

NIKKI LIPPERT

IBLA 2000-100

Decided October 17, 2003

Appeal from a decision of the Billings (Montana) Field Office, Bureau of Land Management, rejecting an application for adoption of a grullo stallion from the Prior Mountain Wild Horse Range. MT 4700.

Affirmed; stay denied as moot.

1. Administrative Procedure: Generally--Administrative Procedure:
Burden of Proof

The party challenging an exercise of administrative discretion by BLM bears the burden of showing that the decision is not supportable on any rational basis or does not comply with the regulations or statutes.

2. Wild Free-Roaming Horses and Burros Act

In exercising its broad discretion to approve or reject an application to adopt a wild horse under 43 CFR Subpart 4750, BLM properly considers information and circumstances contained in the application, as well as matters outside the application of which it has knowledge.

APPEARANCES: Nikki Lippert, Lame Deer, Montana, pro se; Karan L. Dunnigan, Esq., Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Nikki Lippert has appealed from a November 5, 1999, decision of the Field Manager, Billings (Montana) Field Office, Bureau of Land Management, denying her application to adopt, by sealed bid, a grullo ^{1/} stallion offered for adoption by BLM on

^{1/} "Grullo" describes a mouse- or slate-colored coat. The term is also spelled "grulla."
(continued...)

September 29, 1999.^{2/} In addition, she petitioned to stay BLM's decision. Lippert's application, dated October 28, 1999, was filed pursuant to section 3(b) of the Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2) (2000), which authorizes the adoption of wild free-roaming horses by qualified individuals. Lippert submitted the high bid for the horse.

In her application, Lippert specified that she would be boarding the animal with her sister, Jerri Tillett, at the "Lippert Trailer and Compound" located on the "Royce Tillett Estate/Trust," just over the Montana boundary north of the Britton Springs, Wyoming, BLM Administrative Site. (Application and Adoption Questionnaire at 4.) She indicated that Tillett would be taking care of the horse. Id. at 1. The application also stated that corrals and shelter for the horse would be "assembled prior to delivery." Id. at 3.

BLM's decision, citing its broad discretionary authority under the regulations at 43 CFR Subpart 4750 - Private Maintenance, was issued two days after receiving Lippert's application, and it disapproved the application on two grounds. First, BLM stated that Tillett and her associate, Joey Deeg, previously had exhibited a questionable record with regard to caring for the grullo stallion. Second, BLM rejected the application because Lippert did not certify, in accordance with provisions of BLM Manual H4750.2.5, that facilities appropriate to house the horse were available when the application was submitted.

More specifically, the decision stated that the horse had been "held in captivity" by Tillett and Deeg "from May 1997 to October 1998," and had been returned to BLM in an unsatisfactory condition. Specifically, "its hooves had grown to a length of at least 10 inches and had curled due to prevention of freedom of movement. As a result, it was necessary to anesthetize [the] animal to allow for

^{1/} (...continued)

Unless quoting, we will use the spelling "grullo," which was used by BLM in the Sept. 29, 1999, adoption notice.

^{2/} As the horse has since been adopted, and title may have passed (Lippert Letter received Nov. 13, 2000), it could be argued that the matter is moot, as the relief requested cannot be granted. An appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal. See, e.g., Craig C. Downer, 111 IBLA 339 (1989). However, when an appeal raises issues which are capable of repetition, and yet evading review, it is proper to adjudicate the appeal even though the relief sought by an appellant cannot be granted for the particular event. Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 112 (2000). The issues presented by this appeal fall in the latter category; accordingly, we will review the matter on its merits.

almost two hours of professional clipping.” (Decision at 1.) The Field Manager concluded that

[t]his level of neglect is considered inhumane and does not meet standards deemed minimally acceptable for general maintenance and care of domestic horses. As such, Ms. Tillett has previously demonstrated the inability to provide minimum standards of humane care to this horse.

Id. BLM also denied the application on the ground that the application did not provide a basis on which BLM could conclude that adequate facilities existed, at the time the application was filed, at the location identified. BLM referred Lippert to the BLM Manual, H4750-2, “Adoption Handbook,” Chapter IIA.5., Rel. 4-105 (May 22, 1998), which provides that, “at the time the adoption is approved, the adopter must have adequate corrals and structures to maintain adopted wild horses * * * humanely.” ^{3/} Accordingly, BLM rejected the application.

Lippert appealed, alleging that BLM had arbitrarily rejected her application because neither she nor her sister had been accused of animal abuse prior to BLM’s decision, Deeg is not the adopter or the care giver, and neither her sister nor Deeg abused the grullo stallion during the time it was under their care.

The Wild Free-Roaming Horses and Burros Act, supra, authorizes the Secretary of the Interior to place wild horses with qualified applicants who can assure humane treatment and care. Departmental regulations set forth qualification standards applicable to the instant appeal which relate, in part, to the quality of maintenance an adopter is expected to provide:

(a) To qualify to receive a wild horse or burro for private maintenance, an individual shall:

* * * * *

^{3/} It should be noted that, while provisions of the BLM Manual are binding upon BLM employees, the Manual provisions do not have the force and effect of law, nor are they binding on the general public or on this Board. See, e.g., Morton v. Ruiz, 415 U.S. 199, 235 (1974); Pamela Neville, 155 IBLA 303, 309 (2001); Burlington Resources Oil & Gas Co., 150 IBLA 178, 187 (1999); United States v. Lynn H. Grooms, 146 IBLA 289, 293 (1998). Accordingly, if the Manual provided the only basis for BLM’s rejection of the application, we would remand the matter to BLM for further consideration. In this case, however, the decision specifically cited the provisions of 43 CFR Subpart 4750 as the basis for BLM’s determination.

(2) Have no prior conviction for inhumane treatment of animals or for violation of the Act or these regulations.

(3) Have adequate feed, water, and facilities to provide humane care to the number of animals requested. Facilities shall be in safe condition and of sufficient strength and design to contain the animals. The following standards apply:

(i) A minimum space of 144 square feet shall be provided for each animal maintained, if exercised daily; otherwise, a minimum of 400 square feet shall be provided for each animal;

(ii) Until fence broken, adult horses shall be maintained in an enclosure at least 6 feet high * * * ;

(iii) Shelter shall be available to mitigate the effects of inclement weather and temperature extremes. The authorized officer may require that the shelter be a structure, which shall be well-drained and adequately ventilated;

(iv) Feed and water shall be adequate to meet the nutritional requirements of the animals, based on their age, physiological condition and level of activity; and

* * * * *

(b) The authorized officer shall determine an individual's qualifications based upon information provided in the application form required by section 4750.3-1 of this subpart and Bureau of Land Management records of any previous private maintenance by the individual under the Act.

43 CFR 4750.3-2.

[1] Our review here focuses on the administrative discretion inherent in the authority to consider and approve or reject an application under 43 CFR Subpart 4750. The party challenging an exercise of administrative discretion by BLM bears the burden of showing that the decision is not supportable on any rational basis or does not comply with the regulations or statutes. See John Linjatie, 137 IBLA 390, 392 (1997); Larry Brown & Associates, 133 IBLA 202, 205 (1995); Wayne D. Klump

v. BLM, 124 IBLA 200, 204 (1992); Union Oil Co. of California, 116 IBLA 8, 16 (1990); Four Corners Expeditions, 104 IBLA 122, 125-26 (1988).

[2] Applicable regulations clearly establish that BLM may consider relevant information both within and outside an adoption application. Specifically, 43 CFR 4750.3-2(b) provides: “The authorized officer shall determine an individual's qualifications based upon information provided in the application form required by § 4750.3-1 of this subpart and Bureau of Land Management records of any previous private maintenance by the individual under the Act.” (Emphasis supplied.)

According to the affidavit submitted by Deeg on Lippert’s behalf, the grullo stallion became an object of an ongoing dispute between Deeg and a nearby rancher, Will Tillett. ^{4/} Deeg had been in possession of the horse since May 1997, when “the grulla stallion and a bay filly at his side tore down a fence on the west side of my property * * * .” (Statement of Reasons (SOR), Attachment B (Deeg Affidavit) at 1.) According to Deeg,

[t]he two horses entered my property and terrorized my horses. My blue roan stallion was permanently injured and a mare and foal were wire cut when the grulla stallion ran them through my southern fence. After one week of running rampant on my ranch, I managed to capture the grulla stallion and bay filly. The horses were put into a sheltered area which provided 1000 square feet of space (the BLM requires 400 square feet of space per horse as a condition of adoption). Fresh water, mineral salt, grain, high quality hay, veterinary care, and hoof care were provided during the time that I had the horses in my care.

Id. According to Deeg and BLM records, the horses were branded “TX,” a brand associated with the Will Tillett operation. (BLM Answer, Ex. 1 at 3, 4; Deeg Affidavit at 1.) In September 1998, Deeg and Jerri Tillett discovered that the grullo horse also bore a partial BLM freeze mark and contacted BLM. (Deeg Affidavit at 2.) Deeg and Jerri Tillett informed BLM that they believed Will Tillett had stolen the two horses from the Pryor Mountain Wild Horse Range. (Deeg Affidavit at 2; Tillett Affidavit at 2.) Deeg held the horses until Jan. 13, 1999, when they were turned over to BLM. (Tillett Affidavit at 1.)

Lyle Bischoff, a veterinarian who provides services to both BLM and Deeg, examined the stallion twice: once on December 4, 1998, while the horse was in Deeg’s custody, and again on January 13, 1999, the day the stallion was turned over

^{4/} Will Tillett and Deeg have previously had a rancorous encounter over several llamas Deeg claims trespassed on his property. (Deeg Affidavit at I-II, and supporting documents.)

to BLM. (Bischoff Affidavit dated November 20, 1999 (Attachment C to SOR), and Memorandum dated January 13, 1999 (Ex. E to BLM Answer), respectively.) Bischoff's Affidavit dated November 20, 1999, revealed that he went to the Deeg ranch on December 4, 1998, to "tranquilize a grulla stallion and a bay filly in order to draw blood samples and for hoof trimming." He further avers:

The grulla was not sedatable at the safe level for hoof trimming. * * *

I was present as the BLM Veterinarian at the Britton Springs Corrals on January 13, 1999 when the grulla and bay filly were turned over to the BLM. I was able to tranquilize the grulla for hoof trimming and vaccination. Both the grulla stallion and the bay filly were in good condition and did not show any signs of animal abuse.

However, the memorandum Bischoff provided to BLM on January 13, 1999, stated the following:

BLM called me down to anesthetize and trim hooves on a grullo stallion, so he could be turned back out on the range. The horse had been kept in a barn at Joey Deeg's for an undetermined period of time. All four hooves were very long and even curling up so that the horse was walking on his heels. 6" of hoof was taken off and more should have been removed, but I thought any shorter would have caused him to become lame. I also vaccinated him at the same time. The stallion was turned back out the same day. It would have been advisable if possible to reanesthetize him to trim his hooves again in two weeks.

BLM offered the horse for adoption nine months later, on September 29, 1999. The adoption notice indicated that the horse was approximately 12 years old, bore a "TX" brand as well as a partial government freemark, and would be available for adoption with certain stipulations. The adoption notice stipulated that the horse must be housed in a "natural pasture setting, with adequate fencing and the presence of other horses," as isolation of the animal could result in "repeated attempts to escape confinement." Lippert submitted the highest bid in response to this adoption notice, culminating in the decision here appealed.

In her SOR, Lippert claims that neither she nor her sister have ever been accused or convicted of abusing an animal prior to BLM's decision, that her track record as an adopter of a Pryor Mountain wild horse has been impeccable, and that Deeg is not the adopter or the care giver of the horse, nor does he own the facilities that would be used for housing the horse. (SOR at 1-2.) With regard to BLM's conclusion that she did not have proper facilities, Lippert stated:

The panels were custom made and as such had to be special ordered and created. I wanted to make sure that these special heavy duty panels were used instead of the ready made lighter panels currently on the market. These panels were not completed at the time the application was sent in but they are now and the facility is completed.

(SOR at 3.)

In its Answer, BLM responds that the Board has previously ruled that BLM may properly consider past conduct associated with the care of wild horses to determine whether a proposed adoption is advisable. (BLM Answer at 4.) BLM asserts that it is undisputed that the horse suffered neglect while in captivity under the care of Jerri Tillett and Deeg. BLM thus contends that “Ms. Tillett’s past conduct in failing to properly care for this stallion while it in captivity made her unsuitable for future care of the stallion.” Id. BLM further maintains that it would have been inappropriate for BLM to approve an adoption application “with the promise” that facilities would be constructed prior to delivery of the horse. Id.

In her Reply to BLM’s Answer, Lippert claims that BLM denied her application based on innuendo and guilt by association with Deeg. (Lippert Reply at 6.) She argues that BLM has not proven abuse by either her or her sister. Id. at 8. She claims that the horse was housed on Deeg’s land, not her sister’s, and Deeg was responsible for its care, not Jerri Tillett. Id. at 5. With regard to BLM’s denial of her application for lack of adequate existing facilities, she argues that BLM officials routinely drive by her sister’s ranch to reach the Britton Springs Administrative Site, and had actual knowledge that existing facilities on the ranch would have accommodated the horse, irrespective of new facilities that had been planned. Id. at 2-3. She asserts that her intent in providing “custom made” facilities was to better house the horse, as Deeg’s experience with the horse had already demonstrated a need for strong confinement facilities “until he settles down enough to stay in the area he identifies as his territory.” Id. at 4. Finally, Lippert argues that she is entitled to adopt the horse because she was the highest bidder. Id. at 7.

[2] We thus consider a situation in which the individual named by Lippert in her application to be the care taker for the adoptee horse was known to BLM as a result of unsatisfactory care previously provided to the horse. Lippert does not refute and Jerri Tillett does not deny in her affidavit that she shared responsibility for the grullo stallion’s care with Deeg. While in their care the horse was confined to such a degree that his hooves grew to the point where they had “curled up,” so that the horse was “walking on his heels.” (Bischoff Affidavit dated January 13, 1999.) This extended confinement plainly was contrary to the care specified in the adoption notice. While BLM has not prosecuted Tillett for inhumane treatment of the animal,

the veterinarian's statement of January 13, 1999, and photocopied photographs submitted with the record plainly support a finding that the horse's condition when returned to BLM does not comport with standards of humane treatment as that term is defined by 43 CFR 4700.0-5(e). That regulation provides: "*Humane treatment* means handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse or burro." The record contains nothing that could support a finding that the condition of the stallion's hooves is consistent with humane treatment, and an argument to the contrary would not be well-founded. Accordingly, we conclude that the grullo stallion, though well-fed and otherwise in good condition, was not treated humanely in the joint care of Tillett and Deeg.^{5/}

Lippert asserts that she intended to build proper facilities for the horse on property she shares with Jerri Tillett and that Deeg was to have no part in the future care of the horse, but we are not persuaded that BLM's denial of the adoption application constituted an abuse of its discretion. To the contrary, in exercising its discretion to place a wild horse under a private maintenance agreement, BLM properly may consider the prior conduct of those accepting responsibility for a wild horse's care. 43 CFR 4750.3-2(b). It is neither unreasonable for BLM to consider past conduct as a guide to future actions, nor error to do so. Leroy Kalenze, 106 IBLA 201, 205 (1988). Nor is it necessary for BLM to prosecute and obtain a conviction for inhumane treatment of animals as a predicate to denying an adoption application on the ground that a question concerning whether the horse will be properly cared for exists. See Marvin Cook, 126 IBLA 158, 160 (1993), where the Board stated:

We are reluctant to construe 43 CFR 4750.3-2(a)(2) in a manner that would require BLM to prosecute an applicant and obtain a conviction in order to deny an application if the applicant's responsibility for a violation of the Act or applicable regulations are not in dispute.

We are mindful that Lippert, and not Deeg, is the adoption applicant. However, the fact remains that Lippert's application on its face states that she planned to entrust it to the care of an individual who had played a role in the confinement that reduced the grullo to "walking on its heels." We think it entirely

^{5/} We do not need to find that Tillett was deliberately cruel to the horse. Inhumane treatment may result as much from neglect as from design. Thana Conk, 114 IBLA 263, 275 (1990); Esther E. Lenox, 102 IBLA at 228 n.6; Kathryn E. Spring, 82 IBLA 26, 30 (1984). As for Deeg, we cannot ignore the fact that, according to his affidavit and supporting documents, for a year and a half he kept the grullo stallion and filly captive, even though he believed the animals were owned by Will Tillett. (See n.3, ante.)

reasonable that BLM would find this a significant factor. See, e.g., Leroy Kalenze, 106 IBLA at 201.

Lippert's assertions that BLM was remiss for rejecting her application based on lack of facilities are also rejected. Again, Lippert's application on its face showed that she did not yet have a facility for the horse. Departmental regulations make clear that an application that does not assure that existing facilities are available may properly be denied. 43 CFR 4750.3-2(a) and (b); see John Lijintie, 137 IBLA at 390. Lippert claims that BLM had actual knowledge of Tillett's existing improvements, and that these were adequate for the horse. This assertion does not overcome the evidence represented by the condition of the stallion's hooves in January 1999.^{6/} Under these circumstances, we find that BLM's decision is supported by a rational basis.

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, and appellant's petition for stay of the adoption is denied as moot.

T. Britt Price
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{6/} Our action herein does not preclude appellant from submitting an application to adopt a wild horse in the future. See 43 CFR 4750.3-4.