

MARVIN COOK

IBLA 91-299

Decided May 10, 1993

Appeal from a decision of the Spokane, Washington, District Office, Bureau of Land Management, disapproving application to adopt a wild horse OR WA 77975773.

Set aside and remanded.

1. Wild Free-Roaming Horses and Burros Act

The Wild Free-Roaming Horses and Burros Act authorizes the Secretary to make excess wild horses available for private maintenance and care by qualified individuals. An applicant must have no prior conviction for inhumane treatment of animals or for violation of the Act or its implementing regulations.

2. Wild Free-Roaming Horses and Burros Act

A BLM decision rejecting an application to adopt a wild horse on the ground that an applicant has violated a regulation implementing the Wild Free-Roaming Horses and Burros Act will be set aside if the applicant has not been convicted of the violation as provided in 43 CFR 4750.3-2(a)(2), and a substantial issue exist as to an applicant's responsibility for the violation. The regulation contemplates that issues of culpability will be resolved in a proceeding that would lead to a conviction rather than an appeal to this Board.

3. Wild Free-Roaming Horses and Burros Act

A person who has expressed an intent to commercially exploit an animal after receiving title is not a qualified applicant. When determining whether an applicant is qualified it is proper for BLM to ascertain an applicant's long-term intent in order to assure that the horse's humane treatment and care will continue after title transfers.

APPEARANCES: James W. Atwood, Esq., Coeur d'Alene, Idaho, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

Marvin Cook has appealed from an April 11, 1991, decision by the Spokane, Washington, District Manager, Bureau of Land Management (BLM), disapproving his application to adopt a wild horse because Cook had attempted to sell a wild horse, bearing freeze mark 77975773.

Departmental regulation 43 CFR 4770.1(d) prohibits "[s]elling or attempting to sell, directly or indirectly, a wild horse or burro or its remains." Cook does not dispute that he attempted to sell the horse, but states that he purchased the horse from a private party and neither he nor the person who sold the horse to him knew that the horse was BLM's property or that the seller did not have good title to the horse.

On October 10, 1979, one Martin Vinton executed a private maintenance and care (PMAC) agreement for a wild horse bearing freeze mark 77975773. Although the applicable legislation and regulation would have allowed Vinton to obtain title to the horse after 1 year, no application for title was ever received, and the horse continued to be a Government-owned wild horse. See 16 U.S.C. § 1333(c) (1988); 43 CFR 4750.5(c).

On February 20, 1991, a Washington State brand inspector informed BLM that he had impounded the horse because it was untitled when Cook tried to sell it. Cook then telephoned BLM, stating that he had a bill of sale for the horse, asking about how he might acquire the horse and whether it could be resold.

On March 6, 1991, BLM issued a decision, notifying Vinton of the repossession and cancelling Vinton's PMAC agreement because the sale of the horse constituted a violation of 43 CFR 4770.1(d) and (g). This decision was returned as undeliverable. On the same day, BLM mailed a letter to Cook, enclosing an adoption application and a booklet setting forth the conditions for adoption. Cook's application, which was received on March 13, 1991, was rejected by the decision under appeal. 1/

[1] The Wild Free-Roaming Horses and Burros Act authorizes the Secretary to capture and remove excess wild horses and make them available for private maintenance and care when he determines that "an adoption demand exists by qualified individuals." 16 U.S.C. § 1333(b)(2)(B) (1988). The statute further authorizes the Secretary to transfer title to an adopted animal to a "qualified individual" who "has provided humane conditions, treatment and care for such animal or animals for a period of one year." Id. at 1333(c). To qualify for a PMAC agreement, an applicant must, among

1/ Although appellant's application clearly indicated his desire to adopt the horse he had attempted to sell, the applicable regulation requires only that BLM offer an applicant a choice from animals available at the time an application is approved. 43 CFR 4750.3-4.

other things, "[h]ave no prior conviction for inhumane treatment of animals or for violation of the Act or these regulations." 43 CFR 4750.3-2(a)(2). Cook has no conviction for attempting to sell the horse at issue, and although he does not deny attempting to sell it, he claims lack of knowledge of BLM's ownership.

[2] We are reluctant to construe 43 CFR 4750.3-2(a)(2) in a manner that would require BLM to prosecute an applicant and obtain a conviction in order to deny an application if the applicant's responsibility for a violation of the Act or applicable regulations are not in dispute. However, when substantial issues are raised as to the responsibility for the violation, the regulation contemplates resolution of issues of culpability in a proceeding that would lead to a conviction rather than in an appeal to this Board from a decision rejecting an application.

Cook's apparent lack of knowledge that BLM owned the horse raises such an issue. We recognize that Cook's good faith might not bar liability in a civil proceeding (see 89 C.J.S. Trover & Conversion, § 8 (1955)), and BLM's regulations provide for civil as well as criminal penalties. See 43 CFR 4770.2, 4770.5. However, the liability for civil penalties is limited to adopters, permittees, and lessees. Cook was not an adopter, permittee, or lessee when he attempted to sell the horse, and is subject only to criminal penalties. Although the regulation prohibiting an attempt to sell a horse does not expressly make willfulness an element of the violation, 16 U.S.C. § 1338(a)(6) (1988), the applicable statute, makes it necessary to establish willful violation of a regulation if a criminal penalty is imposed. Thus, reference to Cook's violation of the regulation, with no conviction and no other explanation of why Cook is not qualified, gives no basis for affirming BLM's decision to reject his application. Cf. Patrick E. Hammond, 60 IBLA 205 (1981) (appellant acquitted of criminal charges; BLM decision cancelling PMAC reversed).

[3] Although a qualified individual may receive title to an adopted horse after 1 year, a "qualified individual" does not include a person who has expressed an interest to commercially exploit an animal after acquiring title. Animal Protection Institute of America v. Hodel, 860 F.2d 920 (9th Cir. 1988) (API v. Hodel). In API v. Hodel the court made a careful analysis of the history of the Act and its amendments, noting that the 1978 amendments "sought to make adoption more attractive to 'responsible parties' by allowing the adopter to receive legal title to his animal." Id. at 926. Rejecting the Department's argument that title may be transferred to adopters who intend to commercially exploit animals after title transfer, the court stated:

Legislative history thus reveals that Congress intended the one-year wait for title transfer to act as a probationary period that would weed out unfit adopters. The Secretary's disregard for the announced future intentions of adopters undercuts Congress' desire to insure humane treatment for wild horses and burros. In fact, it renders the adoption process a farce,

for the one-year requirement of humane treatment and care serves no purpose if on the day the one-year period expires, the adopter can proceed to the slaughterhouse with his horses and burros.

Id. at 927; see also, LeRoy Kalenze, 106 IBLA 201 (1988). The 1-year "probationary" period, which is designed to confirm the qualification of the adopter, would serve no purpose unless it provided some basis for concluding that the care given the animal during the probationary period would continue. Thus, it is proper for BLM to ascertain an applicant's long-term intent when considering the applicant's qualifications for adopting a wild horse in order to assure that humane treatment and care will continue after title transfers.

Therefore, 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 set aside and the case remanded for further action consistent with this opinion.

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R. W. Mullen  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge