

and IBLA 88-679. 1/ In addition, API has appealed from a draft plan, dated April 26, 1988, for the removal of approximately 549 excess wild horses from the Buffalo Hills HMA in the Winnemucca BLM district. 2/ This appeal is docketed as IBLA 88-591. By order dated February 16, 1989, we consolidated all four API appeals for decision by the Board. 3/

1/ IBLA 88-638 involves API's appeal from the Associate State Director's June 10, 1988, approval of a final plan for the removal of 127 wild horses from the Miller Flat, Clover Creek, and Clover Mountain HMA's and from outside designated HMA's in the Delamar, Boulder Springs, Pioche, Highland Peak, Crossroads, Barclay, and Simpson grazing allotments, including certain "problem animals" intruding on private property in the Clover Creek and Little Mountain HMA's, and from the Associate State Director's June 10, 1988, approval of a final plan for the removal of 225 wild horses from the Nellis Range Complex, which encompasses the Nevada Wild Horse Range HMA. IBLA 88-648 involves API's appeal from the Associate State Director's July 11, 1988, approval of a final plan for the removal of 690 wild horses from the Desatoya, Diamond, and New Pass/Ravenswood HMA's. IBLA 88-679 involves API's appeal from the State Director's Aug. 8, 1988, approval of a final plan for the removal of 1,045 wild horses from the Maverick-Medicine, Monte Cristo, Buck and Bald, Butte, and Diamond Hills South HMA's, Cherry Springs and Monte Cristo WHT's, and a designated horse-free area. The following contains a listing of the HMA's and WHT's involved herein, along with the appropriate management level (AML), current horse population and the number of wild horses intended to be removed in each case.

<u>HMA/WHT</u>	<u>AML</u>	<u>Current Horse Population</u>	<u>Horses To Be Removed</u>
Buffalo Hills	272	821	549
Monte Cristo	72-120	100	100
Diamond Hills South	36	95	59
Buck and Bald	700	1081	381
Cherry Springs	42-68	100	50
Butte	60	202	142
Maverick-Medicine	195-244	443	248
Desatoya	217	688	318
New Pass/Ravenswood	913	1227	314
Diamond	205	263	58
Miller Flat	50	71	21
Clover Creek	9	26	17
Clover Mountain	55	84	29
Nevada Wild Horse Range	2000	4120	225*

*Removal from the Nevada Wild Horse Range HMA is intended to be a phased removal involving 2,120 wild horses, with 225 wild horses scheduled for removal in the first year.

2/ API's appeal of BLM's draft plan proposing removal of wild horses from the Buffalo Hills HMA was taken in accordance with 43 CFR 1610.5-3(b).

3/ By order dated Nov. 7, 1988, the Board granted the request of the Wild Horse Organized Assistance, Inc. (WHOA) to intervene as a party appellant in the appeal docketed as IBLA 88-591. In our subsequent February 1989 order, we noted that, in view of the consolidation of the four appeals, WHOA would be considered an intervenor in the consolidated appeals.

In our February 1989 order, pursuant to a request by BLM, we also placed the BLM removal actions into full force and effect with respect to the Buffalo Hills, Desatoya, New Pass/Ravenswood, and Buck and Bald HMA's because the record established that removal was "necessary because the four HMA's are either currently experiencing resource damage or there is a significant threat of such resource damage such that immediate removal of wild horses is warranted" (February 1989 Order at 6). With respect to the remaining HMA's involved in API's appeals, BLM had not requested that the BLM removal actions be placed into full force and effect, asserting, nevertheless, that removal is necessary in order to achieve a baseline population for the purposes of study.

Finally, our order granted expedited consideration of API's appeals with respect to all of the HMA's subject to the challenged BLM removal actions because of the potential for new or continuing damage to the public range and the need to decide on a timely and proper administrative response.

API has filed statements of reasons (SOR) for each of its appeals and BLM has filed answers in response thereto. Because the case is now ripe for adjudication, we turn to the merits of the controversy.

Generally, the BLM actions challenged by API would remove wild horses from areas not designated for wild horse management and would return the number of wild horses within HMA/WHT's to the AML's established in land use planning decisions adopted for those areas. All of the BLM removal actions were accompanied by a site-specific or programmatic environmental assessment (EA), which analyzed the environmental consequences of removing wild horses from the public range and a no action alternative.

In its SOR, API requests that we rule that the decisions to remove wild horses are improper because BLM failed to properly determine that there is an excess number of wild horses in each area of the public range, and that removal is necessary in order to restore a thriving natural ecological balance to and prevent a deterioration of the range caused by that excess, in accordance with section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act (the Act), as amended, 16 U.S.C. § 1333(b)(2) (1982), and the district court's ruling in Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984). In addition, API requests that we rule that BLM failed to properly assess the environmental consequences of removing wild horses. Finally, API contends that BLM is required to prepare a herd management area plan (HMAP) prior to the removal of any wild horses from an HMA/WHT.

Section 3(b)(2) of the Act provides the statutory authority for the removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that, where the Secretary of the Interior determines on the basis of information available to him

that an overpopulation exists on 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. Such action shall be taken * * * until all excess animals have been removed so as to restore a

thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1982). "[E]xcess animals" are defined in the statute as wild free-roaming horses and burros "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1982).

As the court stated in Dahl v. Clark, supra at 594, the "benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." In the words of the conference committee which adopted this standard: "The goal of wild horse and burro management * * * should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros." H.R. Conf. Rep. No. 1737, 95th Cong., 2d Sess. 15 (reprinted in 1978 U.S. Code Cong. & Admin. News 4069, 4131). 4/

Using this test, we conclude that, with the exception of the four HMA's with respect to which we placed the BLM removal actions into full force and effect, BLM has not established that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range threatened by an overpopulation of wild horses. We, therefore, affirm the BLM removal actions with respect to these four HMA's and reverse the BLM removal actions with respect to the remaining HMA/WHT's.

For the most part, the challenged BLM removal actions were designed to return the number of wild horses within each HMA/WHT to an AML. The record, as supplemented by API, indicates the genesis of BLM's general method for establishing AML's. In a June 12, 1981, letter to the Governor, State of Nevada, the Secretary stated that, as a result of questions regarding the adequacy of use of a "one-point-in-time vegetation inventory" as a basis for forage allocation decisions in the Caliente Resource Area, the State Director had undertaken an extensive review of the matter. This review had culminated in a decision to take a "modified approach to forage allocation." The Secretary explained:

While the Caliente range survey contains adequate information to assist in establishing a monitoring program, the vegetation production data are inadequate for determining initial stocking levels. Therefore, at the start of the program, livestock and wild horse use may remain at current levels, except where agreements are reached with the livestock operators and/or the wild horse and burro interests. These accepted initial stocking

4/ Departmental regulation 43 CFR 4700.0-6(a) states that wild horses and burros "shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat."

levels will be based upon current data and will not preclude future establishment of intensive grazing systems or other management practices that may be necessary to obtain proper management of the rangeland resources.

If a different level of grazing is required, this will be decided using the results of an intensive monitoring program involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. * * *

If the monitoring studies show a need for additional vegetation information, a vegetation study will be conducted on the allotment or allotments, as appropriate. The results may be used to establish a new stocking level, which will be regularly verified or modified through the results of monitoring studies.

Thereafter, in an effort to provide specific guidance to the various district offices and relying on the concept contained in the Secretary's June 1981 letter, the State Director, in Instructional Memorandum (IM) No. NV-82-305, dated June 8, 1982, set forth the "conditions" governing the number of wild horses to be used in the development and implementation of land use plans. See Affidavit of State Director, dated Dec. 14, 1988, at 1-2. He provided as follows:

a. Where range studies or other quantifiable data have identified a need to begin monitoring studies with a specific number of wild horses or burros and those studies demonstrate that only by reducing the number of wild horses or burros will a specific resource problem be corrected, the specified number of animals may be used.

b. Where the CRMP has recommended an alternative number of wild horses or burros, as documented in the minutes of a CRMP meeting and concurred with the Bureau, the alternative number may be used.

c. Where formal signed agreements between affected interests have been obtained which specify a different number of wild horses or burros from current levels, the specified number may be used.

d. Where previously developed interim capture and management plans and associated EARs presently exist and where actual implementation has started but not been completed, the interim number of wild horses or burros specified in the plan may be used.

e. Where previously developed interim capture/management plans exist, nothing has been done toward implementation and there is reason to believe that support for the plan by affected parties no longer exists, current wild horse or burro numbers will be used unless negotiations can produce a documented acknowledgment supporting the number of animals specified in the plans.

f. Where previously developed interim capture plans exist, nothing has been done toward implementation and there is reason to believe that support for the plan by affected parties still exists, the number of wild horses/burros specified in the plan may be used.

g. Where negotiations are in progress (either CRMP or other processes of negotiation) and there is an opportunity to arrive at an adjusted number of wild horses/burros, the land use decision may acknowledge a range of numbers being considered in the negotiations.

h. If none of the above conditions are applicable in establishing a starting point for monitoring, the current wild horse and burro numbers will be used. [Emphasis in original.]

With several exceptions, viz., in the case of the Nevada Wild Horse Range HMA, Buck and Bald HMA, Monte Cristo HMA/WHT, and Cherry Springs WHT, the AML's upon which the BLM removal actions involved herein are based constitute the "current wild horse * * * numbers" as of either 1981 or 1982, as developed pursuant to BLM's land use planning process. ^{5/} As the Secretary stated in his June 1981 letter, in the absence of agreements with livestock operators and/or wild horse and burro interests, wild horse use may remain at "current levels." API objects to BLM's reliance on these numbers, asserting that they were intended to be only the "starting point

5/ In the case of the Nellis Range Complex, which encompasses the Nevada Wild Horse Range HMA, the District Manager, Las Vegas District, stated that the AML of 2,000 wild horses had been recommended by the Consultation and Coordination (C & C) committee, composed of representatives of interested wildlife organizations, during preparation of an HMAP with respect to that HMA and adopted by BLM upon approval of the HMAP by the State Director on Mar. 18, 1985. The Nevada Wild Horse Range HMAP, at page 2, states simply that the C & C committee had "recommended that 2,000 wild horses be managed initially * * * with future analysis of monitoring studies to be used to determine the appropriate management number."

In the case of the Buck and Bald HMA, Cherry Springs WHT, and Monte Cristo HMA/WHT, the District Manager, Ely District, explained the basis for establishment of AML's in a Sept. 23, 1988, memorandum to the State Director. With respect to the Buck and Bald HMA, the District Manager stated that the AML of 700 wild horses had been established in the Egan Resource Area Management Plan. A copy of the Egan Resource Area Record of Decision, at page 28, indicates that the allowable number of wild horses, in the case of the Buck and Bald HMA, was "an interim level established through a gathering plan and environmental assessment written in 1981." With respect to the Cherry Springs WHT and the Monte Cristo HMA/WHT, which are within the Humboldt National Forest, the District Manager stated that the AML's of from 42 to 68 and from 72 to 120 had been established by the Forest Service in an August 1986 Land and Resource Management Plan, relying on the levels established in 1977 wild horse management plans for these areas.

to begin monitoring in order to determine AML," rather than AML's themselves (Letter to Board, dated Dec. 8, 1988, at 8, emphasis in original). 6/

The Secretary's June 1981 letter indicates that "current levels" of wild horse use were established by BLM only for administrative convenience, i.e., in the absence of adequate "vegetation production data" to establish levels other than at current numbers, presumably because prior "one-point-in-time vegetation inventor[ies]" had been discredited. BLM clearly faced an administrative dilemma in 1981 and 1982. On the one hand, it was required to manage the public range, establishing appropriate levels of wild horse use, while, on the other hand, it did not have adequate information to make the necessary management decisions regarding appropriate levels of such use.

While we can appreciate this dilemma, it is clear that any decision to remove wild horses is constrained by the express requirements of section 3(b) of the Act. Under that Act, the term AML has a very particular meaning in the context of actions required to be taken to remove wild horses from the public range. It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration. Thus, section 3(b)(2) of the Act provides that excess wild horses shall be removed "so as to achieve appropriate management levels" or, stated differently, "so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation." 16 U.S.C. § 1333(b)(2) (1982).

As the district court explained in Dahl v. Clark, supra at 595:

[T]he test as to appropriate wild horse population levels is whether such levels will achieve and maintain a thriving, ecological balance on the public lands. Nowhere in the law or regulations is the BLM required to maintain any specific numbers of animals or to maintain populations in the numbers of animals existing at any particular time.

Thus, an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute.

Nevertheless, it might be argued that an AML established for administrative reasons fits within this statutory meaning so long as it constitutes a level of use by wild horses which results in a thriving natural ecological balance and avoids a deterioration of the range, even though it falls below the optimum number of wild horses which may be supported on the public

6/ API purports to be quoting from IM No. NV-82-305. However, that memorandum states simply that current wild horse numbers will be used as a "starting point for monitoring." There is no suggestion that this monitoring is to then result in establishment of AML's which had not previously been established.

range. However, section 3(b)(2) of the Act expressly provides that removal shall proceed only "until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation." 16 U.S.C. § 1333(b)(2) (1982) (emphasis added.) Thus, the statute simply does not authorize the removal of more than the excess number of wild horses. We interpret the term AML within the context of the statute to mean that "optimum number" of wild horses which results in a thriving natural ecological balance and avoids a deterioration of the range. Dahl v. Clark, supra at 592.

Accordingly, we conclude that section 3(b) of the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range. 7/

In the present case, as noted supra, with the exception of the Nevada Wild Horse Range HMA, Buck and Bald HMA, Cherry Springs WHT, and Monte Cristo HMA/WHT, the BLM removal actions are predicated on returning the number of wild horses within the subject HMA's to the AML's that were based on the levels of wild horse use in 1981 or 1982. These AML's were originally established for administrative convenience, rather than based on a determination of the optimum number of wild horses which would maintain the range in a thriving natural ecological balance and avoid a deterioration of the range. Since that time, there is no evidence that BLM has engaged in any range assessments adequate to allow BLM to conclude that returning the numbers of wild horses to these AML's would achieve that optimum number of wild horses.

The EA's involved herein generally do not serve that purpose. For the most part, they do not indicate in any respect the current condition of the range or how that condition will be affected by the removal (or lack of removal) of wild horses such that we may judge whether removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range. At best, there are scant references in the EA's to the anticipated effect of removal or lack of removal of wild horses on the condition of the range.

7/ In 1984, BLM proposed defining the term "[e]xcess wild horses or burros" simply to mean wild horses or burros "which must be removed from an area in order to attain the appropriate management level" (49 FR 49254 (Dec. 18, 1985)). However, in response to comments that the proposed definition was "inconsistent with the statutory [definition] and intent," BLM did not promulgate the regulation, stating that the "language of the statute will govern management" (51 FR 7410 (Mar. 3, 1986)). API contends that this constituted a recognition by BLM that removal of excess wild horses simply to attain an established AML does not comport with the statute. We cannot draw that conclusion. There is no suggestion that BLM at any time intended that the "appropriate management level" would be established other than in accordance with the dictates of the statute.

For instance, the EA with respect to the Buffalo Hills HMA states, at page 6, that, absent removal, there would be "an increase in the number of excess wild horses and burros beyond AMLs" and this "could result in excess numbers reaching a population level that would be detrimental to the vegetative, water and soil resources * * * ultimately resulting in significant environmental degradation." The EA with respect to the Nevada Wild Horse Range HMA states, at pages 12 and 13, that, absent removal, the "general ecology of the area would continue to be adversely impacted by increasing horse populations," with "[c]ompetition for forage resources * * * affecting the desirable vegetative component, and condition of all animals," and that "[i]t is expected that horse populations would increase beyond the support capability of the range resource." The EA with respect to the Miller Flat, Clover Creek, and Clover Mountain HMA's states, at page 12, that, absent removal, there will be a "general degrading of forage condition." The EA with respect to the Desatoya, Diamond, and New Pass/Ravenswood HMA's states, at page 8, that, absent removal, there would be "an increase in the number of excess wild horses and burros beyond AMLs." The EA with respect to the Maverick-Medicine, Buck and Bald, Butte, and Diamond Hills South HMA's, the Monte Cristo HMA/WHT and the Cherry Springs WHT states, at page 14, that removing wild horses "would slow downward trends in overall range condition and would improve the ecological balance and multiple use relationship of the area." These conclusory statements fall short of true assessments of the optimum numbers of wild horses these ranges can support.

Even where the EA's indicate that the range is being adversely affected by wild horses, there is no indication that these statements, to the extent that they suggest that removal of wild horses is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, were based on an in-depth analysis of the condition of the range and the impact of wild horses on that condition. As the district court indicated in Dahl v. Clark, supra at 592, a determination that the removal of wild horses is warranted must be based on "analysis and studies." We note that the Secretary, in his June 1981 letter, indicates that an appropriate determination of the number of wild horses to be permitted on the public range, consistent with section 3(b) of the Act, requires relying on "an intensive monitoring program involving studies of grazing utilization, trend in range condition, actual use, and climatic factors." The EA's do not reflect such a program of data collection and analysis.

Thus, we conclude that there is no definitive, well-documented statement in the EA's that removal is necessary to restore the public range to a thriving natural ecological balance and prevent a deterioration of the range threatened by an overpopulation of wild horses.

Furthermore, nothing in the State Director's December 14, 1988, affidavit or the "Position Paper" attached to BLM's Motion to Consolidate Appeals demonstrates that BLM properly predicated the removal of wild horses on a determination that it would restore the range to a thriving natural ecological balance and prevent a deterioration of the range. These statements generally only state the conclusion that removal is necessary in order to

achieve stable populations of wild horses in accordance with the AML's already established in applicable land use planning decisions for the purposes of future monitoring of the affect of wild horses on the public range. That approach cannot be sustained, as discussed infra. At best, the "Position Paper," at page 9, refers to "BLM's studies and field observations" which support BLM's concern that there is not adequate forage available in the four HMA's, with respect to which we placed the BLM removal actions into full force and effect, to support the current populations of wild horses during the winter months.

We turn, therefore, to the "Condition Assessment of Selected Nevada Wildhorse Herds and Herd Areas" (Condition Assessment), attached to BLM's Motion to Consolidate Appeals, which was apparently prepared sometime before the winter of 1988-89 by four outside consultants experienced in animal nutrition, animal husbandry, and range management. The Condition Assessment assessed the "nutritional status of the horses as well as forage availability and ecological well being of the range area on which these horses and other grazers depend" in the case of the Buffalo Hills, Clover Mountain, Desatoya, New Pass/Ravenswood, Maverick-Medicine, Monte Cristo, Buck and Bald, and Butte HMA's (Condition Assessment at 1).

The Condition Assessment was based on "visual observations of wild horses; forage utilization, abundance and quality on wild horse ranges; and apparent ecological status of horse ranges as well as briefings by Bureau wild horse specialists." Id. at 2. Observations in the field were made between October 24 and November 5, 1988, i.e., "at the end of the plant growing season and immediately prior to the onset of winter," in order to assess the ability of the wild horses to over-winter. Id. The Condition Assessment describes the ecological condition of the vegetation in the four HMA's as either poor to fair, fair, fair to good, or excellent and the condition of the wild horses in these areas as either fair or good.

Although the Condition Assessment contains an assessment of the condition of the range in the case of the HMA's it assessed, with the exception of the four HMA's with respect to which we placed the BLM removal actions into full force and effect, our review of the assessment discloses that it does not support BLM's determination that the HMA's contain an overpopulation of wild horses. The evidence cited in the assessment fails to establish either that the available forage is not adequate to support the numbers of wild horses in those areas at or near current levels, or that there is any other basis for regarding the numbers as excessive.

In the case of the Maverick-Medicine HMA, the assessment states: "The apparent ecological condition is fair to good * * *. Considerable standing forage is available on the west side of the area * * *. [T]here is sufficient feed to winter the horses this year * * *. Observations of agency field staff rated horse condition as good." Id. at 10. In the case of the Butte HMA, the assessment states: "Winter season horse diets should be near maintenance levels because of availability of shrubs. Apparent ecological condition is mostly satisfactory to good, with considerable standing forage. * * * Body condition of observed wild horses was good." Id. at 12. In the case of the Monte Cristo HMA, the assessment states:

Ecological condition of these plant communities is generally good * * *. Current forage utilization * * * is moderate to light. Much winter forage remains ungrazed at this time, suggesting that adequate winter feed exists to successfully over-winter this horse herd. * * * Although no horses were observed * * * horse condition, likely is at least satisfactory.

Id. at 19. Finally, in the case of the Clover Mountain HMA, the assessment states: "Apparent ecological condition of this area is good. * * * Current forage use is light to moderate throughout the area." Id. at 20. In addition, the assessment noted that BLM field personnel reported that the condition of horses observed in that area was good to excellent.

The Condition Assessment does support the removal of wild horses from the four HMA's with respect to which we placed the BLM removal actions into full force and effect. As the assessment concludes: "Several of the HMA's included in this report showed obvious biologic indicators of the need for wild horse population reductions. Specifically the Buffalo Hills, New Pass-Ravenswood and portions of the Buck and Bald and the Desatoya HMA's are in trouble biologically." Id. at 22.

The Nevada Wild Horse Range HMA, the Monte Cristo HMA/WHT, and the Cherry Springs WHT merit special consideration. We note that the AML's with respect to these HMA's were not established on the basis of the number of wild horses using the range in 1981 or 1982.

The Nevada Wild Horse Range HMA was established on the basis of the recommendation of the C & C committee. According to the Nevada Wild Horse Range HMAP, at page 9, the AML was, like the other AML's involved herein, designed to be an "initial" management level which would be adjusted as a result of further monitoring studies, that is, merely an interim number established for administrative convenience. In addition, the HMAP stated, at page 2, that this process was designed to determine the "appropriate management number." There is simply no evidence in the HMAP regarding the basis for the C & C committee's recommendation concerning the AML. More importantly, there is nothing in the HMAP indicating that the AML constitutes the optimum number of wild horses which will maintain the range in a thriving natural ecological balance and prevent a deterioration of the range. 8/

8/ We note that the AML of 2,000 wild horses recommended by the C & C committee was, according to the Nevada Wild Horse Range HMAP, approved by the State Director on Mar. 18, 1985, apparently less than the number of wild horses then using the range. The plan indicated that 4,890 wild horses had been determined to be using the range as of March 1984. Doubt is cast on the figure of 2,000 by the fact that the plan also reports, at page 6, that: "Generally animals appear to be in fair to good condition. The population as a whole appear[s] to be healthy with isolated maladies afflicting some animals." In addition, the plan indicates that no vegetation inventory had been conducted and trend studies had not yielded any results. Id. at 2.

In the case of the Monte Cristo HMA/WHT and the Cherry Springs WHT, the AML's were established in 1977 as wild horse management plans, which are akin to HMAP's. These plans reveal an in-depth analysis of the appropriate number of wild horses which could be supported in these areas consistent with statutory criteria. However, the plans were prepared in 1977. The condition of these areas has undoubtedly changed since that time. See Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1060 (D. Nev. 1985). Yet, there is no evidence that BLM or the Forest Service has made any effort to reassess the current validity of the AML's prior to ordering the current removal of wild horses. This does not comport with the directive of 43 CFR 4720.1 that the removal of wild horses from the public range be based "[u]pon examination of current information." Moreover, we are not persuaded that removal is now warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range threatened by an overpopulation of wild horses.

In the case of the four HMA's with respect to which the Board placed the BLM removal actions into full force and effect, viz., the Buffalo Hills, Desatoya, New Pass/Ravenswood, and Buck and Bald HMA's, BLM has, however, made a minimal showing based on the necessary analysis and study that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, despite the fact that it has not shown that the AML's were properly established on the basis of the number of wild horses using the range as of 1982. Specifically, BLM demonstrated in the Condition Assessment that these HMA's either were experiencing resource damage or were very likely to experience resource damage as a result of an overpopulation of wild horses. See Condition Assessment at 7, 13, 15, 16, 18. By necessary implication, BLM demonstrated that immediate removal of wild horses would restore the range to a thriving natural ecological balance and prevent a deterioration of the range.

Therefore, we conclude that, with the exception of the four HMA's with respect to which we placed the BLM removal actions into full force and effect, there is no evidence that the numbers of wild horses in the subject HMA/WHT's must be returned to the established AML's in order to now restore these areas to a thriving natural ecological balance and prevent a deterioration of the range.

We note that section 3(b) of the Act, as originally enacted on December 15, 1971, contained discretionary authority to remove excess wild horses from the public range "[w]here an area is found to be overpopulated." 85 Stat. 650 (1971). The committee which adopted this language explained that it did so in recognition that "some control over the numbers of animals may be necessary in order to maintain an ecological balance in an area." S. Rep. No. 242, 92nd Cong., 1st Sess. (reprinted in 1971 U.S. Code Cong. & Admin. News 2149, 2152). However, the committee further stated: "[A]ny reduction should be carefully weighed before being undertaken. The committee does not intend that the provision for a reduction in numbers * * * be considered a license for indiscriminate * * * removal of the wild free-roaming horses or burros." Id.

While Congress amended section 3(b) of the Act on October 25, 1978, to mandate the removal of excess wild horses, we do not believe that it intended to alter the legislative directive that any removal of wild horses from the public range be carefully considered. Commensurate with the requirement to undertake removals, Congress, as discussed supra, provided a specific restraint on the exercise of the removal authority. Moreover, the report of the conference committee which adopted the amendment states that "the conferees agreed that excess numbers of wild horses and burros must be removed from the range, but that caution must be exercised in determining what constitutes excess numbers." H.R. Conf. Rep. No. 1737, 95th Cong., 2d Sess. 15 (reprinted in 1978 U.S. Code Cong. & Admin. News 4069, 4131). To the extent that we set aside the BLM removal actions challenged herein, we do so based on our considered conclusion that BLM has not exercised the necessary caution, and that to do otherwise would grant BLM the license which Congress specifically sought to preclude.

BLM also contends that it has authority to remove wild horses from the public range in the exercise of its discretion, even where it cannot demonstrate current damage to the range. See Motion to Consolidate Appeals at 5. BLM argues that it can remove wild horses in order to achieve stable populations of wild horses for monitoring purposes, so that the potential for damage can be assessed and thus prevented. In a March 6, 1989, memorandum to the Regional Solicitor, the State Director stated, at page 2, that BLM interprets the statutory term "excess animals" to mean not only the number of animals necessary to maintain the range in a thriving natural ecological balance, but also "the number of animals substantially above the initial AML established for study or monitoring."

We do not dispute the fact that stable populations of wild horses can facilitate monitoring studies. However, it is clear that a study can be undertaken quite apart from any removal of wild horses, using and, if necessary, maintaining existing populations of wild horses and the existing environment. 9/ Once a study has determined that the statutory prerequisites for removal of wild horses from the public range have been fulfilled, immediate removal can then take place.

Moreover, we can find no support for the conclusion that BLM has the discretionary authority to order the removal of wild horses from an area of the public range simply to establish a baseline population for purposes of

9/ Maintaining the status quo is clearly an appropriate response where BLM does not have adequate information upon which to base a proper determination of the appropriate number of wild horses to permit on the public range. Cf. Natural Resources Defense Council, Inc. v. Hodel, supra at 1057, 1060-62 (livestock). Moreover, it is implicitly required in the case of wild horses by section 3(b) of the Act where BLM is not able to establish that removal of wild horses is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range.

studying the potential for damage to the public range. 10/ We note that in IM No. NV-82-305, which set forth various accepted bases for establishing the number of wild horses to be used in the development and implementation of land use plans, the State Director stated that BLM could use a "specified number of animals" where this was necessary to begin monitoring studies. However, the State Director also stated that the number could be used only where such studies demonstrate that only by reducing the population of wild horses to that number "will a specific resource problem be corrected." With the exception of the four HMA's with respect to which we placed the BLM removal actions into full force and effect, the record contains no such demonstration.

The only authorities cited by BLM as support for its contention that wild horses may be removed in order to establish a baseline population of wild horses for study purposes are section 11 of the Act, as amended, 16 U.S.C. § 1340 (1982), and section 307(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1737(a) (1982). Section 11 of the Act only provides for the submission of joint reports to Congress by the Secretaries of Interior and Agriculture and consultation and coordination between them and, in addition, authorizes and directs them to undertake "studies of the habits of wild free-roaming horses and burros." 16 U.S.C. § 1340 (1982) (emphasis added). There is no mention of studies directed to the question of the impact of wild horses on the public range. Moreover, this statutory provision contains no removal authority. 11/ Section 307(a) of FLPMA only provides authority for the Secretary of the Interior to conduct "studies * * * involving the management, protection * * * of the public lands." 43 U.S.C. § 1737(a) (1982). While it may authorize studies directed to the question of the impact of wild horses on the public range as an aid to protecting that range, it, likewise, contains no removal authority.

10/ We note that the district court in American Horse Protection Association v. Frizzell, 403 F. Supp. 1206, 1219 n.9 (D. Nev. 1975), permitted BLM to proceed with the removal of wild horses from the public range where removal was intended as an "interim measure to preserve the Valley pending a complete study and the development of a long-range solution designed to preserve the environment and reconcile the competing interests involved." However, it is clear that the removal was not predicated simply on establishing a baseline population of wild horses for study purposes, but rather was in response to a determination that "a seriously overgrazed range cannot continue to supply all of the needs for food placed on it by the various users: cattle, wild horses, and other wildlife," which situation required immediate attention pending development of a long-term strategy. Id. at 1217; see also American Horse Protection Association v. Andrus, 460 F. Supp. 880, 886 (D. Nev. 1978), aff'd in part, vacated and remanded in part, 608 F.2d 811 (9th Cir. 1979).

11/ The legislative history of this section of the statute indicates that it was intended only to make up for a "lack of information" concerning wild horses. S. Rep. No. 242, 92nd Cong., 1st Sess. (reprinted in 1971 U.S. Code Cong. & Admin. News 2149, 2152).

By contrast, section 3(b)(2) of the Act provides explicit direction regarding the circumstances under which removal of wild horses from the public range is permitted, viz., where there is an overpopulation of wild horses in a given area and removal is necessary in order to restore a thriving natural ecological balance and prevent a deterioration of the range threatened by that overpopulation. We conclude that this statutory provision contains the sole and exclusive authority for BLM to remove wild horses from the public range.

Moreover, in the course of arguing that it has the authority to order the immediate removal of wild horses from the public range in order to establish a baseline population for study purposes, BLM effectively concedes that it does not know whether the HMA/WHT's, with the exception of the four HMA's with respect to which we placed the BLM removal actions into full force and effect, contain wild horses in excess of that which will maintain the range in a thriving natural ecological balance and prevent a deterioration of the range. Indeed, BLM admitted that it "cannot demonstrate any damage being done to the public lands by wild horses" (Motion to Consolidate Appeals at 5). Nor does BLM demonstrate that such damage is likely. In addition, the Condition Assessment, which specifically assessed the availability of forage and the physical condition of the wild horses, in connection with four of these HMA's, viz., the Maverick-Medicine, Butte, Monte Cristo, and Clover Mountain HMA's, did not conclude that an overpopulation exists on these HMA's. That determination is required before proceeding with the removal of wild horses from these HMA's.

API has also asked the Board to rule that the BLM removal actions were improper in the absence of preparation of an EA which assessed the environmental consequences of removing wild horses from the public range, rather than the implications of using alternative methods of removal. We do not agree that BLM failed to execute the necessary EA's. In conjunction with each of the draft and final removal plans, BLM prepared an EA. These EA's assessed the environmental consequences of removing wild horses from the public range and a no action alternative. API has demonstrated no particular deficiency in preparation of the EA's, and we can discern none.

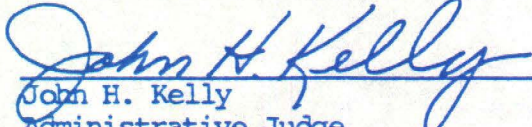
In addition, we note that, with respect to some of the HMA's, the record indicates that BLM had at one time prepared Environmental Impact Statements (EIS) in order to assess the environmental consequences of adopting general grazing management plans for allocating forage to livestock, wildlife, and wild horses within a significant portion of the public range encompassing certain of the HMA's. Thus, BLM and the Forest Service prepared EIS's with respect to the Sonoma-Gerlach, Caliente, Egan, and Wells resource areas, involving the following HMA's and WHT's: Buffalo Hills, Miller Flat, Clover Creek, Clover Mountain, Maverick-Medicine, Monte Cristo, Buck and Bald, Butte, Diamond Hills South, and Cherry Springs. These EIS's, as mentioned in the EA's prepared in conjunction with the applicable removal plans, either describe the affected environment or assess the environmental consequences of removing wild horses. To the extent that the EIS's are tiered to the EA's, they further satisfy BLM's obligation under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4370 (1982).

API also contends that BLM is required to prepare an EIS prior to undertaking the removal of any wild horses. We note that, in the case of each of the removal actions involved herein, BLM determined that no EIS was required. For its part, API has provided no evidence that the proposed removal actions would have such a significant effect on the quality of the human environment that an EIS is required by section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1982). Nor can we discern any basis for ordering the preparation of an EIS. Therefore, we conclude that BLM was not required to prepare an EIS prior to removing any wild horses from the subject HMA's. American Horse Protection Association v. Frizzell, supra at 1218-19.

Finally, API contends that BLM should not be permitted to proceed with removal of wild horses from the HMA/WHT's involved herein until it has prepared an HMAP in each case. We note that 43 CFR 4710.3-1 requires preparation of an HMAP. BLM and/or the Forest Service has prepared HMAP's only with respect to the Miller Flat and Nevada Wild Horse Range HMA's, Monte Cristo HMA/WHT, and Cherry Springs WHT. No HMAP's have been prepared in the case of the other HMA/WHT's involved herein. We conclude that it is not necessary that BLM prepare an HMAP as a basis for ordering the removal of wild horses, so long as the record otherwise substantiates compliance with the statute. Indeed, 43 CFR 4710.3-1 does not require preparation of an HMAP as a prerequisite for a removal action. Thus, we are not persuaded that preparation of an HMAP must in all cases precede the removal of wild horses from an HMA/WHT, and decline to order preparation of HMAP's.

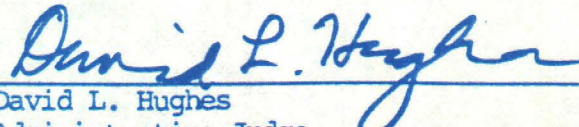
Before concluding, it is necessary to point out that this case also involves BLM's decision to remove wild horses from a designated horse-free area in the Egan Resource Area and from outside designated HMA's in the Caliente Resource Area, including certain "problem animals" intruding on private property in the Clover Creek and Little Mountain HMA's. API takes exception to this proposed removal. However, we can find no fault with the proposed removal of wild horses from these areas. Therefore, these removal actions are affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part and reversed in part.



John H. Kelly
Administrative Judge

I concur:



David L. Hughes
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240

JUN 22 1989

In Reply Refer To:
(102)

Memorandum

To: Director; State Director, Nevada;
Chief, Division of Wild Horses and Burros

From: David P. Tidwell, Special Assistant to the Director *D. P. Tidwell*

Subject: Comments on IBLA Decision: Animal Protection of America,
June 7, 1989

The foundation of the June 7, 1989, Opinion of the Interior Board of Land Appeals (IBLA) in which the Animal Protection Institute of America (API) challenged the Bureau's wild horse removal plans on 14 Wild Horse Herd Management Areas (HMA) and from 7 grazing allotments outside of HMAs, lies in Section 3(b) of the Wild Free-Roaming Horse and Burro Act, as amended, 16 U.S.C. S-1333(b)(1982).

Section 3(b)(2) of the Act expressly provides, says the decision, that removal shall proceed only "until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from deterioration associated with over-population."

IBLA has interpreted the statutory language narrowly in the extreme. Some of my concerns include:

- BLM's planning process is apparently ignored as a means of allocating forage and establishing management objectives for wild horses and burros and other multiple-uses.
- The court ignored the National Academy of Sciences 1982 report wherein a definition of "excess" animals considered both sociological and biological factors. Only biological factors are considered in the June 7, 1989, Opinion.

- Excess animals are only established at one point in time. If range stress is not imminent, and documented as such, gathering cannot occur.
- Excess forage created by wildlife die-offs or livestock reductions would automatically be claimed by wild horses and burros until a threat to "a thriving natural ecological balance could be demonstrated."
- A specific AML cannot be established for an HMA, since the AML can only be established after studies confirm a threat to a thriving natural ecological balance. The court also states that excess numbers must be established with caution.
- Non-use for management purposes would not be feasible because horses would be allowed to utilize all forage until range deterioration could be documented.
- Multiple-use management of wild horse and burro ranges would be impossible, contrary to FLPMA and WFR&BA Section 2(f)(2).
- BLM has no discretionary or administrative authority in determining AMLs or excess numbers.
- This decision invites wild horse interests to ignore BLM's planning process.

It is difficult to discern from the opinion whether the question of conflict with FLPMA and the planning process actually became an issue in the case or was even raised by the government's attorneys. It is possible that the issue has not emerged until now.

The possibility exists that had the BLM adhered to its own guidance, including the Secretary's letter of June, 1981, and the State Director's Instruction Memorandum of June 8, 1982, a different decision might have emerged regarding specific gatherings. However, the threat to the Bureau's range management objectives as outlined in land use plans is serious.

A few points IBLA ignored or overlooked:

- Section 2(f)(1)(2): "excess animals - "(2) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area."
- Section 3(a) (last sentence) "Any adjustments in forage allocations on any such lands shall take into consideration the needs of other wildlife species which inhabit such lands."
- Determination of an overpopulation:
 - *Section 3(b)(2)(ii): "information contained in any land use planning completed pursuant to Section 202" of FLPMA;
 - *Section 3(b)(2)(iii): "information contained in court ordered environmental impact statements ----."
 - *Section 3(b)(2)(iv): "Such additional information as becomes available to him --- including that information developed in the research study mandated by this section, --- that an overpopulation exists--- and that action is necessary to remove excess animals from the range so as to achieve appropriate management levels."

There are a number of actions that should be considered in both the short-term and the long-term:

Short-Term

- Evaluate each of the HMAs to determine if conditions have changed enough to be able to document a threat to the "thriving natural ecological balance."
- Modify gathering plans and EAs to reflect the findings of grazing EISs, land use plans and current studies that support a designation of excess animals.
- Proceed full force and effect with gatherings that are supportable.

Long-Term

- Consider the Secretary assuming jurisdiction in the case ordering IBLA to alter its decision so as to allow consideration of FLPMA planning decisions, grazing EIS findings, NAS recommendations, and multiple-use relationships, or
- Appeal the IBLA Decision to District court for the reasons stated above, and/or
- Solicit an appropriations bill amendment directing BLM to adhere to FLPMA, grazing EIS findings, etc.; the IBLA case notwithstanding.
- Solicit a congressional resolution which clarifies the intent of Congress on this matter with regard to wild horses and other uses.

In view of some of the FLPMA amendments floating around Congress, action other than through the appropriations process would involve a degree of risk. Since IBLA placed considerable stock in conference committee report language, some sense of congressional intent appears necessary.