

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 89-206, 90-243

Decided February 15, 1991

Consolidated appeals from decisions of the Director, Nevada State Office, Bureau of Land Management, approving final plans for removal of excess wild horses from the Wilson Creek, Dry Lake, Seaman, and White River Herd Management Areas in the Ely District. EA No. NV-040-9-1; EA No. NV-040-0-1.

Dismissed in part; affirmed in part; set aside and remanded in part.

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

An appeal may properly be dismissed as moot where the Board can grant no further relief because of events occurring subsequent to the appeal.

2. Wild Free-Roaming Horses and Burros Act

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an analysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate 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) (1988).

3. Wild Free-Roaming Horses and Burros Act

Departmental regulation 43 CFR 4710.4 requires wild horse management to be undertaken with the objective of limiting the animals' distribution to herd areas, which are defined as "the geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d).

4. Wild Free-Roaming Horses and Burros Act

The decision to remove wild horses from an area of the public lands is properly remanded where the record fails to establish that the horses are excess, i.e., that removal of the horses is necessary to establish a thriving natural ecological balance and multiple-use relationship in that area.

APPEARANCES: Nancy Whitaker, Animal Protection Institute of America, Sacramento, California, for appellant; Kristina Clark, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On December 12, 1988, the Director, Nevada State Office, Bureau of Land Management (BLM), issued letters approving proposals for removal of excess wild horses from four Herd Management Areas (HMA's) within BLM's Ely, Nevada, District. ^{1/} The letter referred to Environmental Assessment (EA) No. NV-040-9-1 and stated that the reason for the gather was to implement land use planning. An appeal from this decision by the Animal Protection Institute of America (APIA) has been docketed as IBLA 89-206, and the contract for the gather was cancelled pending administrative review.

On January 5, 1990, the State Director issued another letter approving proposals for removal of 46 excess wild horses from the Dry Lake HMA, allowing 74 to remain, and for removal of 48 horses from a horse-free area adjacent to the Wilson Creek HMA, allowing none to remain. This letter referred to EA No. NV-040-0-1. APIA's appeal from this decision has been docketed as IBLA 90-243. The removal contract in this case was also cancelled pending a decision on appeal.

By order dated October 15, 1990, we granted expedited consideration of these appeals and consolidated them in response to assertions by BLM that affected rangelands will deteriorate if the removals are not timely implemented, resulting in stress on horse herds and indigenous wildlife, leading to poor physical condition which could cause horse deaths. BLM also contended that its decisions will be out of date if delayed because they would no longer be based on current conditions.

We find that the January 5, 1990, decision was intended to supercede rather than supplement the December 12, 1988, decision. During the interval between these decisions, the Board set aside other BLM decisions proposing removals merely based on horse population numbers existing at the time land use plans were originally adopted. We held that a determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. Craig C. Downer, 111 IBLA 332 (1989); Animal Protection Institute of America, 109 IBLA 112 (1989).

^{1/} The number of horses to be removed from each HMA was indicated as follows:

<u>Area Name</u>	<u>Approximate Number to Be Removed</u>	<u>Approximate Number to Remain</u>
Wilson Creek	65	181
Dry Lake	14	82
Seaman	106	84
White River	48	20

[1] BLM apparently believed that its December 12, 1988, decision was vulnerable to being set aside for the same reasons. A map attached to the 1990 decision expressly indicates no removals are planned for the Wilson Creek HMA itself, nor were removals proposed for the Seaman and White River HMA's as in the 1988 decision. As for the Dry Lake HMA, BLM's 1988 proposal to allow 82 horses to remain is clearly superceded by the 1990 decision to allow only 74 to remain. Because BLM has effectively withdrawn its decision of December 12, 1988, no further relief can be provided on appeal. 2/ In these circumstances, APIA's appeal from that decision is properly dismissed as moot. See Craig C. Downer, 111 IBLA 339, 342 (1989).

[2] Following the issuance of the above-cited Board decisions, various BLM offices have issued new decisions to gather wild horses and the Board has affirmed those decisions where we found removals to be predicated on analyses of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate the removals to be necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with section 3(b) of the Wild Free-Roaming Horses and Burros Act (WFRHBA), as amended, 16 U.S.C. § 1333(b) (1988). Animal Protection Institute of America, 117 IBLA 208 (1990); Animal Protection Institute of America, 117 IBLA 4 (1990).

In the instant appeal, APIA's arguments are wide-ranging. Some relate specifically to the proposed removals; others are of a more programmatic nature. Before we can properly address the issues appellants raises, it is first necessary to set forth the legal authorities which govern our disposition of this appeal.

Section 3(b)(2) of the WFRHBA, 16 U.S.C. § 1333(b)(2) (1988), provides the statutory authority for the removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that, where the Secretary of the Interior determines 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 further deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1988). "[E]xcess animals" are defined in the Act as wild free-roaming horses and burros "which must be removed from an area

2/ To the extent the earlier decision was not withdrawn by BLM, it would be necessary to set aside and remand that decision. It is clear from the record in IBLA 89-206 that the 1988 decision was based simply on restoring numbers to those found to exist at the time the land use plans were drafted. The Board has held that this is not a sustainable basis for a wild-horse removal decision. Craig C. Downer, supra; Animal Protection Institute of America, supra.

in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1988).

As the court stated in Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984), "the benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." In the words of the conference committee which adopted this standard: "[T]he goal of wild horse and burro management * * * should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros." H.R. Conf. Rep. No. 1737, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 4069, 4131.

The proposed gather areas are located approximately 60 miles south of Ely in northern Lincoln County, Nevada. Review of the record in this case is complicated by the fact that this appeal includes three separate gather areas (the horse-free area adjacent to the Wilson Creek HMA, Grassy Mountain or Grassy Spring, and Dry Lake Valley) which involve two different HMA's (Dry Lake and Wilson Creek). Two of the gather areas (Grassy Mountain and Dry Lake Valley) are located within the Dry Lake HMA in the Schell Resource Area of BLM's Ely District. The removal would also affect a horse-free area adjacent to the Wilson Creek HMA. These HMA's are situated within (but not coextensive with) the Wilson Creek and Geyser Ranch grazing allotments. BLM acknowledges that the areas are not covered by a herd management area plan, but states that its action is in conformity with the Schell Management Framework Plan. BLM's removal plan states that the proposed action will bring the population of wild horses to a level in balance with available forage within the Wilson Creek and Dry Lake HMA's. The removal plan asserts that the population adjustment is based solely on analysis of monitoring data.

The censuses of the Wilson Creek herd counted a total of 165 wild horses in June 1987, and 246 in 1988. Dry Lake herd censuses counted 96 in 1987 and 120 in 1989. While the number of wild horses has increased, the condition of the range has deteriorated. The EA provides the following description of the vegetation in the areas affected:

Utilization studies and use pattern mapping of the vegetation completed since 1982 show that extensive areas within the HMA's are currently receiving heavy and severe use. This use can be attributed to wild horses, which graze yearlong, and to cattle, which graze during their established seasons of use by allotment. Use on the horse free area (Patterson Seedings) can be attributed to both wild horses and livestock. Use in Dry Lake Valley can also be attributed to both wild horses and livestock. These areas are shown in [referenced maps] as the Horse Free Area Gather Area and the Dry Lake Valley Gather Area, respectively. Use on the Grassy Mountain Gather Area * * * can be attributed to wild horses only, since there has been no livestock use there during the monitoring evaluation period.

(EA No. NV-040-0-1 at 9).

Before reviewing BLM's proposals to remove horses from two areas in the Dry Lake HMA, we turn to the proposed removal of horses from the horse-free area adjacent to the Wilson Creek HMA known as the Patterson Seeding. Appellant asserts that BLM has failed to justify this removal, but BLM's EA states:

Based on the Wilson Creek Allotment Evaluation Summary, LUP [Schell Resource Area Land Use Plan] objectives were not met approximately 50% of the time, and heavy to severe use often occurs within 1½ miles of water. The 1988 wild horse census indicates that 48 wild horses contributed to overuse by utilizing 586 AUMs [animal unit months] of forage in the Horse Free Area. The 1987 wild horse census indicates that 46 wild horses contributed to overuse by utilizing 552 AUMs of forage in the Horse Free Area. Additional field observations, made during the allotment monitoring and evaluation process, indicate that wild horses are establishing yearlong residency in this area. It is proposed to remove all horses from this use area since it is outside the Wilson Creek HMA and is not to be managed for wild horses.

(EA at 24).

[3] In Craig C. Downer, 111 IBLA at 342-43, we affirmed a decision to remove horses from an area outside a HMA because such action was consistent with 43 CFR 4710.4. That regulation sets forth the following constraint on wild horse management: "Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas." (Emphasis added.) The regulations define "herd area" as "the geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d). In promulgating the foregoing regulations, the Department stated: "This provision has been amended * * * to clarify that herd management areas shall be established only where herds existed in 1971." 51 FR 7411 (Mar. 3, 1986).

Appellant contends: "Finding horses outside HMA boundaries is a convenient ploy to continue removing horses without implementing the IBLA rulings of June 1989 - or enforcing statutory protections granted to wild horses. It raises the issue of how boundaries were determined and HMA's designated" (Notice of Appeal (N/A) at 3). Appellant states "the Patterson Seeding is not a multiple-use public land, it is a cow pasture on a rotational cow pasture grazing system. This is often, we believe, the reason for setting an HMA boundary" (N/A at 5).

We find that appellant's contention does not establish a basis for overturning the BLM decision, but rather, supports the decision. BLM confirms appellant's characterization of the Patterson Seeding, pointing out that it was established for livestock grazing in the mid-1950's and was fenced to contain livestock in the late 1950's. BLM states that this area is fenced in its entirety and therefore could not have become a herd area (Memorandum of Feb. 23, 1990, from Ely District Manager to State Director, at 9).

Appellant has raised questions concerning the boundaries of HMA's that are not involved in this appeal, seeking a "bureauwide ruling on the boundary issue" (N/A at 5). However, the decision appealed from did not establish the boundaries of the HMA or the horse-free area. The only issue before the Board is whether BLM has properly decided to remove wild horses from the area at issue, and appellant has provided no showing of error regarding BLM's recognition of the Patterson Seeding as a horse-free area. Alleged deficiencies in drawing the boundaries of HMA's and horse-free areas are outside the scope of this appeal. ^{3/} Accordingly, BLM's decision to remove horses from the Patterson Seeding must be affirmed.

Appellant suggests that horses removed from the Patterson Seeding should be returned to the Wilson Creek HMA. We cannot argue with BLM's conclusion that the likelihood that the horses originated from the HMA and would return to the Patterson Seeding precludes relocating them to the HMA (Memorandum of Feb. 23, 1990, supra at 10). BLM is required to limit the size of the Wilson Creek herd to prevent its population from expanding outside the HMA. The preamble to the above-quoted rulemaking supports this conclusion: "Another change has been incorporated to make it clear that management will * * * be undertaken with the objective of limiting animal distribution to herd areas by controlling herd size to prevent habitat from being overpopulated." 51 FR 7412 (Mar. 3, 1986). Transferring the horses to the HMA would clearly be inconsistent with this intent.

We now consider appellant's objections to BLM's proposal to remove 46 horses and allow 74 to remain in 2 areas within the Dry Lake HMA: (1) the Grassy Mountain gather area which is in the Geysers Ranch Grazing Allotment, and (2) the Dry Lake Valley gather area which is in the Wilson Creek Grazing Allotment. Although the removal of 46 horses is generally based on the perceived need to bring horse populations into balance with available forage, the specific proposal to remove 14 horses from the Grassy Mountain area and allow 16 to remain is primarily intended to reduce damage to springs and riparian vegetation:

The Geysers Ranch Allotment Evaluation attributes spring and riparian damage on the Grassy Springs complex to wild horses. Their associated riparian vegetation is being seriously impacted by heavy to severe grazing and has almost disappeared at some sources. The spring sources are experiencing heavy trampling which leads to reduced spring flow and fouled water. Erosion and loss of riparian species is taking place on many meadows in the HMA's.

^{3/} The jurisdiction of this Board embraces the final decisionmaking authority with respect to appeals from decisions of BLM regarding the use of the public lands and their resources. 43 CFR 4.1. Although the Board has the duty to consider cases de novo, "as fully * * * as might the Secretary," see United States Fish & Wildlife Service, 72 IBLA 218, 221 (1983), we do not exercise authority over matters not before us on appeal. See James C. Mackey, 114 IBLA 308, 315 (1990). This Board has no general supervisory authority over BLM officials.

Reduced wild horse numbers would lessen grazing and trampling at waterholes and riparian areas, contributing to a more favorable riparian habitat. Reduced wild horse numbers would lessen the competition among wild horses, wildlife, and livestock for limited water supplies, which in turn would contribute to a more favorable water quality for all animals. However, to adequately protect these riparian areas and spring sources, some exclosures will still be needed.

(EA at 6). It appears from the EA that the reduction in wild horses on Grassy Mountain was based on applying the desired stocking rate formula ^{4/} to compare the ratio of the actual use in AUM's based on the 1989 horse census to the percentage of forage consumed, on one side of the equation, with the ratio of the desired level of use in AUM's to the desired percentage of forage use (EA at 21). Solving this equation for the level of desired use yields a result of 200 AUM's, roughly equivalent to the amount consumed by 16 horses in yearlong use. This provided the basis for the decision to remove 14 and leave 16 of the 30 wild horses disclosed by the 1989 census in the Grassy Mountain area (EA at 21).

Appellant generally takes issue with BLM's use of stocking formulas, contending that management is being based "solely on arbitrary numbers," (N/A at 2) and that the removal action would leave wild horse numbers so that the plan "maximizes livestock usage" (N/A at 2). Appellant cites BLM's failure to establish wild horse objectives or grazing allotment objectives other than livestock preference. Id. Appellant asserts that the removal action "is based entirely on numbers set in the land use plan and these numbers were picked from a hat." Id. Further, appellant contends the "numbers have nothing to do with whether or not horses cause or substantially contribute to damaged resources to determine if there are excess horses." Id.

By characterizing the issue in this appeal as BLM's failure to determine the optimum level of wild horses on the basis of adequate monitoring, appellant seeks in part to draw support from our decisions in prior appeals in which we set aside proposed gathers because we found that BLM had not properly established appropriate management levels for wild horses in the affected HMA's. We find this case to be distinguishable in certain respects from those prior cases where horse gather decisions based on horse population numbers existing at the time land use plans were generated were set aside and remanded. Those decisions were set aside because the decisions adopted the planning document numbers as appropriate management levels, rather than as a starting point for monitoring purposes, and the record failed to support a finding that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological

^{4/} The desired stocking rate formula applied by BLM is expressed as follows: [Actual use in AUM's/measured percentage of forage utilization] = [desired use in AUM's/desired percentage of forage utilization] (see EA at 21; Wilson Creek Allotment Evaluation Summary at 17).

balance and protect the range from deterioration associated with overpopulation. See Craig C. Downer, 111 IBLA 332 (1989); Animal Protection Institute of America, 109 IBLA 112 (1989). However, the record in the present case reflects substantial monitoring of usage of the public lands by wild horses and livestock and of the condition of the range in terms of forage utilization.

[4] The Secretary is required by statute to maintain a current inventory of wild horses on the public lands and to make a determination of whether and where an overpopulation exists. 16 U.S.C. § 1333(b)(1) (1988). The statute further provides that 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) (1988). Thus, the issue is whether the record before us supports a finding that removal of excess horses is necessary to establish a thriving natural ecological balance and preserve a multiple-use relationship in the area. 16 U.S.C. § 1332(f) (1988) (definition of excess animals).

Applying this standard with respect to the Grassy Mountain gather area, we find the question must be answered in the affirmative. Although appellant contends that the Grassy Mountain gather area should be considered for closure to livestock under 43 CFR 4710.5, BLM attributes the spring and riparian damage in the Grassy Springs complex solely to wild horses since there has been no livestock use in the area for nearly 2 years. Thus, closure of the area to livestock would not alleviate the reported condition. Although BLM may be required to consider closure of an area to livestock in certain situations, see Bar X Sheep Co., 56 IBLA 258, 88 I.D. 665 (1980), we recently affirmed a decision to remove horses from an area rather than close it to livestock, because such action was consistent with the multiple-use objectives stated in BLM's land use plans. Animal Protection Institute of America, 117 IBLA 4, 6 (1990). ^{5/} We find this precedent controlling in the present case with respect to the Grassy Mountain gather since BLM's proposed removal from Grassy Mountain is consistent with the multiple-use objectives of the area and responsive to the particular causes of imbalance among the uses.

With respect to the decision to remove 32 wild horses in the Dry Lake Valley gather, the EA recites that the basis of this action is to be found in the Wilson Creek Allotment Evaluation Summary (EA at 11). The EA noted that contemplated action to rectify overgrazing included a livestock reduction in use of 6,405 AUM's (35 percent) including a reduction of the season by one month in the spring, as well as a reduction of 395 AUM's (or

^{5/} The decision specifically noted the intent of the statute to achieve a balance in resource allocation among multiple users. See 16 U.S.C. § 1332(f) (1988) (defining excess horses in part as those which must be removed to maintain a "multiple-use relationship").

32 horses) for wild horses (EA at 22). 6/ The basis for the adjustments was stated to be an application of the desired stocking rate formula as averaged for 1982 through 1987. Id. It appears from the record that in order to determine the appropriate level of grazing for horses and livestock in the Dry Lake Valley (Key Area WCR 1), BLM totalled the actual use in AUM's by livestock and horses for each year from 1982 through 1987 and compared that with the measured utilization of forage as adjusted for precipitation (Appendix 3 to Allotment Evaluation Summary). Using the desired stocking rate formula, 7/ the ratio of AUM's to the measured percentage of forage used was then compared to the desired percentage of forage consumption (45 percent) to determine the desired level of AUM's for each year. Id. The desired level of AUM's was then averaged for the 6-year period to arrive at an average desired level of use. Id. This desired level of use was determined to be approximately equivalent to the level of use remaining after a 35-percent reduction in active grazing preference within the Dry Lake Valley (Table IV, Allotment Evaluation Summary at 18). The Dry Lake Valley gather decision in turn is predicated on a BLM decision to reduce wild-horse grazing proportionally by 35 percent (EA at 22). The 1989 census of the Dry Lake Valley HMA (Tab 13 in the administrative record) disclosed a total of 90 wild horses within the Wilson Creek allotment. A reduction of 35 percent amounts to approximately 32 wild horses.

There is no question from the record that overgrazing has been a problem in the Dry Lake Valley. See Wilson Creek Grazing Allotment Evaluation Summary, Appendix 1 at 1. However, BLM acknowledged in the Allotment Evaluation Summary that wild horses contributed a very limited amount of this use: "Allowable use levels at key areas within Herd Management areas were exceeded approximately 50% of the time, primarily in the Dry Lake Valley, wild horses contributed approximately 2% of this use" (Allotment Evaluation Summary at 13). Appellant argued before BLM in comments on the allotment evaluation summary dated July 17, 1989, after analyzing BLM's utilization charts (Summary, Appendix 3), that:

The utilization charts list the seven year usage as at 114 AUMs for five years and only two years at 222 AUMs. By depicting it in terms of a range rather than the actual, the picture drawn is quite different than what really occurred. The actual livestock utilization for these two years, when horses were at 222, was very low: 9,331 AUMs in 1987 and zero in 1988. The utilization for 1987 was 45 percent and no impact at all in 1988. However, livestock utilization in 1986--when utilization exceeded the recommended usage level--was 14,141 AUMs. In actuality wild horse usage compared with livestock usage is .8 percent rather

6/ With respect to reductions in the Wilson Creek allotment, after noting the 35-percent reduction from active grazing preference in the Dry Lake Valley use area, the EA states that: "The remaining use areas, other than the Patterson use area (horse free area), are not impacted by wild horses (see Appendix II)" (EA at 13).

7/ See note 3, supra.

than the 2.0 percent stated--in other words, livestock usage is 99.2 percent. In looking at your data, we would conclude that livestock usage should not exceed 9,331 AUMs in this area. In our opinion, the data do not justify a reduction of wild horse numbers in this area of the allotment. However, we would agree that the data do indicate a grazing reduction is needed since the area is severely overgrazed.

Reference to Appendix 3 where actual use by horses and livestock for 1982 through 1987 is shown discloses that wild horse use consists of only 114 AUM's (approximately 9 horses) for all except one year when it was 222 AUM's (approximately 18 horses). This compares with livestock use ranging from 9,331 AUM's to 14,141 AUM's over the same interval. Thus, wild-horse use recorded in Dry Lake Valley amounted to less than 2 percent of average livestock grazing use. While this Board will not substitute its judgment for that of BLM regarding the allocation of grazing reductions among livestock and wild horses, the statute requires a finding that the horses to

be removed are excess, *i.e.*, that they threaten range deterioration and impairment of multiple-use relationships resulting from overpopulation.

BLM asserts in the record that the plan to remove 32 horses from the Dry Lake Valley gather area "is based on spatial overlap with livestock in the areas where wild horses were censused. Proportionate adjustments in livestock are also proposed for this area in the Wilson Creek Allotment Evaluation Summary (Attachment No. 9)" (Memorandum of Feb. 23, 1990, from BLM District Manager, Ely, to BLM State Director at 8). Despite the asserted spatial overlap, the case record filed with the Board simply does not support the conclusion that wild horse use in Dry Lake Valley contributes significantly to overgrazing in that area. Accordingly, we find the record before the Board is insufficient to support the decision that removal of the 32 horses in the Dry Lake Valley gather is necessary "in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal from the decision dated December 12, 1988, is dismissed and the decision of January 5, 1990, is affirmed in part and set aside and remanded in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge