

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 93-308, 94-14

Decided December 10, 1993

Appeal from decisions of the Lander, Wyoming, Resource Area, Bureau of Land Management, to gather excess wild horses. WY-036-EA3-010 and WY-036-EA3-013.

Appeals dismissed in part; requests for stay and expedited consideration granted.

1. Administrative Procedure: Stays--Rules of Practice: Appeals: Effect of-- Rules of Practice: Appeals: Stay--Wild Free-Roaming Horses and Burros Act

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it

is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

2. Rules of Practice: Appeals: Mootness--Wild Free-Roaming Horses and Burros Act

An appeal from a BLM decision to round up horses is not moot, even though the horses have been removed, as remedies are available (even apart from returning the same horses to the range) if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Further, the appeal is not moot, as it is capable of repetition, in that the population of wild horses may return in time to former numbers through propagation of the remaining horses.

3. Appeals: Generally--Rules of Practice: Appeals: Timely Filing

An individual's request "to add her name" to a timely-filed appeal by an organization is properly denied if not filed within the 30-day time frame established by regulation. Where the individual indicates that she has been an interested party to Wyoming's management of wild horses for several years, she may either provide input to the organization so that it may incorporate her views or may request permission to appear as amicus curiae.

APPEARANCES: Anna E. Charlton, Esq., Newark, New Jersey, for appellant; 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 HUGHES

The Animal Protection Institute of America (APIA) has appealed from two decisions of the Lander, Wyoming, Resource Area Manager, Bureau of Land Management (BLM).

BLM's first decision, dated February 24, 1993, was to gather excess wild horses from five Lander Herd Management Areas, and was based on Environmental Assessments WY-036-EA3-010 and WY-036-EA3-013. APIA's appeal from that decision has been docketed as IBLA 93-308.

BLM's second decision, dated September 27, 1993, placed the first decision into full force and effect. APIA's appeal from that decision has been docketed as IBLA 94-14. Owing to the common subject matter of the two appeals, they are hereby consolidated.

BLM did not put its February 24, 1993, roundup decision into full force and effect. Nor did APIA request a stay of that decision. In late February 1993, the general regulation governing appeals from BLM decisions, 43 CFR 4.21, had recently been revised. 58 FR 4939 (Jan. 19, 1993). Based on its interpretation of that revision, BLM concluded that it could proceed to gather horses in the absence of a request for a stay. BLM rounded up 359 horses between July 13, 1993, and August 20, 1993.

[1] On August 12, 1993, in another case, the Board found BLM's interpretation of the stay revision to be in error. Michael Blake, 127 IBLA 109 (1993). As we explained in that case, the recent revision of 43 CFR 4.21 provides that, "[e]xcept as otherwise provided by law or other pertinent regulation," a BLM "decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal." 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)).

However, we held, the wild horse and burro management regulations do contain a specific provision governing the effect of decisions to remove wild horses or burros from public or private lands. 43 CFR 4770.3(c). Accordingly, the stay provision in 43 CFR 4.21(a) does not apply. Michael Blake, 127 IBLA at 110. The effect of BLM's February 1993 removal decision was controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)).

Under 43 CFR 4770.3(c), the authorized officer may opt to place a wild horse removal decision into full force and effect, and it "take[s] effect on the date specified, regardless of an appeal." However, if he fails to do so, the effect of BLM's decision is suspended both during the period in which an appeal could be filed, and (if a notice of appeal is timely filed) indefinitely thereafter until the Board rules on the appeal. See 43 CFR 4770.3(a); Michael Blake, 127 IBLA at 110.

Here, the filing of APIA's notice of appeal suspended the effectiveness of BLM's decision pending our consideration of its appeal, and removal of wild horses could not properly proceed. BLM therefore conducted the roundup in error.

Subsequent to the Board's ruling in Michael Blake, and during the pendency of APIA's first appeal, BLM attempted to remedy its error. On September 27, 1993, it issued its second decision, putting its first decision into full force and effect. BLM then proceeded to gather additional horses. APIA appealed from BLM's second decision and has requested that its effect be stayed as provided by 43 CFR 4770.3(c).

APIA is concerned that BLM's actions here, both in proceeding with the roundup and in subsequently putting the decision into full force and effect despite the filing of APIA's appeal, insulated from review the legality of BLM's decision to conduct the roundup. We will consider that question in due course in a future decision. Upon completion of pleading, we will proceed to expeditiously adjudicate the legality of the roundup.

[2] More immediately, we must determine whether the appeals and the stay request are moot, now that horses have already been gathered. An appeal of an action is not moot, even if that action has been completed, if it is capable of repetition. Int'l Org. of Masters, Mates, & Pilots v. Brown, 111 S.Ct. 880 (1991); Weinstein v. Bradford, 423 U.S. 147 (1975). If past history on other Federal lands is any guide, the population of wild horses on the tracts in question will recover in time, and the question of whether to remove wild horses will arise again. Furthermore, although horses may have been rounded up, remedies are available, even apart from returning the same horses to the range, if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Because such remedies are available, and because this situation is capable of repetition, the appeals and request for stay are not moot. We must determine whether the record justifies BLM's decision to gather excess animals, that is, whether it is properly predicated on an appropriate determination that removal is necessary to restore the range

to a thriving natural ecological balance and prevent a deterioration of the range. Animal Protection Institute of America, 109 IBLA 112 (1989).

APIA's request for a stay under 43 CFR 4770.3(c) is granted. BLM is directed to cease any further wild horse gathering on the tracts in question until these appeals are resolved.

APIA has requested an opportunity to present additional evidence and expedited review of the BLM decisions. Those requests are granted. APIA is granted until January 7, 1994, to file further evidence. BLM shall have 30 days after receipt of APIA's additional filing to file an answer.

[3] In APIA's statement of reasons, filed on April 13, 1993, it indicated that Jeannine R. Stallings asked "to add her name to APIA's appeal as an individual who has been an interested party to Wyoming's management of wild horses for several years" (APIA Statement of Reasons at 1). By document filed on May 6, 1993, Stallings confirmed her desire to join APIA's appeal "as an individual concerned about the Wyoming BLM management of wild horses." Those requests are denied. If Stallings wished to appeal in her own right, it was incumbent upon her to file a notice of appeal with BLM within 30 days after being notified of BLM's decision to conduct the roundup. See 43 CFR 4.411(a). She failed to do so. ^{1/} Stallings may provide input to APIA so that it may incorporate her views in its further submission. Alternatively, Stallings, as a concerned individual, may request permission to appear in this matter as amicus curiae, and bring her views before the Board in that role. See United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 303, 89 I.D. 548 (1973).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the two appeals are consolidated, the request for stay is granted, time is provided to APIA for an additional filing, expedited consideration is granted, and Stalling's appeal is dismissed.

David L. Hughes
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

^{1/} Neither of APIA's notices of appeal mentions Stallings. Even if APIA's statement of reasons could be regarded as a notice of appeal filed on Stallings' behalf, it was not timely filed. Nor was Stallings' letter filed on May 6, 1993, a timely notice of appeal.