BW: this must meet the aug 1 deadline. Copies should go to Sen Reid, Bryd, Ford, Bradley & Congressmen Vento, Yates, Campbell I'll be back 7/30. NW

rulemaking 1991 "X"

July 19, 1991

Director [140]
BLM Room 5555
Main Interior Bldg
1849 C Street NW
Washington DC 20240

7/2/91 RULEMAKING

WO 250-4370-02-241A
Management and Protection of
Wild, Free-Roaming Horses & Burros

Dear Sir:

The Animal Protection Institute speaks for its 150,000 members in response to the proposed rulemaking published in the Federal Register July 2, 1991. This proposal to put decisions to remove free-roaming wild horses and burros from public lands into full force and effect grants the Secretary the very authority which Congress purposely withheld.

§4720.2-1 grants the Secretary authority to immediately remove horses from private lands. Full force and effect is absolutely irrelevant to private lands.

More important, the IBLA has already ruled on putting public land removal decision into full force and effect. A copy of that ruling is enclosed.

The IBLA has already ruled on the limitation Congress imposed on the Secretary's authority to remove horses in their June 1989 ruling. When BLM argued that the Secretary had discretionary authority for when, how, and why wild horses and burros can be removed from the public lands, IBLA stated unequivocally that "the sole and exclusive authority for removing horses is in the law." They cited the statutory restrictions and constraints related to determining when an overpopulation exists and wild horses and burros removed. API was one of many interested and affected parties in 1978 at the time that restricted authority was granted. We joined with the arguments for the need of it. That same need is apparent today in this very rulemaking.

In their October 19, 1990 ruling IBLA states "WE DECLINE TO GRANT FULL FORCE AND EFFECT TO BLM'S DECISION, AS TO DO SO MAY EFFECTIVELY MOOT THE APPEALS. They go on to reiterate their statement of October 15, 1990 related to their procedure for a Motion for Expedited Consideration.

The fact of the matter is that IBLA has already ruled on this rulemaking. In practice the rulemaking eliminates BLM's need to file a Motion for Expedited Consideration and requires the appeallant to file a Motion to Stay at the time of the appeal. We would not appeal without such a motion because we would contend that the arguments for our appeal would deny the decision.

BLM argues

> ** that it takes so long for the appeals process to work that populations can expand at rates of 15 to 25 percent and that this increase of growth makes it <u>difficult</u> to maintain a thriving ecological balance in the habitat area.
>
> This spurious argument implies that a population increase automatically "POSES A THREAT TO THEMSELVES AND THEIR HABITAT AND TO OTHER RANGELAND VALUES" and causes an imbalance of the ecological condition in a given area. To make that assertion requires monitoring the impact of horses on their habitat to show when and where they are the cause of overutilization or other damage and where actual competition with livestock occurs which could pose a threat to livestock grazing. BLM has NEVER done this even though their own field manual lists these studies as mandatory and the law requires them.
>
> BLM is required to correct overutilization and remedy damage when range condition information shows that the natural ecological balance is upset or impaired. The law clearly requires monitoring and inventorying be the basis of decisions. The failure to conduct the studies to show overutilization and competition is the basis of every removal appeal.
>
> The "difficulty" referred to in BLM's supplemental background was clearly pinpointed in the 1988 GAO investigation on grazing as political pressure from grazing interests inside and outside BLM. There is no other "difficulty."
>
> MORE IMPORTANT, IBLA has already ruled on the argument related to alleged delay by citing their procedure for a Motion for Expedited Consideration.

BLM argues:

> ** [delay in appeals] also INCREASES THE COST of removing horses because the budget planners can't write contracts to accommodate a possible change in numbers. The problem here is in the budget forecasting process and the contract-writing process. Denying the public its right of appeal and granting

to the Secretary the very authority Congress withheld is not the solution to this administrative ineptness. Contracts can be worded to allow for a possible change of number and the procedure adapted to the intent and requirements of the law--not vice versa.

Again, IBLA already addressed the issue of BLM's using "administrative convenience" to change the intent of the law. They called it a dilemma that BLM must work out. We realize it is a challenge to budget planners to figure out how to write a contract to meet the reality of the situation.

BLM argues:

** [that] "on several occasions" wild horse and burro herds have been endangered by the lack of forage or water caused by weather conditions or other emergencies such as fire or deep snow.

API has been actively involved in over sixty decisions affecting wild horses in the past three years. Only twice has this endangerment been an issue. One was the Nellis HMA, the other the Goldfield HMA--which is adjacent to Nellis. Both of these situations included such controversial extenuating circumstances as to make them completely atypical. The construction of the western boundary fence of the Nellis Complex in 1985 is part of the controversy in both cases. But the proper and common sense response to the need for addressing possible emergency situations is to write a procedure to allow for an emergency removal. Nevada BLM worked out just such a procedure in an open meeting with interested wild horse protection groups. The procedure included guidelines and criteria that would specify the nature of the emergency and the number of horses involved along with parameters on actions to be taken. Nevada BLM's commonsense solution is ignored.

We believe the proper rulemaking to address the argument for emergency situations presented by BLM is to set forth procedures and criteria to meet an emergency when "lack of forage or water caused by weather conditions or other disaster" occurs in exactly the way Nevada BLM suggests. The solution to this problem is not to deny the public its administrative right of appeal or to grant the Secretary authority which Congress refused.

Because wild horse removals today are the result of the allotment evaluations that are in progress [in accordance with FLPMA and the timeframes resulting from the implementation of NEPA], the need is to bring wild horse monitoring schedules within the same timeframes as livestock in order to carry out the multiple use decision that arises from the allotment review process. A workable multiple use decision format was devised by Nevada BLM and has the support of wild horse groups, conservation groups, and Nevada Department of Wildlife. It is in accordance with law. This

rulemaking does not address the need to bring wild horses into that multiple use decision making. In fact it ignors that allotment evaluation process and the multiple use decision format.

It takes wild horses and burros further away from a coordinated, integrated management approach as required by NEPA and further from the intent of the Wild, Free-Roaming Horse and Burro Protection Act.

The language for appealing decisions for livestock and wild horses in that multiple use decision making needs to be identical. The appeals process for wild horse/burro and livestock needs to be in the same arena. This rulemaking is totally insufficient and inappropriate.

The §4700 Regulations need to restore the statutory requirements for monitoring and inventorying that were deleted in December 1984. This would bring the wild horse program into compliance with law. The Resource Management Plans and Allotment Management Plans (where the Secretary elects to write an AMP) need to include quantifiable objectives to protect wild horse habitat and populations and to do this at this time requires either a procedure to include them in allotment evaluation decisions by a rulemaking or taking every RMP and AMP through the amendment process to correct the consequence of the 1981 §1600 rulemaking and the December 1984 rulemaking e two rulemakings This would not only put the law back in the program but bring wild horses into the same monitoring time schedule as livestock, thus implementing the laws--NEPA. FLPMA, and the Wild Horse law as amended by PRIA. This rulemaking ignors this need entirely.

We strenuously object to the use of the word "control" when the word "manage" already includes removal as an option for management action. The word "control" is not in the law. We object to its use because it is a propaganda word inserted into official government documents.

API will appeal the rulemaking in total as being in violation of the words and the intent of the law.

FOR THE ANIMAL PROTECTION INSTITUTE OF AMERICA

Sincerely,

Nancy Whitaker
Assistant Director of Public Land Issues,
Specializing in Wild Horses

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:

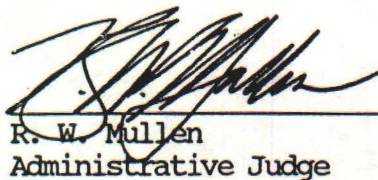
OCT 19 1990

IBLA 90-419	:	Wild Horses and Burros Act
	:	
ANIMAL PROTECTION INSTITUTE OF AMERICA	:	Request to Place Decision in full force and effect denied; motion to show cause denied; expedited consideration granted

ORDER

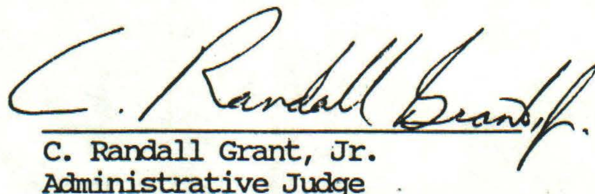
On July 2, 1990, Animal Protection Institute of America (API), appealed the Montrose District Office, Bureau of Land Management's (BLM's), June 8, 1990, decision to gather and remove approximately 55 wild free-roaming horses from the Spring Creek Basin Wild Horse Herd Management Area. API also on that same date filed a "Motion to Stay and Show Cause for Colorado Roundup Decision." BLM on July 30, 1990, filed a "[m]otion to Dismiss, Answer, and Request to Place Decision in Full Force and Effect" (Motion and Answer).

We decline to grant full force and effect to BLM's decision, as to do so may effectively moot the appeals. Nonetheless because we recognize the seasonal constraints upon gathering wild horses and the potential damage to the range (BLM's Motion and Answer at 7), we are expediting this appeal. API's request that this Board issue an order directing BLM to show cause that it is in compliance with statutory restrictions for basing removal on monitoring data is denied as appellant bears the burden to show error in BLM's decision and we do not deem it appropriate for this Board to shift the burden to BLM. BLM's motion to dismiss is being taken under advisement.



R. W. Mullen
Administrative Judge

I concur:



C. Randall Grant, Jr.
Administrative Judge

Clannigan

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:

OCT 15 1990

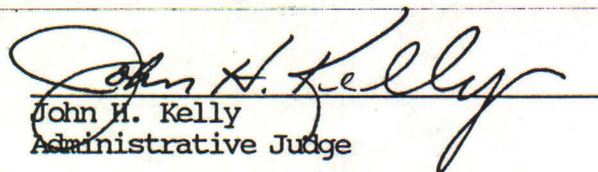
IBLA 90-115	:	NV 030-90-1
	:	
ANIMAL PROTECTION INSTITUTE OF AMERICA	:	Wild Horse Roundup
	:	
	:	Request for Expedited Consideration Granted

ORDER

The Bureau of Land Management (BLM) has filed a motion for expedited consideration in the above captioned appeal by the Animal Protection Institute of America, from a decision approving the roundup of wild horses.

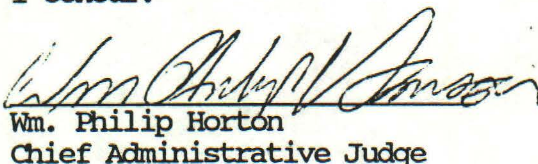
In support of its motion for expedited consideration, BLM contends that affected rangelands will deteriorate if the removals are not timely implemented, resulting in stress on horse herds and indigenous wildlife, leading to poor physical condition which could cause horse deaths. BLM also contends that its decisions will be out of date if delayed because they would no longer be based on current conditions. Moreover, BLM notes that because of the high reproductive rate of the horses, delays in removing horses can quickly destroy the balance between horse populations and available forage.

In consideration of the motion and the grounds stated therein, the motion for expedited consideration of the above-captioned appeal is hereby granted.



John H. Kelly
Administrative Judge

I concur:



Wm. Philip Horton
Chief Administrative Judge

APPEARANCES:

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FYI FROM: N. Whitaker

The enclosed is information I hope you will find helpful. The IBLA has already given an opinion [in one case] on full force and effect. What is needed in the rulemaking is to bring the appeals process into alignment with the regulations governing livestock appeals. Now livestock and wildlife appeals go to an Administrative Law Judge like a Round #1 level. Automatic full force and effect DOES take us out of the appeals process.

IBLA is the proper place to appeal a rulemaking. We need to each of us appeal the final in order to get a fair and proper reading on our right to appeal and exactly how full force and effect denies it. I agree with the reasoning that went into IBLA's finding on it in the Wyoming case: when the horses are reduced we lose; BLM has yet to use proper procedure for making the reduction. FF & E renders the IBLA rulings moot. BLM is determined to use the arbitrary numbers set in land use plans rather than statutory requirements basing how many on current range condition <u>data</u> and monitoring UTILIZATION. (Actual use is NOT utilization monitoring, its numbers only!) Making numbers of horses a planning decision took horses out of the monitoring/evaluation timeframes but not out of the grazing decisions. [In fact, their having made forage allocations a planning decision undermines and subverts the monitoring/inventorying actual use directives of FLPMA...but any actions on this should be coordinated with Sierra Club and NRDC so we don't counterdict or interfere with what they're doing.]

We need to have a united front amongst all the interest groups keeping Congress aware of the discrepancies in the 1984 rulemaking and the law. We need to either network with conservation grps--e.g., national wildlife federation and others or at least make known that horses & wildlife are not advesaries but a compatible habitat issue. Also we should stress, to Congress and elsewhere, the fact the full force and effect rulemaking jumps the gun on the advisory board--renders <u>it</u> moot. Who should they complain to? Who do we complain to? Perhaps interest groups should make a real stink about rendering the ad bd moot. We need also to make known the fact wild horses cannot be separated from livestock grazing and the multiple use decision in the allotment evaluation process because it directly affects wild horses. It is essential for us to understand the allotment evaluation process.

<u>RE: Nellis</u> (Can the Advisory Board help in this?)

BLM is milqueing the Nellis situation and is doing so to deflect interests and inquiries. The boundary remains an issue because it DOES violate the law. The validity of the RMP remains an issue...maybe we should look into demanding a full EIS on Nellis.

KEEP IN TOUCH....nw

Resource Area. [2/] For these areas, the Federal District Court has defined the term "excess," within the meaning of 16 U.S.C. 1332(f) (1982), and it would now take court action to change that definition. [3/] To the extent that the May 29, 1990, BLM decision is applicable to the areas subject to the above-described court orders, it is hereby placed into full force and effect, and API and/or WHOA may seek relief from the court if they disagree with the court's prior determination.

For those areas described in the May 29, 1990, decision and the underlying Environmental Assessment not subject to the above-described court orders, we decline to grant full force and effect to that decision, as to do so may effectively moot the appeals. Likewise, we deny the API/WHOA request that this Board issue an order directing BLM to show cause that it is in compliance with statutory restrictions for basing a removal on monitoring data. The appellants are charged with the responsibility for showing error, and we do not deem it appropriate for this Board to shift the burden to BLM.

On October 5, 1990, we consolidated IBLA 90-414 with previously consolidated 90-412 and 90-413 and extended expedited consideration to 90-414.

[1] We find it necessary to address first the BLM motions to dismiss the appeals for lack of standing. The primary basis for seeking dismissal is the same as that addressed in Animal Protection Institute, 117 IBLA 208 (1990). In that case, as well as the cases now before us, BLM relied extensively on the U.S. Supreme Court's decision in Lujan v. National Wildlife Federation, ____ U.S. ____, 58 U.S.L.W. 5077, 5080 (June 26, 1990), as the basis for its assertion that appellants must establish that the injury they complain of falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for their complaint.

Lujan v. National Wildlife Federation and the other cases cited by BLM address standing to seek judicial review of agency action. At issue now is standing to seek administrative review. This Board has previously recognized that the two are not synonymous and expressly rejected the notion that determinations addressing judicial standing control when seeking to determine administrative standing. High Desert Multiple-Use Coalition, 116 IBLA

2/ At page 8 of its Motion to Dismiss and Answer in IBLA 90-413 BLM explains that "[t]he Salt Wells/Pilot Butte checkerboard lands is generally that area south of Interstate 80 now designated as the Salt Wells Creek WHHMA, and the Big Sandy area is generally that area north of Interstate 80 now designated as the White Mountain and Great Divide Basin WHHMAs."
3/ See Mountain States Legal Foundation v. Andrus, No. C79-275K (D. Wyo. Mar. 13, 1981), amended, Mountain States Legal Foundation v. Watt, No. C79-275K (D. Wyo. Feb 19, 1982).

COPY FOR YOUR INFORMATION

ANIMAL PROTECTION INSTITUTE
2831 Fruitridge Road
Sacramento, CA 95822
(916) 731-5521

WILD HORSES
What is going on in Nellis?

SACRAMENTO -- The Animal Protection Institute represents its 150,000 members as interested parties to public land wildlife and wild horse management. We appealed the roundup of 324 horses from Nellis in 1988 to the Interior Board of Land Appeals. The Nellis appeal was part of a challenge of the legal justification of BLM's entire removal policy. We won the challenge. The IBLA rulings require BLM to put the law back in their program.

But this is not what has prevented BLM from removing horses from Nellis recently. The current controversy related to Nellis is as a boundary issue. There are hidden politics (not the usual conflicts with livestock) in that boundary issue. We suspected that orders on Nellis came from Washington back in 1988 and that local BLM merely obeyed.

The 1989 draft management plan deleted 1.7 million acres identified as where horses and burros existed in 1971 and where a 5-Party agreement, between Department of Interior, Department of Defense, Department of Energy and two Nevada state agencies, specified that BLM was to manage wild horses and burros on the public lands which were withdrawn for use as the Nellis Complex and Tonopah Test Range.

In September 1989, API along with the Nevada State Commission filed a protest of the deletion of the 1.7 million acres of habitat as violating the law. Cy Jamison, the national BLM director, refused to respond to our formal protests. He refused to address the boundary issue. This refusal tied the hands of the local BLM. It held up any removals. Jamison finally made the decision in early June 1991. But his decision upholds the deletion of the 1.7 million acres and takes the boundary back to that of the pre-1971 Nevada State Horse Range. The decision ignors the law and dismisses the 5-party agreement as well as the question over the validity of the management plan.

API scrutinized BLM's field data and their reports very closely. In January 1991, BLM reported normal adult to foal ratios, horses were in good condition, and there was adequate range. We asked about finding dead horses. Less than fifty was mentioned. A ten percent mortality for a population of 4,000-6000 would be 400-600. Why don't they find more dead horses or other wildlife? Is there a rescue operation for deer, antelope, or other wildlife in this current crisis? How many fawns, baby bobcats, kit fox, or coyotes are being rescued?

The water systems were the problem in 1990--but drought only part of it. Thunder showers had knocked out the Breen Creek water system in July 1989. In December 1989, BLM declared an emergency in Nellis and removed 600 horses under their emergency removal procedures.

In 1990 a removal plan was submitted but it was a final decision which by-passed the entire administrative process. BUT IT WAS NOT AN EMERGENCY REMOVAL PLAN. There was a confusion of population numbers and the size of the habitat since the boundary decision was pending. Both WHOA and the Commission supported the removal. API's response to that plan (based on BLM's report of normal adult-to-young ratio, horses in good condition, adequate forage available) was to request that BLM follow proper policies and administrative procedures.

BLM's choice at that time was to declare an emergency or move through the regular administrative procedure channels. They did the second. Today's roundups are the result of that decision. When BLM did not declare an emergency, we suspected that there was a hidden agenda--coming from Washington. We backed out entirely with no intention of appealing the removal. We suspected BLM wanted a crisis situation and hoped we would appeal on a procedural issue so they could milque it. But we don't know what the politics are since there are no livestock. We guess it must have to do with the Department of Energy's application to withdraw lands which will be reviewed by Congress this November. We've sent all background material to the Congressional committee related to energy. We have also asked the Council on Environmental Quality for advice in the matter of the environmental assessment and BLM's Finding of No Significant Impact in the deletion of 1.7 million acres of habitat on the Nellis wild horse population.

But of course no one is asking about the boundary issue because now we have a full blown crisis and a real emergency in progress. Now, no one is asking why they didn't call an emergency a year ago.

Without in anyway affecting the current removal of horses from the Nellis herd use area, API intends to continue its policy of demanding the government fully implement the law. The elimination of 1.7 million acres identified as wild horse habitat violates the law.

Since 1984, BLM has deleted over 100 areas identified, in accordance with law, as wild horse habitat areas. This has eliminated over 13 million acres from wild horse and burro usage. API contends that BLM creates "overpopulation" by eliminating habitat areas then convinces the public and Congress of the need for fertility controls.

Nancy Whitaker

Nancy Whitaker
Animal Protection Institute