

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 90-115

Decided November 20, 1990

Appeal from a decision of the Nevada State Director, Bureau of Land Management, approving final plans for removal of excess wild horses from the Flanigan Herd Management Area within the Carson City District. NV-030-90-1.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an analysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988).

APPEARANCES: Nancy Whitaker, Animal Protection Institute of America, Sacramento, California, for appellant; Kristina Clark, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Animal Protection Institute of America (APIA) has appealed an October 2, 1989, determination by the Nevada State Director, Bureau of Land Management (BLM), approving a plan for the removal of 427 excess wild horses from the Flanigan Herd Management Area (HMA) and surrounding area within BLM's Carson City District. 1/

By order dated October 15, 1990, we granted expedited consideration of the appeal based on assertions by BLM that its decision would be out of date if review were delayed, and that because of the high reproductive rate of the horses, delays in removing horses can quickly destroy the balance between horse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.

1/ Appellant is not appealing the proposed removal of wild horses from areas outside the Flanigan HMA (Statement of Reasons (SOR), Oct. 27, 1989, at 5).

Section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b)(2) (1988), 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 further deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1988). "[E]xcess animals" are defined in the Act as wild and 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) (1988).

As the court stated in Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984), "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: "[T]he 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. 2/

A determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. Animal Protection Institute of America, 109 IBLA 112, 120 (1989).

On October 31, 1989, APIA filed its initial SOR challenging BLM's horse removal plan for the Flanigan HMA. The District Manager's November 29, 1989, response to the appeal includes a point-by-point discussion of the pertinent issues raised by APIA and also attempts to identify and explain certain misinterpretations by APIA of BLM's removal plan. On January 11, 1990, APIA filed an additional brief with the Board responding at length to BLM's November 29, 1989, filing. In addition to its challenges directed specifically at BLM's Flanigan HMA horse removal plan, APIA's pleadings express concerns with, and a critique of, BLM's wild horse and burro management activities in general, BLM's data gathering and evaluation methodologies, as well as regulatory changes viewed by APIA as departures from

2/ 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."

the intent of Congress as expressed in the Act. However, the issue before us in this appeal is whether, with respect to the Flanigan HMA, BLM has established that its horse removal plan 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. Animal Protection Institute of America, supra. To the extent APIA has raised other questions beyond the scope of the decision appealed from, we decline to discuss them in this opinion.

Using the guidelines of the above authorities, we will review the record in light of APIA's arguments to determine whether BLM has justified its removal plan.

BLM's environmental assessment (EA No. NV-030-89-033), prepared for the Flanigan HMA wild horse removal, states that the purpose of the removal is to

restore the range to a thriving natural ecological balance and multiple use relationship and prevent further deterioration of the vegetation community threatened by an overpopulation of wild horses in the Flanigan Herd Management Area (HMA), and remove wild horses that have moved to areas outside of the HMA and are also contributing to the overutilization of the key forage species.

According to the EA, a February 1989 census revealed that approximately 80 percent of the wild horses both within and outside the HMA were in "very poor physical condition, due to lack of forage" (EA at 3). The rationale of the removal action is summarized as follows:

[I]t was determined that 104 wild horses is the maximum that the HMA can support * * * while maintaining an ecological balance between vegetation, wild horses, wildlife, and livestock.

In order to minimize the stresses and disruption of band structures, the population of wild horses will be reduced below 104 and allowed to increase above 104. It is anticipated that during years of under utilization the vegetation will recover to a point that will not be compromised by years of over utilization. Therefore, the population will be decreased to 80 wild horses and allowed to build to approximately 128. It is estimated that it will take four years for the population to reach 128 head from 80 head.

(EA at 10).

APIA disputes BLM's definition of "excess" wild horses. APIA contends that the wild horses are being removed to make the HMA available for livestock in violation of the Act and 43 CFR 4710.5. That regulation provides in part:

§ 4710.5 Closure to livestock grazing.

(a) If necessary to provide habitat for wild horses or burros, to implement herd management actions, or to protect wild horses or burros from disease, harassment or injury, the authorized officer may close appropriate areas of the public lands to grazing use by all or a particular kind of livestock.

APIA suggests that BLM erred in failing to consider "other options" besides removal, and that wild horses must not become the scapegoat for overgrazing by livestock or be "removed without justification based on range monitoring data from their public land habitat areas."

Referring to the Flanigan Wild Horse Removal Plan (Plan), BLM responds that both livestock and wild horses are being reduced in proportion to the use being made by both animal groups. According to the Plan, the HMA contains 16,474 available acres of which "4,583 are not used by cattle because the permittee did not place his cattle in this area due to severe over utilization by wild horses." The remaining 11,981 acres are used by both cattle and wild horses, resulting in 915 Animal Unit Months (average for 1986-1988 cattle use within the HMA). BLM refers to utilization studies and pattern mapping of the vegetation completed in 1986-1988 showing that 69 percent of heavy and severe utilization was attributable to wild horses and 31 percent to cattle. Studies conducted prior to turnout of domestic livestock showed that the overall vegetation utilization by wild horses alone (both inside and outside the HMA) was 44 percent. The Plan explains that BLM's figures are based "on actual use data, field observations and distribution analysis of where the grazing use by individual species occurred and reflect that portion of the area used by each species." Using these data, BLM calculated reductions in use proportional to the utilization and numbers for both animal groups (Plan at 14, 30-31).

APIA concedes that BLM's attempt to pinpoint percentages "is on the right track in general" but argues that 43 CFR 4710.5 should be applied in this particular case in order to allow for habitat evaluation and determination of carrying capacities.

BLM responds that closure of the HMA to livestock pursuant to 43 CFR 4710.5 is not a viable or reasonable alternative to proper management of both wild horses and livestock. BLM states that wild horses have caused heavy and severe utilization in areas outside the HMA, and explains that proper utilization will be attained by removing the wild horses and reducing livestock outside of the HMA and by proportionally reducing livestock and wild horses within the HMA. BLM also asserts that its determination to remove wild horses from the Flanigan HMA was based "solely on the result of rangeland monitoring data which clearly showed that the condition of the HMA was in a degraded state and could not support the wild horses within it" (Response at 3).

The regulation cited in support of APIA's appeal, 43 CFR 4710.5(a), gives the authorized officer discretionary authority to close an area to livestock grazing in order to achieve objectives stated in the regulation. However, APIA makes no showing that any or all of these objectives cannot reasonably be met by managing the HMA for both wild horses and livestock as foreseen in BLM's Plan. A case for closing the HMA to livestock would have to be based on a determination that such action was "necessary," for example, to provide habitat or protection to wild horses and burros. The record reveals no such necessity and APIA has cited none. Therefore, BLM did not err in not closing the HMA to livestock usage. APIA does not indicate what "other options" BLM should consider besides closing the HMA to livestock. As is clear from the authorities cited earlier, the intent of the Act is to achieve a balance in resource allocation among several groups of users of those resources. Thus, to the extent BLM's management initiatives reasonably reflect that goal, they would appear to be in harmony with the Act.

With respect to several of the appeals consolidated in Animal Protection Institute, supra, we found that the EA's supporting the removal actions contained "no definitive, well-documented statement * * * 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." Id. at 120. Such is not the case here. Having reviewed the EA in the case now before us, we conclude that it adequately supports the removal action.

As we indicated earlier, the salient inquiry is whether the planned action is supported by diligent analysis and research in the required disciplines, and whether it follows the requisites of the law authorizing it. We find that this standard has been met and that APIA has submitted no countervailing data showing otherwise. Specifically, APIA has failed to show that BLM's numbers, respecting horses supportable and not supportable in the Flanigan HMA, are in error. APIA has failed to demonstrate that BLM's environmental evaluations, including the ecological interactions of flora and fauna, are not soundly based. APIA has offered only disagreements with BLM's analyses and conclusions. Such disagreements are insufficient to render BLM's findings invalid. 3/

3/ As the Board has often held in cases involving differing interpretations of the same geological data, the Secretary is entitled to rely on the reasoned conclusions of his technical experts in the field. See Daniel C. Wychgram, 116 IBLA 89, 103 (1990), and cases there cited. Similarly, in evaluations made by BLM in the wilderness inventory process, the Board has found that BLM's judgments are entitled to considerable deference when challenged on appeal and may not be overcome by simple differences of opinion. Committee for Idaho's High Desert, 85 IBLA 112 (1985). In situations requiring BLM to assess an impact on the environment or to establish an environmental prognosis, an appellant has the burden of overcoming BLM's factual conclusions by a preponderance of evidence. L.C. Artman, 98 IBLA 164, 168 (1987).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge