

Appeal from a decision of the Ely, Nevada, District Office, Bureau of Land Management, approving the final wild horse removal plan for the Dry Lake and Wilson Creek Herd Management Areas and Patterson Seedings. N4-93-09.

Request for stay denied; request for expedited review denied; request for hearing taken under advisement.

1. Rules of Practice: Appeals: Stay--Wild Free-Roaming Horses and Burros Act

The provisions of 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a), and BLM's failure to place such a decision into full force and effect effectively stays the removal decision pending appeal.

APPEARANCES: Gary L. Francione, Esq., Rutgers Law School, Newark, New Jersey, for appellants; Kenneth G. Walker, Ely District Manager, Ely, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Michael Blake, Timothy Wilson, and Public Lands Resource Council have appealed from the May 28, 1993, decision of the District Manager, Ely, Nevada, District Office, Bureau of Land Management (BLM), approving the final wild horse removal plan for the Dry Lake and Wilson Creek Herd Management Areas (HMAs) and Patterson Seedings (N4-93-09), and the May 28, 1993, decision record, finding of no significant impact, and environmental assessment (EA-NV-040-02-22) prepared for the removal plan. Appellants have also requested that the decisions be stayed pending appeal and that an expedited hearing be held in this appeal.

[1] Appellants apparently filed their stay request in accordance with 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), which controls the effect of decisions pending appeal "[e]xcept as otherwise provided by law or other pertinent regulation," and provides that a decision will become effective on the day after the expiration of the time in which an adversely affected person may file a notice of appeal unless a petition

for a stay pending appeal is filed together with a timely notice of appeal. The regulations pertaining to the protection, management, and control of wild free-roaming horses and burros, 43 CFR Part 4770, however, contain specific provisions governing the effect of decisions to remove wild horses or burros from public or private lands regardless of an appeal. See 43 CFR 4770.3(c). Therefore, 43 CFR 4.21(a) does not apply to appeals from wild horse or burro removal decisions. <sup>1/</sup> See 58 FR 4939 (Jan. 19, 1993).

The provisions of 43 CFR 4770.3(c) empower the authorized officer of BLM to place wild horse removal decisions into full force and effect regardless of an appeal. Review of the administrative record in this case reveals that the Ely District Manager did not place into full force and effect the appealed decision to capture and remove excess wild horses from the Dry Lake and Wilson Creek HMAs and Patterson Seedings, the adjacent horse free area. By not placing the decision into full force and effect, BLM has effectively stayed its wild horse removal decision pending resolution of this appeal. Because the effect of the appealed decision has been suspended by BLM's failure to place it into full force and effect, appellants did not need to file a request for a stay. Accordingly, we deny their stay request as moot.

Although appellants seek an expedited hearing in this case, they have presented no justification for expediting consideration of this appeal. Given that the Ely District Manager did not place the removal plan for the Dry Lake and Wilson Creek HMAs and Patterson Seedings into full force and effect, immediate removal of the horses will not occur, and we find no reason to expedite review of this appeal. We will, however, take appellants request for a hearing under advisement since, even though our preliminary review of the record does not disclose an issue of fact warranting a hearing under 43 CFR 4.415, we recognize that sometimes an appeal involves factual issues not initially apparent.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellants' request for a stay is denied as moot; their request for expedited review is denied; and their request for a hearing is taken under advisement.

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Franklin D. Arness  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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<sup>1/</sup> Although 43 CFR 4770.3(a) provides that appeals must be filed within 30 days of receipt of the decision in accordance with 43 CFR Part 4, Subpart E, the referenced regulations do not include 43 CFR 4.21, which is codified at 43 CFR Part 4, Subpart B.

