

Appeal from a decision of the Eastern States Office Bureau of Management, cancelling Private Maintenance and Care Agreement and taking possession of colt Freeze Mark 86640145.

Affirmed.

1. Wild Free--Roaming Horses and Burros Act

The Bureau of Land Management may cancel a Private Maintenance and Care Agreement under the Act of Dec. 15, 1971, as amended 16 U.S.C. § 1331 (1982), and take possession of a wild free-roaming horse under the agreement, where the evidence establishes that the adopter violated the terms of the agreement by the unauthorized destruction of another wild free-roaming horse in her custody under the agreement.

APPEARANCES: Susan A. Moll, pro se; Kristina A. Clark, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On May 13, 1987, Susan A. Moll filed a notice of appeal from a decision issued May 8, 1987, by the Eastern States Office, Bureau of Land Management (BLM), cancelling her adoption agreement and taking possession of the colt identified as Freeze Mark 86640145. ^{1/} In its decision, BLM stated that it was taking this action pursuant to 43 CFR 4770.2(b) because appellant "failed to keep the Terms of Adoption (b), (e), (g), and the Prohibitive Acts (a), (b), (d)" of the "Private Maintenance and Care Agreement for Wild Horses and Burros" with respect to her treatment of the adult mare Freeze Mark 79504663. ^{2/}

^{1/} On Oct. 5, 1987, this Board issued an Order granting the Government's motion for expedited consideration of this appeal to protect the adoptive status of the colt and because of the importance of this case to BLM's Adopt-a-Horse program.

^{2/} The reverse side of appellant's copy of the Private Maintenance and Care Agreement reads in part:

On July 23, 1986, BLM had approved appellant's application to adopt wild horses pursuant to the Act of December 15, 1971, as amended, 16 U.S.C. § 1333 (1982), and entered into an agreement with her for the maintenance,

fn. 2 (continued)

"TERMS OF ADOPTION

"The following terms apply to all wild horses and burros adopted under this Private Care and Maintenance Agreement:

"(a) Adopters are financially responsible for providing proper care; "(b) Adopters are responsible, as provided by State law, for any personal injury, property damage, or death caused by animals in their care, for pursuing animals that escape or stray, and for costs of recapture;

"(c) Adopters shall not transfer animals for more than 30 days to another location or to the care of another individual without the prior approval of the authorized officer;

"(d) Adopters shall make animals available for physical inspection within 7 days of receipt of a written request from the authorized officer; "(e) Adopters shall notify the authorized officer within 7 days of discovery of an animal's death, theft or escape;

"(f) Adopters shall notify the authorized officer within 30 days of any change in the adopter's address;

"(g) Adopters shall dispose of remains in accordance with applicable sanitation laws; and

"(h) Title shall remain with the Federal Government for at least 1 year after the Private Maintenance and Care Agreement is executed and until a Certificate of Title is issued by the authorized officer.

"Failure to comply with these terms may result in the cancellation of the agreement, repossession of the animals, and disapproval of requests for adoption of additional animals. In addition, violation of any term of a Private Maintenance and Care Agreement is a prohibited act. Any person who commits a prohibited act shall be subject to a fine of not more than \$2,000 or imprisonment for not more than one year, or both, for each violation.

"PROHIBITED ACTS

"a) Maliciously or negligently injuring or harassing a wild horse or burro;

"(b) Treating a wild horse or burro inhumanely;

"(c) Removing or attempting to remove a wild horse or burro from the public lands without authorization from the authorized officer;

"(d) Destroying a wild horse or burro without authorization from the authorized officer, except as an act of mercy;

"(e) Selling or attempting to sell a wild horse or burro or its remains;

"(f) Branding a wild horse or burro;

"(g) Removing or altering a freeze mark on a wild horse or burro; "(h)

Violating an order, term, or condition established by the authorized officer under this part.

"(i) Commercially exploiting a wild horse or burro.

"Any person who commits a prohibited act shall be subject to a fine of not more than \$2,000 or imprisonment for not more than one year, or both, for each violation."

protection, and welfare of two wild horses: Freeze Mark 79504663#, Signalment Key RFIAAAAAEO, a mare, and Freeze Mark 86640145 Signalment Key HMIAFAEIE, a colt, which was the mare's foal.

In response to a complaint received on April 30, 1986, that an adopter had shot a horse, Robert Sellers and Lili Thomas of the BLM Wild Horse and Burro Staff conducted an investigation into the matter. They interviewed the complainant, Cindy Minium, and her husband Bill, who live west of Middleburg, Pennsylvania. The Miniums indicated that the mare adopted by Moll had escaped her custody and they showed the investigators the area where the mare roamed during the winter. The investigators also viewed photographs of the horse roaming the fields in apparent good health and were shown the carcass. The carcass was partially decomposed and Sellers was unable to verify the Freeze Mark on its neck. The investigators also interviewed Ron Baker who described his unsuccessful attempts to catch the mare. Baker stated that appellant had tried to catch the horse at various times.

Sellers and Thomas reported that they then went to appellant's residence, identified themselves and interviewed appellant about her adopted horses. Moll pointed out the colt, which appeared to the investigators to be in good condition. With respect to the mare, Moll stated that it had escaped in September 1985 and asserted that she did not know where it was. Sellers then advised appellant that it had been reported that the mare had been shot and killed. Appellant's mother, who was present, verified that that was true. In response to Seller's inquiry concerning who shot the mare, the report states that appellant responded "I did." Moll then recounted the events surrounding the mare's escape, which occurred while the mare was being transferred to another person. E.A. Bodmer, a veterinarian, who was assisting in the transfer, verified appellant's account of the horse's escape.

Kenneth Smith, owner of the property where the horse died, stated that he had tried to get his tractor in to remove the carcass but, because of the terrain, it was not possible. He said that Moll had called him after she shot the horse and asked if she could leave the mare there, and he agreed.

On May 8, 1987, after reviewing the investigator's findings, BLM issued the decision to cancel appellant's adoption agreement. On that date, appellant was personally served with the decision and BLM took possession of the colt.

In her statement of reasons, appellant states that soon after receiving custody of the horses she sought and obtained permission to transfer the mare to a Lorraine Eisenhuth. On September 6, 1986, while Moll was preparing to move the mare into a van for transport to Eisenhuth, the animal escaped. Immediate attempts to capture the horse failed. Moll notified BLM of the escape and was told to continue to try to capture the animal. She could not. From September 1985 to April 1986, the mare roamed free, living in pastures and fields of appellant's neighbors. In the spring of 1986, appellant began receiving complaints that the roaming horse was destroying newly planted crops. Appellant was advised by one of her neighbors that unless she did something she would be charged for the damages. Unable to catch the animal, appellant determined that her only recourse was to destroy the horse.

In its answer, the Government argues that the BLM decision should be affirmed. The Government points out that BLM has a responsibility to protect wild horses placed for adoption and, considering the circumstances of this case, BLM was justified in taking the action it did. In conclusion, the Government states:

The killing of the mare was unjustified and unexcused. In taking that action Ms. Moll violated the terms of the agreement and broke the law. Title to the colt has not passed to Ms. Moll and the colt has not lost its status as a wild free-roaming horse. See, i.e., 16 U.S.C. § 1333(d)(1). It remains subject to the jurisdiction of the Secretary. Moreover, in view of the unauthorized and illegal destruction of the mare, the Secretary cannot be assured of the long term humane treatment of the colt.

The prohibition against destruction of adopted horses is the cornerstone of the Adopt-a-Horse program and is essential to the Secretary's ability to insure that animals receive humane care. Destruction of a horse, even if justified, must be done under authority from BLM so that BLM can assure that the animal is put down humanely. Even where an animal must be destroyed BLM does not authorize shooting animals with a gun because there are more humane means available. When Ms. Moll shot the horse, she risked that the animal would suffer. It is the possibility of inhumane treatment that the law is meant to protect against. 16 U.S.C. § 1331. *U.S. v. Hughes*, 626 F.2d 619 at 620 (9th Cir. 1980). If, as BLM's investigation suggests, the animal did not die immediately, its treatment at Ms. Moll's hands was in fact inhumane.

Removing the horse from Ms. Moll's care and custody is a reasonable exercise of the Secretary's jurisdiction and management responsibilities. Indeed, the Secretary arguably would abrogate his responsibilities to assure humane care of wild free-roaming horses if he were to put the colt in Ms. Moll's custody.

Ms. Moll violated the law and her agreement concerning these horses. BLM has legal title to the colt and is vested with responsibility to insure its humane treatment. It is a reasonable exercise of BLM's discretion and a reasonable interpretation of its duties under the law to terminate the agreement that Ms. Moll first breached.

Appellant filed a response to the Government's answer describing, in more detail, her attempts to capture the mare over the 6 month period. She explains that her continued lack of success left her with no alternative but to destroy the horse. Appellant stated that while she was away at college, her parents cared for the horses during the week, but that they were unable to do much with the mare because, unlike the colt which was tame, the mare was still wild.

In recounting her many attempts to recapture the mare after its escape, appellant complains that BLM offered no assistance other than to tell her to keep trying to catch the horse. Appellant contends that she searched regularly with groups of organized ropers in an effort to capture the mare. Attached to appellant's response are affidavits from a number of individuals describing the escape of the horse, appellant's repeated attempts to catch her, and the wild nature of the animal. Appellant notes that in March she sought professional advice on catching the horse, and it was suggested that tranquilizers might be effective. At one point tranquilizers were placed in the mare's feed; on another occasion the animal was darted with tranquilizers supplied by a veterinarian. In both instances, however, the tranquilizers had no apparent effect on the horse. When she reported to the veterinarian that the darts did not slow the horse, he could offer no more suggestions. Appellant admits that on April 27, 1987, the horse was shot.

Appellant argues that she had no alternative but to destroy the animal. She was receiving complaints from neighbors, and was threatened with bills for damages to property. At various times, the horse was reported running wild across a traveled road, almost causing accidents and endangering the lives of people traveling the road. Appellant judged that balancing the damage and harm that could result if the horse continued to run wild, she had "no choice but to put the horse down." She stated that the horse was shot in an area of the woods where it was impossible to bury or remove it.

Appellant contends that since the colt is tame, loved, and well cared for, it should be returned to her. The question presented, however, is not whether the colt is loved and properly cared for under the terms of the Maintenance Agreement, but whether appellant's action in destroying the mare violated the term of the Maintenance Agreement and justified the BLM decision to cancel the adoption agreement and to take custody of the colt. We find that it does.

[1] BLM administers the Adopt-a-Horse program under the Wild Free Roaming Horse and Burros Act of 1971 (Act), as amended, 16 U.S.C. §§ 1331-1340 (1982), and the implementing regulations found at 43 CFR Part 4700.

The Secretary of the Interior is vested with jurisdiction over wild free-roaming horses for the purposes of management and protection. 16 U.S.C. § 1333(a) (1982). The Secretary is authorized to offer for placement with qualified applicants excess wild free roaming horses for which he can assure humane treatment and care. 16 U.S.C. § 1333(b)(2)(B) (1982); 43 CFR Subpart 4750. An applicant under the Act must execute a Private Care and Maintenance Agreement. 43 CFR 4750.4-1. Title to horses placed with adopters remains with the Government for at least one year after execution of the agreement and until BLM issues a Certificate of Title. 16 U.S.C. § 1333(c) (1982); 43 CFR 4750.4-1(a). The applicable regulation 43 CFR 4770.2(b), provides:

An adopter's failure to comply with the terms and conditions of the Private Maintenance and Care Agreement may result in the cancellation of the agreement, repossession of wild horses and burros included in the agreement and disapproval of requests by the adopted for additional excess wild horses and burros.

During the first year of placement the adopter acts essentially as a guardian of a wild horse which is still the property of the United States. The list of Prohibited Acts listed in the Maintenance Agreement and found at 43 CFR 4770.1, are clearly designed to prevent an adopter from acting unilaterally in any activity that adversely affects the health and welfare of a wild horse.

In accepting possession of the two horses, Moll expressly agreed to abide by certain terms and conditions. Included in these terms was a list of Prohibited Acts, among which was "destroying a wild horse or burro without authorization from the authorized officer, except as an act of mercy." This language appears not only in the applicable regulations (43 CFR 4770.1(c)), but also on the back of the Private Care and Maintenance Agreement which she signed.

Appellant does not allege that she obtained authorization to put down the mare, nor does she assert that it was done as an act of mercy. Thus, appellant necessarily admits that she violated the terms of her agreement.

In an apparent attempt to mitigate this fact, appellant has provided this Board with extensive documentation recounting her efforts to recapture the horse. We recognize that these documents tend to support her claim that she did make many attempts to recapture the mare, all of which proved fruitless. Clearly, the damage which the mare was causing to newly planted crops and the possible danger posed to vehicular traffic on nearby roads were justifiably matters of serious concern to appellant. We do not believe, however, that this gave her the license to decide on her own that the mare should be destroyed.

We need not speculate on what action BLM would have taken or authorized to be taken had appellant contacted it about destroying the mare. Suffice it for our purposes to note that appellant neither consulted with BLM before destroying the mare nor voluntarily informed BLM after the fact.

Destruction of a wild horse or burro without authorization in the above circumstances must be seen as possibly the ultimate violation of the program. ^{3/}

^{3/} In Patrick E. Hammond, 60 IBLA 205 (1981), the Board reversed a BLM decision canceling two cooperative agreements covering four wild horses, based on the death of a fifth wild horse which was in appellant's custody, but was the subject of a cooperative agreement with his wife. We stated: "In the absence of any evidence of inhumane treatment of the horses under appellant's cooperative agreements, we cannot hold that the agreements were properly canceled pursuant to their stated terms, i.e., for violation of the provision regarding proper care and protection of the animals' subject to the agreement." Id. at 208 (emphasis in original). However, the Board further stated that its decision should not be construed "as precluding the possibility of termination of a cooperative agreement when there is sufficient evidence of mistreatment of an animal or animals under another cooperative agreement.

Regardless of whether or not appellant felt that she was justified in the course of action she took, BLM cannot retroactively approve her action. Indeed, from our view, cancellation of a Private Maintenance and Care Agreement and repossession of any remaining wild horses or burros included in the agreement is the minimum response which BLM can make to such a violation. We must affirm the decision below.

It is within the discretion of BLM to cancel an adoption agreement and to take possession of a wild horse where an adopter fails to comply with the terms and conditions contained therein. 43 CFR 4770.2(b). The facts of this case establish that appellant violated the terms and conditions of the maintenance agreement and, under the circumstances, BLM was justified in taking the action it did.

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.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

fn. 3 (continued)

The record in this case does not support such a finding however." Id. at 208 n.4. In the present case there clearly was evidence of inhumane treatment and both horses were covered by the same cooperative agreement.

