

THE FUND FOR ANIMALS, INC.

IBLA 2001-317

Decided September 24, 2004

Appeal from a decision record and finding of no significant impact of the Wyoming State Office, Bureau of Land Management, approving the Wyoming Wild Horse Pilot Project based upon Environmental Assessment WY-930-01-001.

Appeal dismissed.

1. Administrative Procedure: Standing--Rules of Practice:  
Appeals: Standing to Appeal--Wild Free-Roaming Horses  
and Burros Act

Board of Land Appeals regulations at 43 CFR 4.410(a) require that the appellant be a party to the case and be adversely affected by a decision. Where the appellant fails to identify specific facts giving rise to a conclusion of adverse effect, the appeal will be dismissed for lack of standing. The appellant fails to show standing to appeal a decision regarding the placement of excess horses removed from and no longer located on the public lands, by alleging impacts to its members' interest in seeing horses remain on the public lands.

APPEARANCES: Andrea Lococo, The Fund for Animals, Inc., Jackson, Wyoming; John R. Kunz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Fund for Animals, Inc. (FFA), appeals the Decision Record (DR) issued May 17, 2001, by the Wyoming State Office, Bureau of Land Management (BLM), approving a Wyoming Wild Horse Pilot Project and an associated finding of no significant impact to the environment (FONSI). The FONSI is based upon analysis developed in environmental assessment (EA) WY-930-01-001.

This case has its genesis in BLM's efforts to implement the Wild Free-Roaming Horses and Burros Act of 1971 (WHBA), 16 U.S.C. § 1333 (2000). Under that statute, BLM must manage wild horses and burros on particular public lands at population levels which protect both the animals and their rangeland habitat. When rangeland conditions decline due to increasing herd population, BLM is obligated by law to remove excess animals to restore a thriving natural ecological balance. 16 U.S.C. §§ 1332(f), 1333(b)(2) (2000). The statute authorizes BLM to place horses and burros so removed into private ownership through adoption, subject to private maintenance and care agreements and BLM regulations governing use and care of animals so adopted. 16 U.S.C. § 1333(b) (2000); 43 CFR Subpart 4750.

Over the past 30 years BLM has privately placed horses through the Adopt-A-Horse program. Between 1995 and 2000, approximately 7,750 horses were adopted annually, nationwide, at a cost of about \$600 for each adoption. BLM receives only \$125 in adoption fees per horse.

According to the record, the younger horses, often mares and generally less than 5 years in age, are adopted, leaving a class of the excess horses BLM is obligated to remove from the public lands without a private destination, and in holding pens not suitable for long-term care. BLM has identified this population of horses, composed largely of geldings, as "unadoptable" because of its experience in failing to find willing adopters. BLM anticipated gathering 13,000 wild horses nationwide in 2001; mathematically, BLM could reasonably expect that it would not find homes for more than 5,000 horses it was obligated to round up and remove from public lands.

BLM has established at least three wild horse "sanctuaries" on lands in Kansas and Oklahoma to take this population. In 2001, BLM was in the process of creating two additional sanctuaries. In the existing sanctuaries, approximately 2,000 unadopted horses collected from mandatory round-ups in other locations are neutered and pastured. At the time the case record in this appeal was filed, the cost to maintain each horse was about \$450 annually. The record indicates that by 2001 these sanctuaries were reaching capacity. Nonetheless, even though BLM may be unable to place many horses by adoption, BLM's statutory obligation to remove excess horses from public lands in order to maintain ecological range conditions compels it to continue to capture horses for which sanctuary space may be limited. This places BLM in the awkward position of maintaining a horse population in holding pens or sanctuaries at an increasing cost to the taxpayer in conditions of overcrowding potentially at odds with the purpose of the statute it is obligated to administer. Conversely, in a provision entirely avoided by FFA and BLM in this appeal, the WHBA states that 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." 16 U.S.C. § 1333(b)(2)(C) (2000); 43 CFR 4720.2-1 and Subpart 4730.

As a result of this predicament, BLM and the State of Wyoming entered into the pilot project at issue here, the purpose of which was to find another option for locating excess wild horses that are not adopted. The proposed action is a pilot project “to provide suitable, cost-effective pastures for unadoptable wild horses.” (DR at 1.) BLM proposed the pilot project because the existing wild horse sanctuaries are nearly full, yet it must ensure that the established herd management areas (HMAs) are within their authorized animal management levels (AMLs).<sup>1/</sup> (EA at 1.)

The EA describes the project as follows:

The proposed action involves annually placing up to 240 unadoptable wild horses on private lands over the next four years. These horses are usually older than 5 years old, and in the case of males have been gelded. These landowners would be required to provide a safe and humane pasture or rangeland home for these horses for the remainder of their natural lives under the periodic supervision of the BLM or their designee. There would be no transfer of title for these horses. The horses would have a freeze mark on their necks to facilitate identification. Horses could be trained and used as saddle horses or pack horses. An individual landowner can adopt a maximum of 60 horses, 10 of which they can choose, the remaining 50 would be chosen by the BLM from a pool of older horses. The landowner would receive a one time grant of \$1,000 for each horse[] over the initial 10. To receive this grant the landowner must adopt a minimum of 11 horses. To protect the BLM’s financial investment, the landowners would be required to carry a performance bond for three years. The performance bond would be administered through the [Wyoming Department of Agriculture].

(EA at 3.) Among the goals of the pilot project, BLM sought to reduce, over the long term, the cost of maintaining the horses, trading the \$1,000 initial payment to the landowner for the \$450 annual maintenance cost per horse.

BLM released a scoping notice for the project on March 12, 2001, and provided a 30-day comment period. In addition, two public meetings were held to discuss the proposal.

FFA provided comments on the proposal and expressed its concern for issues related to the larger wild horse program, e.g., forage allocation, AML level increases,

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<sup>1/</sup> BLM nationwide manages wild horses and burros in 201 separate HMAs located throughout 10 western states. Each HMA has an established population objective or AML. (EA at 1.)

and predator control. It suggested that mares in the program not be allowed to breed. FFA expressed the view that several aspects of the project proposal needed to be clarified; for example, it requested clarification of specifications required for private lands and facilities to be a part of the program, inspection and supervision criteria, compliance documentation, and enforcement procedures. FFA expressed worries regarding the process for selecting eligible landowner participants and regarding the involvement of state agencies “tied to livestock interests.”

As a result of the comments received from FFA and other parties commenting on potential abuse of the horses or asking how to get into the program, BLM considered additional alternatives and potential impacts in developing the EA. The EA considered the proposed action, the no-action alternative, and alternatives variously excluding or limiting mares. BLM specialists signed and dated companion consultation and coordination checklists for the EA between May 8 and 17, 2001. Choosing among four alternatives analyzed in the EA, the State Director, BLM, decided “to implement the actions in the Limited Exclusion of Mares Alternative \* \* \*. This decision will allow BLM to explore cost-effective options that provide safe, humane, life-long treatment of unadoptable wild horses, while limiting foal production.” (May 17, 2001, DR at 2.) In the rationale provided for this alternative, the State Director noted that it was more cost-effective than the no-action alternative, and also addressed the concern over foal production while retaining incentives for the private landowner.

FFA submitted a notice of appeal and petitioned for a stay of the decision. The Board denied the stay request by order dated October 2, 2001.

In its notice of appeal, FFA asserts that the EA violates section 102(2) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2) (2000), because it fails to give serious consideration to a broader range of alternatives. FFA further contends that the EA is inadequate in that relevant terms or conditions were unexplained or undefined, impacts were not adequately explored, and public participation was improperly minimized. FFA avers that BLM was obligated to prepare an EIS in this instance. It argues that BLM, in instituting this program, is imposing new regulations without following proper rulemaking procedures. It further argues that the project will violate the WHBA and anti-deficiency statutes.

In answer, BLM avers that it fully complied with NEPA by considering a sufficient range of alternatives and that the EA was adequate to provide a sufficient look at the environmental consequences of the proposed action. It further asserts that FFA merely differs in its opinion regarding the project and has failed to identify error in the EA, FONSI, or DR. BLM argues, however, that the Board need not consider FFA’s substantive arguments because FFA does not have “standing” to bring this appeal before the Board.

[1] In order to appeal from a BLM decision, an appellant must be adversely affected by the decision under appeal. Under 43 CFR 4.410(a), an appellant must both be a party to the case and also have a legally cognizable interest that is adversely affected by that decision. Under 43 CFR 4770.3(a), a person who is adversely affected by a BLM decision “in the administration of these regulations may file an appeal.” Board precedent has variously relied on each of these regulations in the case of appeals of BLM decisions issued under the WHBA regulations. See, e.g., Animal Protection Institute of America, 128 IBLA 370, 373 (1994) (43 CFR 4.410); Animal Protection Institute of America, 120 IBLA 342, 344 (1991) (43 CFR 4770). However, as FFA appears to concede, the pilot project is not a decision implementing regulations at 43 CFR Part 4700. Thus, we conclude that the appropriate rule applicable to the appeal before us is 43 CFR 4.410.

FFA is a “party to the case” in that its comments on the proposed project were presented for consideration to BLM. Thus, the issue here is whether FFA is “adversely affected” by the decision under appeal. To meet this test, the interest allegedly affected by the decision under review must be a legally cognizable interest, the allegation of adverse effect must identify specific facts supporting the claimed adverse effect, and the threat of injury and its effect on an appellant must be more than hypothetical. In addressing this test, the Board recently stated as follows:

It is well settled that an appellant will be deemed to be adversely affected, within the meaning of 43 CFR 4.410(a), only where he demonstrates that he will, or is substantially likely to, suffer some sort of injury or harm to a legally cognizable interest. Donald K. Majors, 123 IBLA 142, 143 (1992); Storm Master Owners, 103 IBLA 162, 177 (1986). Further, the appellant must make colorable allegations of an adverse effect supported by specific facts to establish a causal relationship between the action to be undertaken, with BLM’s approval, and the injury alleged. Colorado Open Space Council, 109 IBLA 274, 280 (1989). Ultimately, while the appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action, he must show that the threat of injury is real and immediate. Donald K. Majors, 123 IBLA at 144-45; see Laser, Inc., 136 IBLA 271, 274 (1996).

Fred E. Payne, 159 IBLA 69, 73 (2003). The interest need not be an economic or property interest; however, a deep concern for a problem will not suffice. Robert M. Sayre, 131 IBLA 337, 339-40 (1994).

Turning to this appeal, it is difficult to connect effects stemming from the pilot project with the adverse effects on interests claimed by FFA. FFA contends that its “members who regularly visit Wyoming wild horse herds will have fewer wild horses to view in the wild, will not have access to their wild horses on private lands, and will

worry about the fate of wild horses placed on private lands \* \* \*.” (Reply to Answer at 9.) FFA asserts that “[w]ithout the Pilot Project \* \* \* these wild horses would remain on the range for [FFA] members \* \* \* to visit, view, photograph and study. Removing the public’s wild horses and placing them on private property will immediately eliminate those opportunities.” (Reply to Answer at 8.)

Such assertions, however, misperceive the decision on appeal to the Board. Nothing in the challenged decision to implement the pilot project equates to a decision to remove excess horses.

The Secretary of the Interior is required by law to manage wild free-roaming horses in a manner designed to “achieve and maintain a thriving natural ecological balance.” 16 U.S.C. § 1333(a) (2000). Further, the Department is directed to maintain a current inventory of wild horses on the public lands to determine the AML of wild horses, to make a determination of whether and where an overpopulation exists, and to determine whether action should be taken to remove “excess animals.” 16 U.S.C. § 1333(b)(1) (2000). When the Secretary determines, 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.” 16 U.S.C. § 1333(b)(2) (2000).<sup>2/</sup>

Thus, the obligation to remove excess horses is a statutory one. That obligation is not derivative of or dependent on the decision to approve, or not approve, the pilot project. Further, the pilot project decision does not take a position regarding any particular HMA on the public lands. Rather, it involves a procedure developed to address the problem of large numbers of “unadoptable” excess animals, *i.e.*, the placement of such horses on private lands by contractual arrangement. A decision by this Board to reverse the DR approving the pilot project would, at most, have the consequence that no such pilot project would take place and no such private placement would be allowed. A decision on the pilot program is of no consequence to a finding that any single horse or group of horses would be defined under planning documents and the WHBA as “excess.”

Nor could it change the statutory obligations to remove such excess horses. In 2001, approximately 13,000 horses were required to be removed by law as excess; the appeal before us involves BLM’s decision addressing excess horses once they have

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<sup>2/</sup> Excess animals include wild horses “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) (2000).

been removed.<sup>3/</sup> Thus, implementation of the pilot project would have no impact on the interest of the FFA membership in seeing those horses remain on the public lands.

Likewise, FFA's suggestion that it "will not have access to their wild horses on private lands" presumes, erroneously, that the excess animals of interest to their membership will remain on public lands rather than go to a potential destination as excess horses. In fact, the present destination of such horses is holding pens and sanctuaries in Oklahoma and Kansas. FFA presents no suggestion that its members visit such locations. FFA does not specify how its constituent membership will be injured if the horses end up on private lands under the pilot project as opposed to sanctuaries in Oklahoma or Kansas or other holding facilities awaiting further placement decisions.

Finally, FFA alleges that it will worry about the excess animals in private hands. FFA's concern about the horses derives from its desire to see the excess horses back on the public lands and its presumption that the class of wild, free-roaming horses and, hence, FFA's interest in seeing such horses, will be adversely affected by the decision. This presumption is incorrect and misperceives the class of horses at issue in this appeal. The portion of the excess horse population at issue here does not encompass those left behind on the public lands after the gather, but rather includes horses that must be gathered and cannot be adopted. 16 U.S.C. § 1333(b)(2)(c) (2000). It was incumbent upon FFA, in establishing standing to appeal, to show an adverse impact on some interest FFA may have in the population at issue.

Our decision falls short of finding that no entity can establish standing to challenge implementation of the WHBA with respect to that population of horses. But FFA has not alleged an adverse affect on an interest in "seeing" wild horses by asserting worry about placement in private hands of animals that are statutorily defined as excess, but never adopted.<sup>4/</sup> BLM's action is aimed at protecting those

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<sup>3/</sup> If FFA had an objection to a particular gather regarding an HMA on the basis that BLM's conclusions as to an excess population were allegedly wrong, it was free to appeal, subject to requirements of law, a BLM decision to implement that gather. E.g., Thomas M. Berry, 162 IBLA 221 (2004).

<sup>4/</sup> FFA expresses a concern that the treatment of horses in private hands through the pilot project may be unsafe or harmful. We find these assertions to be entirely speculative and to presume malfeasance on the part of BLM and the private landowners to whom the pilot project looks for assistance. After implementation of the pilot project, BLM will gather data regarding private treatment that, depending on the success of the project, may be relevant in considering whether FFA could in the future show an adverse impact on an interest in the private care of horses. At this  
(continued...)

horses; FFA may not gain standing by asserting an adverse effect from BLM's efforts to maintain them in a healthy condition.<sup>5/</sup> For these reasons, we find that FFA has not shown that it is adversely affected by the decision appealed and must therefore dismiss the appeal.

Even if we were to consider the merits of the appeal, we would be unlikely to find that FFA has met its burden of demonstrating error under NEPA or the WHBA. FFA argues that the EA violates NEPA and is inadequate. In reviewing a finding of no significant impact based on an EA, the Board will uphold that decision "if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis." Colorado Mountain Club, 161 IBLA 371, 382 (2004). An appellant challenging a FONSI must demonstrate by objective proof an error of law or fact, or that the EA failed to consider a substantial environmental problem of material significance. Rocky Mountain Trails Association, 156 IBLA 64, 71 (2001), citing Larry Thompson, 151 IBLA 208, 217 (1999).

FFA has not fit its arguments within the scope of a NEPA challenge.<sup>6/</sup> Rather, FFA presents a list of questions regarding minutiae of the pilot project that FFA alleges are not answered. For example, FFA repeatedly asserts that the Board must

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<sup>4/</sup> (...continued)

juncture, however, such speculations present no ripe issue for the Board to consider.

<sup>5/</sup> Similarly, we find considerable inconsistency between FFA's assertions of concern that private landowners will be entitled to take up to 10 mares that might reproduce, and its demand that the mares be allowed to remain on the public land without reproductive constraint. FFA's concern on this point is simply too implausible and speculative to support standing.

<sup>6/</sup> FFA contends that the EA's consideration of alternatives was insufficient because BLM (a) did not choose FFA's preferred alternative of excluding mares from the pilot project, and (b) did not reconsider appropriate AMLs within nationwide HMAs. The purpose of alternatives analysis under NEPA section 102(2)(E) is to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects \* \* \*." 40 CFR 1500.2(e). BLM considered and rejected FFA's preference for mare exclusion; this choice is not a "failure" to consider an alternative in violation of section 102(2)(E). An agency need consider only alternatives that accomplish the intended purpose of the proposed action, are technically and economically feasible, and have a lesser impact than the proposed project. Bales Ranch, 151 IBLA 353, 363 (2000). Reconsideration of appropriate AML levels is not an objective of the pilot project and was not an alternative which BLM was required to consider in the EA.

reverse the DR because the EA has not defined the term “unadoptable.” (Notice of Appeal at 3.) We find no difficulty reading what BLM is attempting to do in the pilot project, nor does FFA indicate that it did not understand the term. Elsewhere, FFA demands to know the identification of each and every horse that might be adopted. BLM is not in error for failing to acquiesce to a demand that is administratively unworkable. FFA presents queries that the pilot project is designed to answer. For example, FFA complains that it is not possible to tell where “unadoptable” wild horses would be placed geographically and how many adopters would be involved. The pilot project seeks to find homes with private landowner volunteers in Wyoming for 240 horses per year for 4 years. FFA submits a series of detailed questions regarding how inspections are to take place, including questions about prosecutions and investigations beyond the scope of the project. (Notice of Appeal at 4.) Such questions do not constitute a challenge under NEPA or justify a demand for an EIS. Were we to undertake a full consideration of the merits, we would not find that FFA has established a NEPA claim by submitting such questions, many of which would be answered by the pilot project.

Finally, FFA’s suggestion that BLM has violated or effectively revised the rules at 43 CFR Subpart 4700 ignores that the pilot project is a program separate from those rules. The WHBA authorizes the Secretary to consider discretionary options to achieve management levels, 43 U.S.C. § 1333(b)(1) (2000), and to consult with and consider options with participation of various entities including the states. *Id.* While FFA suggests that terms of the WHBA have not been met by the exercise of BLM’s discretion, it fails to account for these statutory terms.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Lisa Hemmer  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge