

CRAIG C. DOWNER

IBLA 89-33

Decided October 31, 1989

Appeal from a decision of the Nevada State Office, Bureau of Land Management, approving the Ely/Elko Wild Horse Gather Plan. NV-04-88-2.

Dismissed in part, affirmed in part.

1. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from a herd management area will be set aside where the removal decision is not properly based on a finding supported by the record that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

2. Appeals: Generally--Rules of Practice: Appeals: Dismissal

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.

3. Wild Free-Roaming Horses and Burros Act

A decision of BLM to remove wild horses from an area outside a herd area will be sustained where it is consistent with the regulation at 43 CFR 4710.4.

APPEARANCES: Craig C. Downer, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a decision of the Nevada State Director, Bureau of Land Management (BLM), approving the final plan for the Ely/Elko

Wild Horse Gather which would remove approximately 1,045 wild horses from portions of the public lands (NV-04-88-2). Of the seven areas covered by the plan, appellant objects to removal of horses from six: the Monte Cristo Herd Management Area (HMA); the Cherry Springs Wild Horse Territory (WHT); a "horse free" portion of the Egan Resource Area not designated an HMA; and HMAs identified as Diamond Hills South, Butte, and Maverick-Medicine. Appellant objects to the removal of wild horses from these areas because the plan calls for fewer than 500 wild horses to remain in each. More specifically, he states that:

500 should be considered the minimum viable herd population in each herd area according to population biology assessments. Maintaining adequate population levels is especially important among species with harem social structure, where one male may do most of the breeding, as occurs in many of the wild horse bands.

The State Director's decision approving the Ely/Elko Wild Horse Gather Plan was also the subject of a prior appeal (IBLA 88-679) filed by the Animal Protection Institute of America (APIA). BLM filed a motion requesting that both appeals, and three other appeals filed by APIA from decisions to remove wild horses from the public lands, be consolidated and expedited.

By order dated February 16, 1989, the Board consolidated the four APIA appeals and granted expedited consideration. As had been requested by BLM, the Board also placed into full force and effect BLM's decision to remove horses from four areas not involved in the present appeal. By order dated February 17, 1989, the Board declined to consolidate Downer's appeal with APIA's appeals because we found that Downer had raised distinct questions. We granted expedited consideration.

The Board's decision on the consolidated APIA appeals has recently been issued. Animal Protection Institute of America, 109 IBLA 112 (1989). Our review of the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (codified at 16 U.S.C. §§ 1331-1340 (1982) and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984), led us to conclude that 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." 109 IBLA at 126. The statute states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information 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. Such action shall be taken * * *

until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation[.]

16 U.S.C. § 1333(b)(2) (1982).

[1] In examining the statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public lands: "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, *supra* at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; Dahl v. Clark, *supra* at 595; *see* 16 U.S.C. § 1332(f) (1982).

We found that in most instances the AML's used as a basis for the removal actions approved by the BLM decisions had been taken from land use plans and other documents which set forth previously current wild horse and burro population statistics. We concluded that BLM had used current numbers in these documents for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Animal Protection Institute of America, *supra* at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." *Id.* Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." *Id.* at 119.

With respect to the Monte Cristo HMA and the Cherry Springs WHT we found that the analysis undertaken to establish the numbers set forth in the wild horse management plans prepared in 1977 was consistent with the statutory criteria. *Id.* at 123. However, we also determined that the decision to reduce wild horse herds to the numbers set by these plans was neither in accord with the directive of 43 CFR 4720.1 that a decision to remove wild horses or burros be based on current information nor supported by a record which established that removal was necessary to restore the range to a thriving ecological balance and prevent deterioration. *Id.*

Because the AML's under review in Animal Protection Institute of America, *supra*, did not reflect determinations by BLM as to the optimum number of horses which would result in a thriving natural ecological balance and avoid a deterioration of the range, we set aside and remanded the

BLM decision to approve the Ely/Elko Wild Horse Gather plan as it applied to removal of wild horses from five of the six areas challenged by appellant: the Monte Cristo HMA, the Cherry Springs WHT, and the HMA's identified as Diamond Hills South, Butte, and Maverick-Medicine. ^{1/}

[2] In regard to these areas, the result of our setting aside of the BLM decision to remove wild horses is that no further relief can be provided. Consequently, the appeal has become moot with respect to the Wild Horse Gather Plan for these areas and the appeal is properly dismissed as to them. See Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 369, 93 I.D. 285, 287 (1986). This leaves for consideration only the appeal of BLM's decision to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA.

The Removal Plan for the Ely/Elko District Wild Horse Gather indicates that the decision to remove wild horses from the "horse free" area was based on the Egan Resource Management Plan and Egan Resource Area Record of Decision. The latter document states: "Wild horses will not be maintained outside of 1971 use areas." Thus, it appears that BLM regarded areas outside designated HMA's as areas which were to be "horse free."

[3] The Wild Free-Roaming Horses and Burros Act, as enacted in 1971, set forth the congressional policy that wild horses and burros "are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1982). In implementing the statutory mandate, BLM has promulgated regulations at 43 CFR Part 4700. Pursuant to the regulations, a "herd area" is defined as the "geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d); see 43 CFR 4710.2. Further, the regulations provide that: "Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas." 43 CFR 4710.4.

Under the statute, the Secretary is "directed to protect and manage wild free-roaming horses and burros as components of the public lands" and is authorized to "designate and maintain ranges on public lands as sanctuaries for their protection and preservation." 16 U.S.C. § 1333(a) (1982). A designated range is the "amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use

^{1/} We affirmed BLM's decision to remove wild horses from four HMA's because BLM had made a showing "that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, despite the fact that it has not shown that the AML's were properly established * * *." Id. at 123. We also affirmed BLM's decision to remove "problem animals" intruding on private property and to remove horses from the "horse free" portion of the Egan Resource Area not designated an HMA. Id. at 127.

management concept for the public lands." 16 U.S.C. § 1332(c) (1982). This is reflected in the regulations which provide that HMAs may be established for the maintenance of wild horse and burro herds. 43 CFR 4710.3-1. Further, HMA's may be designated as wild horse or burro "ranges" to be managed principally, but not necessarily exclusively, for wild horse or burro herds. 43 CFR 4710.3-2.

The sole argument appellant presents concerns viable herd populations. Although, as BLM appears to recognize, the size of a herd necessary to sustain a viable population is relevant to the determination of AML's, it would not be dispositive in decisions concerning wild horses which have migrated to previously "horse free" areas outside herd areas, HMAs, or designated ranges. In such areas, other uses of the land may require reducing the number of horses to that compatible with such uses or removing them entirely. We find the BLM decision to remove wild horses from the "horse free" area is consistent with the regulation at 43 CFR 4710.4. For this reason, appellant's argument does not present a basis on which to overturn our previous decision to affirm the removal of wild horses from the "horse free" gather area designated in BLM's decision.

Accordingly, 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 in part and the decision appealed from is affirmed in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge