

NOEL BENOIST

IBLA 92-588 Decided October 31, 1994

Appeal from a decision of the Phoenix Resource Area Manager, Bureau of Land Management, cancelling a Private Maintenance and Care Agreement for two wild free-roaming horses. 89534604 (AZ) and 89534550 (AZ).

Reversed.

1. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

A BLM decision notifying the adopter that his wild horses had been repossessed and cancelling his private maintenance and care agreement will be reversed where the record on appeal contains insufficient evidence of improper care or abandonment of the adopted animals or any other failure to comply with the terms of the agreement sufficient to justify such action.

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

It is error for BLM to repossess a wild horse and allow it to be readopted prior to notice to the original adopter of the repossession of the horse and cancellation of the private maintenance and care agreement. Such action by BLM defeats the ability of the adopter to reclaim the repossessed animal through the administrative review process.

APPEARANCES: Noel Benoist, Apache Junction, Arizona, pro se., Arthur E. Tower, Area Manager, Phoenix Resource Area, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Noel Benoist has appealed from a June 9, 1992, decision of the Phoenix Resource Area Manager, Bureau of Land Management (BLM), notifying him that BLM had repossessed two adopted wild horses (freeze mark Nos. 89534604 and 89534550) and that it was cancelling his Private Maintenance and Care Agreement (PMACA), dated December 7, 1991, for those two horses. BLM had

assigned the horses to Benoist under authority of the Wild Free-Roaming Horses and Burros Act of December 15, 1971, as amended, 16 U.S.C §§ 1331-1340 (1988).

In its decision, BLM stated:

An inspection on May 28, 1992 revealed that you have failed to provide proper care for the animals identified above. Mr. Chuck Hall, owner of Hall's Stables, stated that you had abandoned these mustangs at his facility and that you owed a \$600 board bill. Therefore, we have repossessed the animals and are cancelling the adoption agreement. Authorization for this action is the Wild Free-Roaming Horse and Burro Regulation 43 CFR 4770.2(b).

Benoist filed a notice of appeal on July 12, 1992. In his statement of reasons and subsequent pleadings filed on appeal, Benoist alleged that he had not abandoned the horses and was properly caring for them in accordance with the terms of the PMACA at the time BLM repossessed them. He further alleged he was given no notice that his actions regarding the horses were improper prior to BLM's repossession of the horses.

In an order dated September 11, 1992, we summarized the evidence received in the case to that point:

The present case file contains no record of a May 28, 1992, inspection of the horses in question. There is, however, a memorandum to the file dated June 12, 1992, from one Marilyn Williams, identified therein as "Volunteer for the BLM under Kyle Mohan," [1/] describing an April 25, 1992, compliance check and a May 27, 1992, follow-up visit. She recounted that during the follow-up visit to the stable where the horses were boarded, she learned from the stable owner that "Mr. Benoist had disappeared for about two weeks and owed him \$600.00." There is no mention in the memorandum that Benoist had "abandoned" the horses. However, Williams stated that the stable owner told her that "he was unwilling to feed these animals any more feed until he had been paid." Williams further stated that "[t]hese horses were very thin at this time and showed no signs of being gentled." There is no indication in the record of Williams' qualifications for determining the health of the horses. The record does not include a statement from the stable owner. Nor is there a statement from a veterinarian regarding the health of the horses upon repossession. The Williams memorandum constitutes the only record support for BLM's action to repossess the horses and cancel the PMACA.

1/ Mohan is identified in the record as the BLM Phoenix District Wild Horse and Burro Specialist.

On August 24, 1992, Benoist filed a statement of reasons for appeal with this Board, and on August 31, 1992, he filed statements from three individuals, two of whom are veterinarians, attesting either to his intent not to abandon the horses or to the good health of three horses owned by Benoist. The statement of Vicki Baulmer, DVM, dated August 17, 1992, states that she examined the three horses ("Two of these were BLM mustangs.") on May 13, 1992, and found them to be in good health.

In that order, we directed BLM to show cause why its decision should not be reversed because the record did not support its action to repossess the horses and cancel the PMACA.

On October 5, 1992, BLM filed an answer in response to the order to show cause and a "Wild Horse and Burro Compliance Record" (Compliance Record), for the horses in question, signed by Mohan. That document shows an inspection date of May 28, 1992, and indicates that the inspection was conducted on the basis of a complaint concerning inhumane treatment. The source of the complaint is not identified. Presumably, it was an oral representation made by Williams following her May 27, 1992, visit to Hall's stable. The Compliance Record stated regarding facility conditions: "Meets BLM minimum standards," and as to animal condition: "In compliance." Thus, the sole basis for BLM's action is contained in the narrative of the Compliance Record, which states in its entirety:

Chuck Hall, stable owner, stated to me that Mr. Benoist had abandoned two mustangs in his care. Hall felt that he would be unable to recover the outstanding board bill of \$600.00 through the State of AZ feed lien procedure, since the mustangs were U.S. property. Hall requested that the animals be removed from his property. Animals were removed this date.

In BLM's answer, the Phoenix Area Manager asserts:

When Mr. Benoist vacated his residence at 1530 West Fillmore in April 1992, he failed to provide this office with his new address as required by the terms and conditions of the Private Maintenance and Care Agreement (PMACA) signed by him on December 7, 1991. The PMACA requires that adopters notify the authorized officer within 30 days of any change in the adopter's address. * * * Failure to comply may result in cancellation of the agreement, repossession of the animals, and disapproval of the request for adoption of additional animals. * * * As described in the report by Marilyn Williams, * * * Mr. Benoist had been living out of his truck since leaving the Fillmore address. Because Mr. Benoist had provided BLM with no mailing address, no telephone number, or message phone, BLM had no way to contact him in reference to Mr. Hall's allegations. Only after the horses were repossessed did Mr. Benoist contact BLM and report his new mailing address.

(Answer at 1).

The Area Manager admits that the condition of the mustangs was satisfactory, and concedes that the animals' physical condition was never an issue in the decision to repossess the horses. "The crucial issue," according to the answer, "was that the mustangs required daily feed and water." Id. at 2. The answer continues:

Mr. Hall told * * * Kyle Mohan during an interview of May 28, 1992 that Mr. Benoist had abandoned the animals and that he (Hall) would no longer provide feed and water for the two mustangs. * * * Mr. Hall requested that the animals be removed immediately from his stable. There was no way to contact Mr. Benoist to make alternative arrangements for the mustangs' care, because Mr. Benoist had failed to provide BLM with a means to contact him. Since Mr. Benoist was unavailable to provide proper care for these animals, and since he (Benoist) had violated the terms and conditions of the PMACA, his PMACA was cancelled and the mustangs were repossessed.

Id.

He also states that "the authorized officer was never relayed the information contained in the deposition by Timothy A. Davis. Timothy A. Davis was unknown to the authorized officer until receipt of his testimony from your office. If the information presented in his deposition is truthful, and had it been relayed to BLM in a timely manner, this entire event may have been avoided." Id. BLM provided no statement from Hall, the stable owner.

The "deposition" referred to by the Area Manager is a statement from Timothy A. Davis received by the Board on September 28, 1992. The state-ment asserted:

I can attest to the fact that Mr. Benoist never abandoned the horses, and that he had an agreement with Chuck Hall for the care of the animals. Mr. Benoist * * * was himself out to Mr. Hall's residence regularly to check on his horses. Mr[.] Benoist was busy with business during this time, but left Mr. Hall my name and phone number to contact him at any time for any reason. I also had a message recorder at my residence.

On December 10, 1992, Benoist filed a response to BLM's answer charging that BLM had no basis for asserting that he had violated the terms of the PMACA by not timely reporting his new address, as he had informed BLM officials that he was in the process of moving and had given them Davis' telephone number as a location where he could be reached at all times prior to his relocation. He further argues that he had "two or three conversations with Kyle Mohan" at that number and that Mohan had "called and left two or three messages on the message recorder * * * from March to May 1992." However, he claims that no attempt was made to contact him at that

number prior to repossession of the horses on May 28. ^{2/} Benoist alleges that he secured a post office box in Apache Junction on June 5, 1992, and notified BLM of his new address, and that BLM mailed a copy of its decision to him at that address on June 9, 1992. He supplied documentation supporting that assertion. Benoist further alleges that his horses were sold in a BLM sale at Flagstaff, Arizona, on June 3, 1992.

[1] The Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1988), authorizes the Secretary of the Interior to place wild horses with qualified applicants who can assure humane treatment and care. See 43 CFR Subpart 4750. Title to horses placed in private care remains with the Government for a minimum of 1 year after placement and execution of the PMACA and until BLM issues a certificate of title. 16 U.S.C. § 1333(c) (1988); 43 CFR 4750.4 and 4750.5. Regulations 43 CFR 4760.1(a) and 4770.1(g) require the adopter to comply with the PMACA and the regulations.

A cooperative agreement for the private maintenance of livestock under the protection of the Wild Free-Roaming Horses and Burros Act may be summarily cancelled by BLM upon good and sufficient evidence that the terms of the agreement have been violated. Where a BLM inspection and/or credible reports by third parties of substandard care reveal that the animals are in a deteriorating condition, this evidence will, in the absence of a showing that persuasive countervailing evidence exists, constitute good and sufficient evidence that terms of the agreement have been violated. Freddie R. Mason, 126 IBLA 28, 29 (1993); Grant F. Morey, 108 IBLA 354, 356 (1989); Mary Magera, 101 IBLA 116, 119 (1988), quoting Dennis Turnipseed, 66 IBLA 63, 67 (1982). In its answer, BLM admits that, at the time the horses were repossessed, they were being properly and humanely treated. Thus, the sole claimed basis for repossession was the alleged statement by Hall that Benoist had abandoned the horses and that Hall would no longer care for them.

We find that the evidence does not support BLM's decision to repossess the horses. Benoist has supplied ample documentation that, at the time the horses were repossessed, he was adequately caring for the animals. While it is reasonable to assume that Hall may have said that he would not care for the horses if, as alleged, he was owed \$600.00 for their care, BLM has not provided a statement from Hall documenting its assertions concerning his statements, which were pivotal to BLM's action. In addition, Benoist has supplied persuasive countervailing evidence supporting his assertion that he had not abandoned the animals, and that he could have been contacted by BLM, even though he did not have a current permanent address in May 1992.

^{2/} In support of this allegation, Benoist submitted a further statement from Davis, dated November 16, 1992, in which Davis explains that, from September 1990 to July 1992, Benoist used his address and phone (with message recorder) as his mailing address and phone number for business and that "[d]uring this time Noel received letters and phone calls from many businesses including the Bureau of Land Management. I myself talked

In not making any effort to contact Benoist prior to the repossession, BLM apparently relied on a representation by Williams, as recounted in her June 12, 1992, memorandum to the file regarding her compliance check on

May 27, 1992: "At this time Mr. Benoist had no mailing address or phone. I remember he said he was living out of his truck." That statement indicates that Williams had a conversation with Benoist or overheard a conversation that Benoist had with someone else in which he "said he was living out of his truck." However, that raises the question whether he had told people, including Hall, Williams, and BLM, how to contact him. Benoist's representations and Davis' statements indicate that he had.

Moreover, we do not believe that the record supports cancellation of the PMACA under the facts of this case. The PMACA provides, under the section, "Terms of Adoption," that "(f) Adopters shall notify the authorized officer within 30 days of any change in the adopter's address." That section further states that failure to comply with any terms of the PMACA "may result in cancellation." Thus, cancellation is not mandatory where there

is a failure to comply with the terms of the PMACA. In this case, however, it is even questionable whether there was any violation of the notification term. The term requires that the adopter notify BLM of "any change in the adopter's address" within 30 days. The record indicates that BLM was aware that Benoist had left his permanent residence in April 1992 and that he was living out of his truck and had no fixed address at the time of repossession of the horses. BLM was apparently timely informed of these facts. The record also shows that he informed BLM on June 9 of his new mailing address. Even assuming that these facts might establish a violation of the notice term, it would be merely a technical violation which would not justify cancellation of the PMACA.

[2] The record shows that only a few days after Benoist acquired a post office box for receipt of mail, he informed BLM on June 9, 1992, of that address. That was only 12 days after repossession of the horses. Nevertheless, Benoist alleges, and BLM does not deny, that his horses had already been readopted at a BLM sale held in Flagstaff, Arizona, on June 3, 1992. ^{3/} That was prior to BLM's issuance of its decision pro-viding Benoist with formal notice of its repossession and cancellation. Under 43 CFR 1810.2, BLM is required to send notice of its actions to the "last address of record." It did not do so in this case. Benoist had no opportunity to appeal and request a stay of BLM's action prior to the readoption of his horses. Clearly, such action by BLM was improper.

fn. 2 (continued)

to representatives of BLM, one was a volunteer inspector & main inspector Kyle Mohan. So it is quite obvious that BLM knew that this address & phone number were used for/by Noel Benoist" (emphasis in original). BLM has not responded to this statement.

^{3/} Absent a denial from BLM, for purposes of further discussion in this case, we accept the truth of Benoist's statement that the horses were readopted on June 3, 1992.

Under the regulations, the authorized officer may place a decision to cancel a PMACA and repossess horses into full force and effect. 43 CFR 4770.3(b) (1993). ^{4/} The remedy for the adopter is to file an appeal and a petition for stay. Id. If a stay were granted, BLM might be required to return the repossessed horse or burro to the adopter during the pendency of the appeal. By allowing readoption of a repossessed horse or burro prior to notification to the adopter of cancellation and repossession, BLM defeats the ability of the adopter to reclaim the repossessed horse or burro.

This case is distinguishable from Mark L. Williams, 130 IBLA 45 (1994), in which we held that BLM was justified in cancelling a PMACA. In that case, the facts supported BLM's action; in this case, they do not. In Williams, the person providing care for two wild horses informed BLM in April 1992 that she had heard nothing from the adopter regarding the care of the animals, and that she had received no money for the care of the animals for 10 months. She asked BLM how it wanted her to proceed. Although the record showed that BLM contacted the adopter, nothing had been resolved when BLM received another letter in August 1992 from the person providing care stating that payment still had not been made and that she would no longer care for the animals. At that time, BLM did not take physical custody of the horses. Instead, it assumed financial responsibility for the horses and cancelled the PMACA.

In this case, there is no direct evidence from the care provider in the record. Although the claimed basis for repossession was abandonment, the record fails to show that the horses had been abandoned. If BLM were concerned for the welfare of Benoist's horses, it could have, as in Williams, assumed financial responsibility for the care of the horses, cancelled the PMACA, and sought to contact Benoist. Here, it repossessed the horses and allowed them to be readopted without issuing any decision regarding its actions. Only after the readoption did it inform Benoist of the repossession and cancellation. BLM's actions in this case are not supported by the record and must be overturned.

In this case, because Benoist's horses have been readopted, BLM is directed to allow him, at his option, to adopt two other horses without cost or recover his original adoption fees.

^{4/} In final rulemaking published in the Federal Register on February 16, 1994, BLM provided at 43 CFR 4770.3(b) that "decisions to cancel a Private Maintenance and Care Agreement shall be effective upon issuance or on a date established in the decision * * *." That rulemaking finalized an interim final regulation, 43 CFR 4770.3, published on January 9, 1991, (56 FR 786). The interim final rule, which was in effect at the time this case arose, provided:

"The authorized officer may place in full force and effect decisions to cancel a Private Maintenance and Care Agreement so as to allow repossession of wild horses and burros from adopters to protect the animals' welfare. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part."

The Area Manager placed the decision in question into full force and effect.

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 reversed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge

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