

**Editor's note: Reconsideration denied, decision reaffirmed by Order dated April 18, 1991, See 117 IBLA 220A through 220D below.**

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 90-419 Decided December 21, 1990

Appeal from a decision of the Montrose District Office, Bureau of Land Management, to remove 55 wild horses from the Spring Creek Basin Wild Horse Herd Management Area.

Motion to dismiss denied, decision affirmed.

1. Rules of Practice: Appeals: Standing to Appeal--Administrative Procedure: Standing

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial standing determinations.

2. Wild Free-Roaming Horses and Burros Act--Federal Land Policy and Management Act of 1976: Land-Use Planning

A BLM decision to gather wild free-roaming horses from within and outside a wild horse herd management area will be affirmed on appeal when: (1) a conclusion that the dormant season utilization levels have exceeded the utilization levels called for in an approved resource management plan is supported by field-monitoring data; (2) the actual size of the wild horse herd exceeds an appropriate management level identified in approved land-use plans; and (3) it is necessary to remove the "excess" horses to restore and maintain a thriving natural ecological balance to the range and protect it from deterioration associated with overpopulation.

APPEARANCES: Nancy Whitaker, Sacramento, California, for the Animal Protection Institute of America; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Animal Protection Institute of America (API) has appealed a June 8, 1990, decision of the Manager, Montrose, Colorado, District Office,

Bureau of Land Management (BLM), to gather 55 wild horses from the Spring Creek Basin Wild Horse Herd Management Area (WHHMA) (1990 Gather). On October 19, 1990, expedited review of this case was granted.

The Spring Creek Basin WHHMA is located approximately 18 miles south of Naturita, Colorado. The Basin is bounded by Disappointment Creek on the south, Klondike Basin and Horse Park to the north, McKenna Peak and Rim on the east, and low rolling foothills gap-fenced in places along the west (Spring Creek Basin Wild Horse Herd Management Area Plan (HMP) at 1). Spring Creek and its tributary forks originate within the Basin. The Basin is characterized by "open, flat, to gently rolling, shadscale, snakeweed plant communities surrounded by rolling to steep and rugged pinyon juniper covered mountains," and is "dissect[ed] by deeply eroded intermittent channels flowing east to west." Id.

[1] Before reaching the merits of API's contentions we will dispose of BLM's motion to dismiss API's appeal for lack of standing. Relying on Lujan v. National Wildlife Federation, \_\_\_ U.S. \_\_\_, 58 U.S.L.W. 5077, 5080 (June 26, 1990), BLM contends that its decision does not adversely affect API within the zone of interest sought to be protected by the Wild Free-Roaming Horses and Burros Act (Act), as amended, 16 U.S.C. § 1333 (1988). We decline to grant this motion. The cases relied on by BLM and API involved standing to seek judicial review of agency action. At issue herein is standing to seek administrative review. This Board has recognized in the past that the two are not synonymous and has expressly rejected the notion that determinations of judicial standing control our adjudications of administrative standing. High Desert Multiple-Use Coalition, 116 IBLA 47, 48-49, n.1 (1990); Colorado Open Space Council, 109 IBLA 274, 286 (1989); Pacific Coast Molybdenum, 68 IBLA 325, 332 (1982). BLM seeks to superimpose a zone of interest test on the Board's standing requirement that a party be adversely affected. The zone of interest test implements the requirement that a person be "adversely affected or aggrieved by agency action within the meaning of a relevant statute" so as to be entitled to judicial review of an agency action under 5 U.S.C. § 702 (1988). See Lujan v. National Wildlife Federation, supra at 5080; Clarke v. Securities Industries Assn., 479 U.S. 388, 396-397 (1987). Standing before this Board is governed by 43 CFR 4.410(a), and is not governed by section 702 of the Administrative Procedure Act. The language "within the meaning of the relevant statute" which is implemented by the zone of interest test does not appear in 43 CFR 4.410(a), and therefore the zone of interest test is not dispositive of standing before this Board.

In Colorado Open Space Council, supra, we observed:

The decisional law of the Department has clearly established that the question of standing must be resolved by a two-step analysis. First, are the appellants parties to the case within the meaning

of the regulation? Second, assuming the answer to the first question is in the affirmative have the appellants been adversely affected by the decision being appealed?

109 IBLA at 279.

API essentially maintains that cultural and aesthetic enjoyment of specific public lands has been adversely affected i.e., diminished by BLM's decision to reduce or eliminate wild horses from specified lands. Appellant's cultural and aesthetic enjoyment is clearly adversely affected by BLM's decision proposing to remove horses from the specified lands. Allowing standing to appellant, we hold, will assist the Department in the fulfillment of its functions. High Desert Multiple-Use Coalition, supra at 48-49, note 1. Accordingly, the motion to dismiss is denied.

Appellant observes that BLM's apparent justification for removing 55 wild horses is to return the herd size to the level quoted in the land-use plan. API relates that, although BLM's decision refers to both an environmental assessment (EA) and monitoring data, no EA or monitoring data accompanied the decision. More specifically, API asserts that (1) "there is no data to show that current actual use is being monitored," (2) there is no evidence that removal of 55 horses will correct resource damage or "achieve a thriving ecologic balance of the natural system," and (3) there is no showing that "the decision is in compliance with the 1989 IBLA ruling [1/] or the statutory restriction regarding the determination of excess." API's Motion to Stay & Show Cause for Colorado Roundup decision Spring Creek Basin WHHMA (API's Motion at 1, emphasis in original). API alleges that the EA for the removal decision was not submitted for public comment (Motion at 1) and contends that there is no evidence that BLM considered 16 U.S.C. § 1333(b)(1) and (2) (1988), when making its determination that 55 wild horses should be removed from the Spring Creek WHHMA. Id. at 2-3. API states it "would not object to this action if it is shown by the Colorado BLM that removal corrects resource damage and/or achieved a thriving ecological balance of the natural system in areas of heavy and severe utilization." Id. It further insists that BLM should use "census mapping plus use pattern mapping in addition to the utilization information \* \* \* because it makes no sense to remove wild horses from the hills if the damage is in the valley" (Statement of Reasons (SOR) at 3). API avers that the requirements set out at 16 U.S.C. §§ 1331-1340 (1988) protect horses and burros from being the scapegoat for livestock damage by requiring decisions to be based on monitoring wild horse actual use and other scientific knowledge. Quoting the definition of "excess animals" found in that Act, API maintains that the first part of the definition refers to horses in the adoption program and the second part addresses restoration of a utilization ratio representing a thriving ecological balance (SOR at 2).

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1/ Presumably, API is referring to this Board's decision in Animal Protection Institute of America, 109 IBLA 112 (1989).

BLM concedes that wild horses are to be managed as an integral part of the natural system of public lands, but insists that Congress "emphatically rejected the concept of single-use management of areas for the bene-fit of wild free-roaming horses and burros." S. Rep. No. 242, 92d Cong., 1st Sess., reprinted in U.S. Code Cong. & Admin. News 2149, 2151.

Controverting API's construction of 16 U.S.C. § 1332(f)(1) and (2) (1988), BLM argues that the adoption program does not constitute an independent basis of removal. It notes that horses and burros removed from the public lands pursuant to both 16 U.S.C. § 1333(f)(1) and (2) (1988) are available for adoption. BLM urges that 16 U.S.C. § 1333(f)(1) (1988), refers to excess animals that must be removed for reasons other than "to preserve and maintain a thriving ecological balance and multiple-use relationship" such as removals to comply with 16 U.S.C. § 1334 (1988), and removals "to comply with a court order such as that issued in Mountain States Legal Foundation v. Andrus" (BLM's Motion to Dismiss and Answer (Motion and Answer) at 5 (no citation provided)).

BLM admits its decision does not set out or list the information it used as the basis for its determination, but insists that the supporting information does exist and that the San Juan Resource Area Manager gave the necessary information to API on July 13, 1990. In turn, BLM contends that API's speculation regarding the data or lack of data is not sufficient to sustain API's appeal, absent a showing of error. Id.

The record before us reveals that the Spring Creek WHHMA is part of the San Juan/San Miquel Resource Management Area. 2/ A resource management plan, entitled "The San Juan/San Miquel Resource Management Plan" (RMP), and an environmental impact statement (EIS) were prepared for the management area in 1985. The Colorado State Director, BLM, approved the RMP and EIS on August 16, 1985 (1985 Gather and Capture Plan for the Naturita/Spring Creek Basin Wild Herds, (Decision Record EA No. CO-030-SJ-85-100 Environmental Assessment for Gather and Capture of Wild Horses from the Naturita Ridge and Spring Creek Basin Herds) at 1).

A portion of the RMP contained in the record provides:

Management Guidance for Area I: Emphasis on Wild Horses

Management direction will emphasize managing the wild horse herd at an average of 50 animals on public lands by providing necessary forage and water. Some investments would probably

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2/ In a number of recent decisions we have chastised the deciding agency for its failure to forward an adequate decision record. It seems fitting, therefore, to also note when a record, such as the one now before us, is found to be well prepared and presented.

occur to enhance the habitat for the horses and also to reduce conflicts with other uses in the area. A wild horse management plan will be developed. Reducing livestock and possibly wildlife may need to occur to maintain forage production and vigor. Dispersed recreation, including wild horse viewing, will continue. Woodland products will be made available on a limited basis. Fire will be used to enhance forage production.

Management Direction for Other Resource Values

<u>Resource/ Activity</u>	<u>Specific Management General Guidance</u>	<u>Direction</u>
Wild Horses	<p style="text-align: center;">* * * * *</p> Develop a site-specific management plan for the wild horses. Develop necessary improvements (fences, waters, vegetation treatments, etc.) for the longterm management of the herd. Maintain forage in a fair condition with an upward trend.	Manage for approximately 50 wild horses in the Spring Creek area. Remove all wild horse from the Naturita Ridge area.

To meet the requirements of the RMP, BLM completed the "Gather and Capture Plan for the Naturita/Spring Creek Basin Horse Herds," (Gather and Capture Plan) and EA No. CO-030-SJ-85-100, and on August 12, 1985, the decision record for the EA and Gather and Capture Plan was signed. In the fall of 1985 BLM gathered 125 horses and released 35 horses (17 females, 18 males) in the Spring Creek Basin WHHMA pursuant to the Gather and Capture Plan. The released horses formed "the nucleus of a viable herd to be managed under this Herd Management Area Plan" (HMP at 1).

BLM approved the HMP on October 8, 1986. The HMP reports were based on actual horse counts between 1970 and 1985. According to the HMP, the herd increased at a rate equal to approximately 12 percent per year. BLM noted that the seasonal-use areas had remained fairly consistent since 1978, except for an apparent increase in the seasonal use and use territory along the Southeast corner of the Spring Creek Basin extending into the San Juan National Forest (outside the Spring Creek Basin WHHMA) which has been observed as early as 1980 (HMP at 2). The management emphasis BLM placed on two areas -- managing wild horses and managing erosion and salinity problems -- was based on the management objectives set forth in the September 1986 RMP Final Record of Decision (HMP at 3).

Specifically the RMP directs BLM to

[m]anage a wild horse herd with an average number of 50 horses on the Spring Creek Basin area. The herd, to range in numbers

between 35 and 65, would be compatible with multiple-use objectives and would not inflict significant adverse effects on vegetation, soils and water resources while supplementing public viewing opportunities of other herds located in Western Colorado.

(RMP at 21; HMP at 3).

A discussion of the objective herd parameters, including the desired herd size, sex ratio, color, and age composition of the Spring Creek Basin herd, and the interrelationship between carrying capacity and the protection of free-roaming behavior of horses, recreational opportunities for viewing, and future removals is found in the HMP at 8-10. For herd size, sex ratio and future removals, the HMP states:

A wild horse herd consisting of an average of 50 head will be maintained and managed in the Herd Management Area (HMA). The initial gather (9-85) and release of 35 head formed the nucleus for future management. At such time (estimated every 4-5 years) when total population approaches 65 head, a gather/capture operation will be initiated to remove excess animals. Summarized, the population level managed will be 35 to 65 head +/- 10% at either end.

\* \* \* \* \*

The objective is to maintain a breeding male to breeding female ratio as close to 1:1 as possible. This ratio was adopted primarily for two main reasons. First, by lessening or decreasing the amount of breeding age females, fewer foals would result thus holding annual population increases to an anticipated or estimated 20% and secondly, avoidance of inbreeding depression in an attempt to insure survival of an effective viable population. The application of effective population number to animals such as horses is demonstrated by Ian Robert Franklin, 1980. "Evolutionary Change in Small Populations," in Conservation Biology, M.S. Soule and B. A. Wilcox (eds.). Although the author suggests a minimum effective number of 50, 25 females and 25 males, to ensure survival of a genetically viable population, his concepts also apply to smaller number herds such as the one managed for in Spring Creek.

(HMP at 8).

As previously stated future gather and removal actions are expected on 4-5 year intervals, or when population approaches 65 head.

These gathers will be identical to the one described in the Gather Capture Plan for the Naturita/Spring Creek Basin Wild

Horse Herds, dated August 1985. Essentially, wild horses will be gathered using a helicopter with ground support crews (wranglers). Temporary horse trap(s) of portable steel panels and wings constructed out from the trap(s) will be used to funnel the horses into the trap. Once captured the horses will be placed into a temporary holding facility (on site or as close as possible) and held until all or nearly all horses are captured. To maintain wildness and avoid disruption to natural immunities, no attempt will be made to worm or vaccinate those breeding animals selected for turn back, however, any emergency treatment which maintains both characteristics will be acceptable.

(HMP at 8, 10).

Under the HMP, BLM must conduct actual horse population counts and monitor the condition of horses, their movement, and seasonal use patterns (Section "IV"; HMP at 11). BLM must also improve the range by constructing fences and stock ponds (HMP at 12-13).

The record contains a wild horse inventory taken on March 23, 1987, listing 47 horses in the Herd Management Area (HMA) (41 adults, 5 yearlings, 1 foal). <sup>3/</sup> All of the horses but one appeared to be in excellent condition. An inventory taken on January 22, 1988, revealed a total of 59 horses (48 adults, 11 yearlings, 0 foals), all in good condition, (Memorandum dated Jan. 25, 1988) and a similar inventory taken on January 10, 1989, reported 68 horses (58 adults, 10 yearlings, 0 foals) all in good condition (Memorandum dated Jan. 10, 1989).

The record also contains a summary of the data collected between 1980 and 1989 from monitoring livestock use, grazing capacity, precipitation, and measured utilization for growing and dormant season. BLM states that "proper utilization is 55% for dormant season and 50% for growing season." Appellant does not contest that these figures represent "proper utilization." Statistics contained in the summary for the "88-89" (growing) season reflect a measured utilization of 62 percent, 12 percent above the desired utilization for this season.

The activity contemplated in the 1990 Gather plan, which is based on the RMP and HMP, would be to "capture all wild horses in the area, currently estimated at 90 animals, to select 35 head to return to the [HMA], and provide for the disposition of the remaining excess wild horses" (1990 Gather

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<sup>3/</sup> Three horses were found "in the flats north of Hughes private," 12 were found in the "[s]outh of Spring Creek in flats north of Hughes' private"; 7 were in the "[s]outh of Round Top"; 2 were "[s]outhwest of Round Top"; 2 were in the "[s]outh of Brumley point"; 4 were "[n]orth of Brumley point"; 3 were in the "[s]outh of Hogback"; 9 were "[e]ast of Hogback in Rough Breaks"; 5 were "[n]orth of Hogback" (Memorandum to File dated Mar. 27, 1987).

Plan at 1). The excess horses would be made available for adoption with unadopted horses being shipped to Canyon City. The 1990 Gather is almost identical to the 1985 capture, the main exception being that the gather would be conducted by the Rocks Springs District Wild Horse Gather crew, rather than using a contract crew. Horses would be gathered from the HMA and adjacent areas including the San Juan National Forest and private lands which are outside a WHHMA. Citing the HMP, the EA prepared for the 1990 Horse Gather observes that the HMP specifies that, to maintain 50 head, a gather will be scheduled when numbers reach 65, with 35 being returned to the herd area and that BLM anticipated that it would take 4 to 5 years for population to increase from 35 head to 65 head. In fact, however, the herd increased from 35 to 90 head in 5 years. The EA additionally states:

Monitoring data gathered since 1980 indicates a grazing capacity of approximately 1600 AUM's available for wild horses and livestock (see appendix for a summary of the monitoring data). Grazing demand for the Spring Creek Allotment, which includes the wild horse area, is 1000 AUM's active use and 1005 AUM's of voluntary suspension for livestock. The current wild horse population of approximately 90 animals requires 1080 AUM's, of which an estimated 75%, or 810 AUM's, are currently provided from the Spring Creek Allotment and the herd area. A population of 50 animals would cause a forage demand that, along with the livestock use would fully utilize the carrying capacity of the range. (Note: Currently the herd area is not completely fenced to contain the horses. It is estimated that 75% of the present horse use is within the herd area and 25% is outside. As part of the HMP implementation, fencing has been constructed over the past 2 years. Completion of this fencing is anticipated for the summer of 1990 prior to the horse gather. After the gather all horses will be contained within the herd management area and all grazing demand by wild horses will be within the Spring Creek Allotment.

Present demand for forage exceeds capacity by 200 AUM's. If all the horse use were within the herd area, capacity would be exceeded by nearly 500 AUM's. Based on the estimated carrying capacity and the current grazing demand by horses and livestock, wild horse numbers over 50 are determined to be excess. It is necessary to reduce the horse numbers to bring the grazing demand to within the carrying capacity of the range. Failing to do so would continue over utilization of the preferred forage species resulting in decreases in vegetation densities, vigor, reproduction, productivity, and available forage. Achievement of the objectives of the RMP and the activity plans would not be possible.

Additionally, the current drought situation has caused a severe shortage of forage for both horses and livestock. Livestock use was restricted to 100 AUM's this past winter. This

action was deemed necessary in order to provide forage for horses into the summer season in the event of continued drought conditions and reduced forage production in the spring.

EA No. CO-030-SJ-90-55 at 1 and 2.

BLM approved the 1990 Horse Gather, the EA and Record of Decision for the 1990 Horse Gather on June 8, 1990.

[2] This Board will customarily affirm a BLM decision implementing a resource management plan when it is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal. Albert Yparraquirre, 105 IBLA 245 (1988); Wilderness Society, 90 IBLA 221, 232 (1986). Under the applicable regulation, resource management authorizations must conform with approved RMPs. 43 CFR 1610.5-3(a); Uintah Mountain Club, 112 IBLA 287, 289 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 212 (1989). When BLM action fails to meet this regulatory standard of conformity, however, this Board will reverse or set aside the implementing decision. High Desert Multiple Use Coalition, *supra*; Uintah Mountain Club, *supra*; Southern Utah Wilderness Alliance, *supra*.

Section 3(b)(2) of the Act (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. "[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) (1988). The "benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." Dahl v. Clark, 600 F.Supp. 585 (D. Nev. 1984); Animal Protection Institute of America, *supra* at 115.

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 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).

Animal Protection Institute, *supra*. 43 CFR 4700.0-6(a) also provides 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."

API's allegation that BLM failed to consider 16 U.S.C. § 1333(b)(1) and (2) (1988), finds no support in the record. 16 U.S.C. § 1333(b)(1) and (2) (1988), respectively, provide:

(b) Inventory and determinations; consultation; overpopulation; research study; submittal to Congress

(1) The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands. The purpose of such inventory shall be to: make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels). In making such determinations the Secretary shall consult with the United States Fish and Wildlife Service, wildlife agencies of the State or States wherein wild free-roaming horses and burros are located, such individuals independent of Federal and State government as have been recommended by the National Academy of Sciences, and such other individuals whom he determines have scientific expertise and special knowledge of wild horse and burro protection, wildlife management and animal husbandry as related to rangeland management.

(2) Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to section 1712 of Title 43; (iii) information contained in court ordered environmental impact statements as defined in section 1902 of Title 43; and (iv) such additional information

as becomes available to him from time to time, including that information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above on the basis of all information currently 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, in the following order and priority, 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:

(A) The Secretary shall order old, sick, or lame animals to be destroyed in the most humane manner possible;

(B) The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals, and for which he determines he can assure humane treatment and care (including proper transportation, feeding, and handling): Provided, That, not more than four animals may be adopted per year by any individual unless the Secretary determines in writing that such individual is capable of humanely caring for more than four animals, including the transportation of such animals by the adopting party; and

(C) The Secretary shall cause additional excess wild free-roaming horses and burros for which an adoption demand by qualified individuals does not exist to be destroyed in the most humane and cost efficient manner possible.

Based on a current inventory of the lands and the herd population (16 U.S.C. § 1333(b)(2)(i) (1988)), applicable land-use plans (16 U.S.C. § 1333(b)(2)(ii), (iv) (1988)) and other available information -- specifically current range utilization data -- (16 U.S.C. § 1333(b)(2)(iv) (1988)), the Secretary has properly determined that the wild-horse herd in the Spring Creek Basin WHHMA is overpopulated, making it necessary to remove 55 "excess animals from the range so as to achieve appropriate management levels (AML)." The action now being challenged by API does not establish the AML for the Spring Creek Basin WHHMA. The AML, an average of "50 wild horses," ranging in numbers between 35 and 65, was determined when the RMP was prepared. <sup>4/</sup> Under the RMP, this herd size would be compatible with multiple-use objectives and would not inflict significant adverse effects on vegetation, soils and water resources while supplementing public viewing opportunities of the herds located in Western Colorado. The exact language of the Act may not have been parroted in the RMP, but

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<sup>4/</sup> An RMP is "not a final implementing decision on actions," and a decision approving an RMP or amendment of an RMP is not appealable to this Board. See 43 CFR 1610.0-5(k). Under 43 CFR 1610.5-2, an RMP is "designed to guide and control future management actions," and thus an approval of an RMP or amendment is subject to review only by the Director, BLM, whose decision is final for the Department. Wilderness Society, 90 IBLA 221 (1986). Nonetheless, the Board has jurisdiction over actions implementing such plans and over approval of an activity plan, such as a recreation management or herd management plan; Idaho Natural Resources Legal Foundation, 96 IBLA 19, 94 I.D. 35 (1987); Wilderness Society, supra.

The 1990 Gather is an action implementing the RMP and HMP.

the thrust of the RMP is that, in order to maintain "a thriving ecological balance to the range and protect the range from the deterioration associated with overpopulation" the herd population must be reduced when average herd size exceeds 50 horses. 16 U.S.C. § 1333(b)(2) (1988). There is no evidence that BLM has established an AML merely for administrative convenience, or that it did so in the absence of adequate information. See Animal Protection Institute, 109 IBLA 112, 118 (1989).

Appellant's contention that BLM's decision is not based upon existing monitoring data is refuted by the record. The HMP contains a summary of data on horse counts between 1970 and 1986, and that data demonstrates an annual increase of approximately 12 percent. The monitoring data gathered since 1986 appears in the record in the form of annual census horse counts, reports on the condition of the herd, and reports of sightings outside the boundaries of the WHHMA. Wild horse geographical use patterns are noted for 1987. Grazing capacity, actual use by livestock (documented by "Actual Grazing Use Records" filed by permittees), and precipitation levels have been measured, monitored, and recorded for the dormant and growing seasons since 1980 and a summary of that data, is included in the record. The record also contains a series of "utilization transects" documenting forage utilization since 1976, which support the conclusion that census data was appropriately considered in tandem with use patterns. This monitoring data fully supports BLM's conclusion that an overpopulation or "excess animals" exist based on the definition of excess in the RMP and HMP and BLM's 1990 Gather Plan is fully supported by prior planning decisions and monitoring data disclosed by the record before this Board.

We find no merit in the contention that the 1990 Gather Plan was not circulated for public comment. The 1990 Gather Plan on page 4 states:

A public meeting will be held on July 1, 1990, for any interested person to attend. This meeting is to provide people with information on the wild horse removal and gather operation and the opportunity to comment.

An environmental assessment was prepared addressing the need for the removal and notice of intent to remove excess wild horses was sent to the people and groups listed in appendix C.

Public observation of the operation will be allowed as specified in the 1985 gather/capture plan (part VI).

Twenty six parties are listed on "appendix C" contained in the record. Exhibit C reflects that the notice of intent was sent to a representative of API "Mr. Bob Hillman Animal Protection Institute of America, P.O. Box 22505, Sacramento, Ca. 95822." API has failed to show that it was not given notice or an opportunity to comment on the 1990 Gather Plan. API has failed to show error in BLM's 1990 Gather decision.

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Therefore, 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.

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R. W. Mullen  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

117 IBLA 220

IBLA 90-419 : EA C0-030-SJ-90-55  
117 IBLA 208 :  
ANIMAL PROTECTION INSTITUTE : Wild Free-Roaming Horses and  
OF AMERICAN : Burros Act  
: Petition for Reconsideration  
: Denied; Decision Reaffirmed

ORDER

The Animal Protection Institute of American (API) had filed a petition for reconsideration of this Board's December 21, 1990, decision in Animal Protection Institute of American, 117 IBLA 208 (1990).

In its petition API contends that the Appropriate Management Level set in the 1985 Resource Management Plan (1985 RMP) was not based on monitoring of actual usage and inventories (API's Petition for Reconsideration (Petition) at 3). In response, the Bureau of Land Management (BLM) states that the Appropriate Management Level was based on monitoring data and avers that API's claim ignores all the monitoring and other information considered by BLM (Respondent's Reply to Appellant's Motion for Reconsideration (Answer at 2.))

The record refutes API's assertion that the Appropriate Management Level established in the 1985 RMP was not based on monitoring and utilization data. The record contains utilization transects and monitoring data on forage utilization, actual grazing use, grazing horse use, and precipitation since the fall/winter of 1980-1981. Data was thus collected for some 4-5 years before the 1985 RMP was adopted. Appellant has presented no evidence demonstrating that BLM did not rely on this data in arriving at the Appropriate Management Level, nor, as we stated in our original decision, is there any evidence that "BLM has established an [Appropriate Management Level] merely for administrative convenience, or that it did so in the absence of adequate information." Animal Protection Institute of American, *supra* at 219.

API also contends that the wild horse population increase reported between 1987 and 1990 is not credible, based on the number of foals born in the respective years and the ratio of adult to young. BLM maintains that its reported data is properly based on monitoring and, unless API has conducted its own monitoring in the Spring Creek Basin Wild Horse Herd Management Area (WHHMA) with different results, or can show that BLM's monitoring

is flawed, BLM's monitoring data should be accepted (Answer at 4). BLM also states that the current ratio of adult to young reflects the effect of existing drought conditions. Id.

In appraisal cases when the accuracy of BLM's fair market value determination was in question, this Board has recognized that "in the absence of a preponderance of the evidence that a BLM appraisal is erroneous, such an appraisal may only be refuted by another appraisal." Big Sky Communications, Inc., 110 IBLA 213 (1989); Chalfont Communications, 108 IBLA 195 (1989). This is a fair and appropriate standard to employ in considering challenges to monitoring data collected by BLM. API alleges error because the foal rates do not track the observed population increases. However, API has not established a direct correlation between the two statistics, and it remains that population figures are directly affected by other factors, including migration or movement of horses into the Spring Creek WHHMA. API has not shown by a preponderance of the evidence that BLM has erred in its horse population reports and API has submitted no contrary monitoring data.

API acknowledges the Board's finding that the Appropriate Management Level is not set by the action being appealed (gather decision), but insists that the Appropriate Management Level must be set by this action (Petition at 3-4, 6-7) contending that a determination of excess and establishment of an Appropriate Management Level must be based on ongoing monitoring of current resource conditions. Id. at 4. BLM counters that API's contention fails to recognize the statutory requirement that wild free-roaming horses and burros are to be managed "as components of the public lands" and cannot be managed without regard to other resources in the area (Answer at 2).

API's argument for reconsideration assumes that BLM's Appropriate Management Level for management of wild horses and burros is not subject to the 1985 RMP, or is somehow exempt from the coverage under the 1985 RMP. This assumption does not withstand analysis. It is contrary to the clear intent of section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1988), and the express language of 16 U.S.C. § 1333(b)(2)(ii)(1988).

In section 202 of FLPMA, the Secretary is directed to develop, maintain, and revise land-use plans for the public lands. The purpose of these plans is to set out the uses to which the public lands may be put, "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C § 1712 (1988); Southern Utah Wilderness Alliance, 111 IBLA 207, 211 (1989). Neither FLPMA nor any other statute exempts the management of wild-free roaming horses and burros from 43 U.S.C. § 1712 (1988). Further, the Secretary is directed to "observe the principles of multiple use and sustained yield" when developing land-use plans. Multiple use is defined in 43 U.S.C. § 1702(c) (1988) as:

(c) The term "multiple use" means the management of the public lands and their various resource values so that they are

utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over area large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resources uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Reconsideration is governed by 43 CFR 4.403. Under that section this Board may reconsider a decision in extraordinary circumstances for sufficient reason. API has failed to show that extraordinary circumstances exist. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, API's petition for reconsideration is denied and the decision in Animal Protection Institute of America, 117 IBLA 208 (1990), is reaffirmed.

R. W. Mullen  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge

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