



WILD HORSE ORGANIZED ASSISTANCE

172 IBLA 128

Decided August 2, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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IBLA 2005-41

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Appeal from a decision of the Las Vegas Field Office Manager, Bureau of Land Management, establishing appropriate management levels for the Red Rock Wild Horse and Burro Herd Management Area. NV-050-04-346.

Affirmed.

1. Wild Free Roaming Horses and Burros Act

Nothing in the Wild Free-Roaming Horses and Burros Act of 1971 or implementing regulations in 43 C.F.R. Part 4700 prohibits BLM from establishing an Appropriate Management Level for wild horses based on rangeland monitoring data, climate, and wild horse health that anticipates herd augmentation to maintain the herd's genetic diversity.

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

A BLM decision establishing an Appropriate Management Level for wild horses will be affirmed on appeal when the decision is based upon a reasoned analysis of rangeland monitoring data, climate, and wild horse health conditions and the appellant fails to show that BLM committed an error in ascertaining, collecting, or interpreting such data.

APPEARANCES: Dawn Y. Lappin, Director, Wild Horse Organized Assistance, Reno, Nevada; Nancy S. Zahedi, Assistant Regional Solicitor, Office of the Regional Solicitor, Southwest Region, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Wild Horse Organized Assistance (WHOA) has appealed a September 3, 2004, Decision Record (DR) and Finding of No Significant Impact (FONSI) of the Las Vegas Field Office Manager, Bureau of Land Management (BLM), adopting the action proposed, with mitigation measures, in the June 2004 Environmental Assessment NV-050-04-346, for the Establishment of Appropriate Management Levels for the Red Rock Wild Horse and Burro Herd Management Area (EA). The EA proposed an Appropriate Management Level (AML)¹ of 16-27 wild horses and 29-49 burros in the Red Rock Herd Management Area (HMA). This appeal concerns only the AML for wild horses, however.

Statutory Background

The Wild Free-Roaming Horses and Burros Act of 1971 (the Act), 16 U.S.C. § 1331 (2000), declared that free-roaming horses and burros are to be considered “an integral part of the natural system of the public lands,” to be managed by the Secretary as “components of the public lands.” 16 U.S.C. § 1333(a) (2000). Specifically, the Secretary is mandated to “manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” *Id.* Accordingly, the Secretary is to determine the AMLs for wild horses and burros. 16 U.S.C. § 1333(b) (2000). Section 3(b)(2) of the Act, 16 U.S.C. § 1333(b)(2) (2000), provides the statutory authority for the removal of excess wild free-roaming horses and burros. When on the basis of available information the Secretary determines that an overpopulation exists on a given area of the public lands, he shall immediately remove excess animals from the range to achieve AMLs, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range. 16 U.S.C. § 1333(b)(2) (2000). “Excess animals” are those that must be removed “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).

¹ BLM defines AML for wild horses and burros as the “optimum number of animals to be managed within a specific HMA that will support achievement of multiple use resource management objectives, while maintaining a thriving, natural ecological balance within the region.” May 2004 “Red Rock Herd Management Area Appropriate Management Level Evaluation Report” (HMA Evaluation) at 1. In accordance with BLM policy, gathers cannot be conducted until a formal AML is established using the best available data based on actual monitoring data. *Id.*

Factual Background

The Red Rock HMA comprises 164,684 acres of public land located in southern Nevada approximately 20 miles west of the center of metropolitan Las Vegas. The HMA is easily accessed from State Routes 159 and 160. Approximately half of the HMA is located within the Red Rock Canyon National Conservation Area (NCA), with portions extending beyond the NCA south to the town of Good Springs, Nevada. Most of the HMA's "eastern boundary is bordered by Las Vegas's urban development, while a majority of the western boundary is defined by the Spring Mountain Range escarpment and the administrative boundaries of the Humboldt-Toiyabe National Forest." HMA Evaluation at 4. Other towns are within HMA boundaries. *Id.* at 5.

The HMA is within the Mojave Desert ecosystem and is characterized by low precipitation levels, cool winters and hot summers, as shown by the monthly climate summary compiled from data collected by the Western Regional Climate Center located at Spring Mountain Ranch State Park (elevation 3,778 ft.) within the NCA/HMA boundary. *Id.* This data provided BLM a 29-year baseline from which to compare current climatic conditions. *Id.* Desert systems typically receive less than 4 inches of rain per year, but the greater portion of the Red Rock HMA is located at elevations above 3500 feet (ft) and receives an average annual precipitation of 12.76 inches, most of which occurs during the winter and early spring months. *Id.* at 5. As of May 2004, southern Nevada was still experiencing "severe drought" conditions. *Id.* at 9. Severe drought conditions have prevailed since 1995. Jan. 29, 1997, Wild Horse and Burro Evaluation (known as the "Pierson Report"), Appendix 2, Executive Summary at 2.²

The estimated or interim AML for the HMA was established in the 1998 Las Vegas Resource Management Plan (RMP) at 50 horses and 50 burros. An emergency gather of 60 horses occurred in June 2002 because of poor health and continuing severe drought conditions. EA at 37-38. The average body condition of

² A copy of the Pierson Report is in the administrative record. As the report states, it is the work of an Emergency Evaluation Team of Federal and State representatives and advisors that was assembled to formulate recommendations in response to the immediate emergency of the drought in Nevada, Utah, and Arizona that began in 1995 and to assess BLM's Wild Horse and Burro (WH&B) program on a long-term basis. Pierson Report at 1. The Team's principal recommendations were to update BLM's 1992 *Strategic Plan for Management of Wild Horses and Burros on Public Lands* and review the selective removal policy; change the reporting relationship for the National WH&B Program office; and reconstitute a National WH&B Advisory Board. *Id.* at 2.

the horses gathered in 2002 was class 2.³ Of the 60 animals gathered, 27 were placed in a temporary holding facility in anticipation of the end of the drought and range recovery. After 2 years of monitoring the range and continuing drought, BLM concluded that the range could not sustain the horses and the 27 horses at the holding facility were adopted in February 2004, leaving approximately 27 horses in the HMA. *Id.* at 38. As of early spring of 2004, the average body condition of the horses remaining in the HMA had improved to Class 4. *Id.* In 2004, the sex ratio of those 27 horses was nearly even, excluding that year's foals, and the average growth rate was approximately 13% per year with year-round foaling. *Id.* at 14. In addition to the prolonged drought, other significant issues pertain to the Red Rock HMA: horses and burros are migrating into the communities that surround the HMA; recreational use in the HMA is increasing; artificial water sources are being developed; energy projects are being proposed; animals are loitering on public roads; and the possibility of setting AMLs that are too low to sustain a healthy, viable population exists. *Id.* at 7. Moreover, there is a substantial public interest in maintaining and viewing wild horses in the Red Rock HMA, representing an important opportunity for public education and participation. *Id.* at 37. However, “[r]esource damage is occurring throughout most of the HMA.” *Id.*

In 2003, BLM began reviewing monitoring forage utilization and use pattern data in the HMA for the years 1995 through 1999.⁴ That data was presented in an initial HMA evaluation and provided to interested parties in July 2003, who submitted 11 comments. In response to those comments, in May 2004 BLM revised the HMA Evaluation to incorporate forage data for the years 2000 through 2002, and riparian data as well. Ultimately, the EA was released in June 2004 with a 30-day comment period. The May 2004 HMA Evaluation with its appendices (A-1 through A-3) was included as Appendix A to the EA. Answer at 2-3; see HMA Evaluation at 3.

In the EA, BLM reviewed several alternatives in addition to the proposed action. The proposed action, Alternative A, was based on a Multi-tiered Rangeland

³ Equine body condition is based on the “Henneke Standards.” Class 2 is very thin to emaciated, Class 3 thin, Class 4 is moderately thin, Class 5 is moderate, and Class 6 is “moderately flashy.” Each Class describes the visibility and prominence of various spinal and bony processes, the degree of fat present, the flatness of the animal’s back, and other signs of equine health. EA at 42, Glossary and Acronyms, “Equine body condition Henneke Standards.” The EA contains a photograph showing a horse with Class 2 body condition. EA at 16.

⁴ Forage utilization data was not available for the year 1998. HMA Evaluation, Appendix A to EA at 3. The next formal AML evaluation report is planned for 2009. *Id.*

Evaluation, by which BLM examined “available resources and current monitoring data” to set the AML for wild horses at 16-27. That AML would require the removal of 11 wild horses and 121 burros to reach the lower limits of their respective AMLs. EA at 15. Wild horses would be managed south of State Route 160 because that portion of the HMA has the forage, water, cover, and space to support a small, healthy herd. *Id.* North of State Route 160, the AML for horses would be zero. BLM expressly recognized that to ensure the genetic viability of a small herd, new mares could be introduced to the breeding population every few years, and that fertility control “to slow the growth rate, increase the time between gathers, and decrease the stress of frequent gathers and handling on the horses” would be considered. *Id.* New mares would not be introduced until after a period of quarantine to protect against disease and the spread of noxious weeds. *Id.* at 18. A temporary watering site, Rainbow Springs, was not used to set the AML. *Id.* at 15. However, the EA noted that there was a proposal to install two water wells in Goodsprings and Wildhorse Valleys to better distribute the animals throughout the HMA and decrease use at current sources to improve riparian conditions, and to better protect the health of the herd and the rangeland. *Id.*

BLM also considered managing the HMA for burros only (Alternative B) and no action (Alternative C). The alternative of artificially managing the horses in a created pasture outside the Red Rock HMA, providing food and water there because neither exists in the area considered for this purpose (Alternative D), was raised and rejected because it does not comply with the Las Vegas RMP or the Act. *Id.* at 12.

BLM received five comments on the EA, four against and one in favor of the proposed alternative, which the Field Manager addressed in the September 3, 2004, covering letter to the DR/FONSI.

In the DR, the Field Manager selected the proposed action and thus established the AML at 16-27 horses, with the result that 11 horses must be gathered and removed to achieve the lower end of the AML.

Arguments of the Parties

WHOA advances three main arguments: (1) WHOA contends that “all allotments in Clark County were designated as ephemeral rangelands in 1969” and BLM is required to implement the “Ephemeral Range Rule of 1968,” Statement of Reasons (SOR) at 1, that “as published in the Pierson Report, the BLM was to fully pursue and implement actions to reduce herds within Nevada’s ephemeral ranges in the Mojave Desert,” *id.* at 2, and that the ephemeral range cannot support sustained use by the Red Rock herd, which has suffered because of prolonged severe drought, *id.*; (2) that genetic thresholds cannot be maintained at the AML selected, and that herd augmentation is “contrary to provisions of The Act that limits BLM’s discretion

to alter the Red Rock Wild Horse Herd's uniqueness or natural balance," *id.*; and (3) that the development and allocation of water constitutes an action that is "contrary to the role and responsibilities of the Nevada State Water Engineer," *id.* at 3, which is thus "outside of BLM authorities," *id.*⁵ WHOA therefore contends that BLM should have established a zero AML for the wild horses of the Red Rock HMA.

BLM counters that appellant has failed to establish by a preponderance of the evidence that it wrongly interpreted the monitoring data or reached an erroneous conclusion based on that data, Answer at 5; that the Ephemeral Range Rule to which WHOA alludes is applicable only to livestock grazing, *id.*; that the Pierson Report does not support WHOA's conclusions, as it neither mentioned wild horses and burros on Nevada's ephemeral ranges in the Mojave Desert nor made any specific recommendations or reached any conclusions regarding the ability of ephemeral ranges to support such animals, *id.* at 6; that BLM properly weighed and considered its data, *id.* at 6-7; that the AML is consistent with maintaining a viable self-sustaining population of wild horses because nothing in the Act prevents the use of selective herd augmentation, *id.* at 8-10; and that the AML was set on the basis of current water sources in the HMA and was not dependent on future water developments in the HMA, since volunteers will continue to provide supplemental water if the drought continues, *id.* at 10.

Analysis

We quickly dispose of appellant's lesser arguments to reach the principal question presented, which is whether BLM has violated the Act or its implementing regulations in setting an AML for the Red Rock HMA that necessitates herd augmentation to maintain genetic diversity. With respect to the Ephemeral Range Rule, WHOA has made no attempt to explain this rule or why and to what extent it is or might be relevant to the situation before us. However, BLM counters that the rule applies to livestock grazing, and there are no active grazing allotments within the Red Rock HMA. EA at 14, 37. WHOA has filed nothing further to dispute this, and accordingly, we reject appellant's contention regarding the applicability of this rule. We note as well that BLM is correct in stating that the Pierson Report does not address ephemeral range in the Mojave Desert.⁶

Appellant's third argument is that BLM exceeds its authority in planning future water development projects, because the Nevada State Water Engineer has

⁵ We understand from the latter contentions that WHOA argues that the decision before us effectively allocates water and authorizes water development projects, and that these are decisions that are committed to the State Water Engineer exclusively.

⁶ See n.2 *ante*.

determined that the Las Vegas basin is closed. The argument is not well-founded. BLM avers that the AML is based on existing water sources, which are sufficient to support the new AML, an assertion that WHOA has not refuted. Moreover, BLM correctly notes, that it has the right to apply for a water right. *See Answer* at 10 n.3. Possessing that right and the discretion to exercise it neither exceeds BLM's delegated authority nor constitutes an intrusion upon the authority vested in the State Water Engineer by State law. Since BLM had not exercised that right when this appeal was filed, WHOA's challenge is premature.

[1] We now turn to whether BLM erred in establishing an AML that depends upon herd augmentation. WHOA argues that, under the Act, BLM has "limited discretion to alter the Red Rock Wild Horse Herd's uniqueness or natural balance." SOR at 2. Appellant obviously believes that augmentation affects the former and that the low AML disturbs the latter. We disagree. Neither the Act nor regulations uses "uniqueness" as a standard for managing wild horse and burro populations. The regulation at 43 C.F.R. § 4700.0-6(a) directs BLM to manage wild horses and burros in a manner that achieves and maintains a thriving natural ecological balance: "[w]ild 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." The term "self-sustaining" is not defined in the regulations, but a genetically effective population is 50 breeding animals (or a total population of 85 horses). EA at 11. Appellant seemingly argues that the need to augment the herd by introducing breeding mares demonstrates that the horses of the Red Rock HMA cannot be considered either healthy or self-sustaining under the new AML.

The EA acknowledged the importance of maintaining genetic diversity in the herd and that an AML of 16 to 27 horses is below the level required for a genetically effective population (50 breeding animals or a total population of 85 horses). EA at 11. Relying on the work of BLM Wild Horse and Burro Specialist, Linda Coates-Markle, *see List of References, id.* at 47, the EA concluded that long term genetic viability could be maintained by introducing new mares "every few years into the breeding population." *Id.* at 15. With its Answer, BLM submitted a copy of Coates-Markle's "Summary Recommendations - BLM Wild Horse and Burro Population Viability Forum, April 21, 1999," printed in BLM publication *Resource Notes*, No. 35 (Aug. 8, 2000) (Coates-Markle 2000). "Self-sustaining" was defined in the Summary Recommendations as

the process whereby established populations are able to persist and successfully produce viable offspring which shall, in turn, produce viable offspring, and so on over the long term. The absolute size which a population must attain to achieve a self-sustaining condition varies based on the demographic and sociological features of the herd (and adjoining herds), and these aspects should be evaluated on a case by

case basis. In many cases it is not necessary that populations be isolated genetic units, but *both naturally-occurring and management-induced ingress and egress activity can be considered, in order to maintain sufficient genetic diversity within these populations.*

Id. at 1 (emphasis added). The Summary states that “[i]n most herds, though, genetic resources will tend to be lost slowly over periods of many generations (~10 years/generation), and there is little imminent risk of inbreeding or population extinction,” though there is a potential for reduced genetic diversity as a result of reduced foal production and survival or reduced adult fitness and deformities. *Id.* The Summary acknowledges that 40% of the herds in Nevada, Utah, Wyoming, Colorado, and Arizona (71 out of 177 HMAs) appear to have herd sizes of less than 50 animals, and that there is a “real possibility” that some will be unable to maintain “self-sustaining reproductive ability, over the long term, unless there is a natural or management induced influx of genetic information from neighboring herds.” *Id.* However, “[a]n exchange of only 2 or 3 breeding age animals (specifically females) every 10 years, is often sufficient to maintain genetic diversity within a given herd.” *Id.* The Summary goes on to make recommendations in light of existing BLM policy, the general thrust of which is consistent with the facts and reasoning supporting the AML adopted by the Field Manager. *Id.* at 3-4. WHOA has neither acknowledged nor shown error in the basis for BLM’s reliance on herd augmentation.

[2] In addition, WHOA suggests that the new AML alters the “natural balance” of the Red Rock HMA in a manner that exceeds BLM’s discretion under the Act. Again, we cannot agree. Although WHOA did not define its use of the phrase “natural balance,” it is clear that wild horses and burros are but one component of the public lands, and BLM’s mandate is to manage them to achieve a thriving ecological balance between their populations and other resource values and uses of the public lands while maintaining range health. *Thomas M. Berry*, 162 IBLA 221, 224 (2004), and cases cited; *Animal Protection Institute of America*, 118 IBLA 20, 23 (1991). The objective of an AML is to establish the optimum number of wild horses in a given case. Here, there is no dispute about the condition of the range, the devastating effect of prolonged drought, or the effect of the wild horse population on the range, all of which is amply demonstrated and supported in the EA. After examining the available data and thoroughly analyzing the action in the EA, BLM has determined that an AML of 16-27 horses is what is necessary to achieve a thriving natural ecological balance and restore rangeland health in the Red Rock HMA. We are not persuaded that taking this step to address genetic diversity is beyond BLM’s authority under the Act and implementing regulations.

As we have said in a variety of contexts, appellants have the burden of demonstrating by a preponderance of the evidence that BLM committed a material error in its factual analysis, that BLM failed to give due consideration to all relevant

factors, or that no rational connection exists between the facts found and the choices made. *Rainier Huck*, 168 IBLA 365, 395 (2006); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999). With respect to a BLM decision setting an AML based on an analysis of monitoring data, which includes removal of some horses from the public land, we have held that the appellant bears the burden of demonstrating that BLM committed an error in ascertaining, collecting, or interpreting the data upon which it relies in its decision. *Thomas M. Berry*, 162 IBLA at 225; *Animal Protection Institute of America, Inc.*, 151 IBLA 396, 401 (2000); *Joey R. Deeg*, 141 IBLA 67, 70 (1997). WHOA has submitted no countervailing evidence or data, nor has it shown error in BLM's assessment of the data before it, without which it has merely expressed a different point of view. However, mere differences of opinion regarding proper management of public lands will not overcome an amply supported BLM management decision. *Rainier Huck*, 168 IBLA at 395 and cases cited. Accordingly, we find that the record in this case clearly supports BLM's decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the AML Decision appealed from is affirmed.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge