



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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KATHLEEN NESS

IBLA 2015-242

Decided October 30, 2015

Appeal from an August 3, 2015, decision issued by the Southeastern States District Office, Bureau of Land Management, cancelling two private maintenance and care agreements for three wild horses (Freeze Mark Nos. 10613578, 03745353, 10797402).

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

Adopters of wild horses are required to provide adequate facilities to properly care for the horses they adopt. When an adopter has not paid for boarding costs associated with the adopted horses, BLM may cancel the adopter's private maintenance and care agreements and repossess the horses. 16 U.S.C. §§ 1331-1340 (2012); 43 C.F.R. §§ 4750.3-2(a)(3)(iii), 4750.4-1(e), 4770.2(b).

2. Administrative Procedure: Generally--Administrative Procedure: Burden of Proof

Appellant bears the burden of showing by a preponderance of the evidence that BLM abused its discretion when it canceled her private maintenance and care agreements for three adopted horses because she did not provide proper facilities for all the adopted horses. Appellant's burden is to show BLM's decision is not supported by a rational basis or does not comply with the governing statute or regulations. 16 U.S.C. §§ 1331-1340 (2012); 43 C.F.R. §§ 4750.3-2(a)(3)(iii), and 4770.2(b).

APPEARANCES: Kathleen Ness, *pro se*, Lakeland, FL; J. Nicklas Holt, Esq., Office of the Solicitor, U.S. Department of the Interior, Knoxville, TN, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE JONES

On August 24, 2015, Kathleen Ness (appellant) appealed from an August 3, 2015, decision issued by the Southeastern States District Office, Bureau of Land Management (BLM). In its decision, BLM canceled appellant's two private maintenance and care agreements (Agreements) for three wild horses (Freeze Mark Nos. 10613578, 03745353, and 10797402).

On October 6, 2015, appellant filed with the Board a petition to stay the effect of BLM's decision. BLM filed an answer on October 21, 2015, and appellant filed a reply to BLM's answer on October 27, 2015. Because the record wholly supports BLM's decision, we affirm and deny the petition to stay as moot.

Legal Standards

This matter is governed by the Wild Free-Roaming Horses and Burros Act of 1971 and BLM's implementing regulations. 16 U.S.C. §§ 1331-1340 (2012); 43 C.F.R. Part 4700. The Act authorizes BLM to place wild horses with qualified applicants who can assure humane treatment and care of the animals. 16 U.S.C. § 1333(c); *see* 43 C.F.R. Subpart 4750; *Jerry Dixon*, 165 IBLA 125, 126 (2005).¹

The Act and its implementing regulations require an adopter of a wild horse to comply with his/her private maintenance and care agreement and the regulations set forth in 43 C.F.R. Part 4700. 16 U.S.C. § 1333(c) (2012); 43 C.F.R. §§ 4750.4-1, 4760.1(a), and 4770.1(g). An adopter is financially responsible for the proper care and treatment of all wild horses covered by a private maintenance and care agreement. 43 C.F.R. § 4750.4-1(e). Further, an adopter must, among other requirements, provide shelter for adopted horses. 43 C.F.R. § 4750.3-2(a)(3)(iii).

To ensure compliance with the regulations, and a private maintenance and care agreement, BLM may inspect the adopted animals and the facilities and conditions in

¹ Title to horses placed in private care remains with the Government until BLM issues a Certificate of Title. 16 U.S.C. § 1333(c) (2012); 43 C.F.R. §§ 4750.4-1(a), 4750.5(c). Thus, because the adoption of a wild horse is not final until a Certificate is issued, any foal born to an adopted horse prior to issuance of the Certificate for that horse is not the property of the adopter and, where the horse has been subjected to inadequate facilities or care, possession of the foal is properly taken by BLM. *See, e.g., Thana Conk*, 114 IBLA 263, 278 (1990). In this case, BLM has not issued any Certificates for the horses in this appeal and therefore title to the horses remains with the Government.

which the animals are being maintained. 43 C.F.R. § 4760.1(a). BLM may rely on the report of an inspector in making its decision to cancel a private maintenance and care agreement based on inadequate facilities or care. *See* 43 C.F.R. § 4760.1(c); *Larry Vanden Heuvel*, 145 IBLA 309, 312-13 (1998).

If an adopter violates the terms of a private maintenance and care agreement, then BLM may cancel it, repossess the adopted horse, and prohibit the adopter from adopting additional animals in the future. 43 C.F.R. §§ 4770.1(g), 4770.2(b); *see, e.g., Jerry Dixon*, 165 IBLA at 127. The burden of proof is on appellant to show by a preponderance of the evidence BLM abused its discretion in finding the adopter violated a private maintenance and care agreement or the governing regulations. Appellant's burden is to show the agency's decision is inconsistent with the Act or its implementing regulations or has no rational basis. *Nikki Lippert*, 160 IBLA 149, 155-56 (2003); *Ted L. Barber, Sr.*, 156 IBLA 59, 63 (2001), and cases cited; *John Linjatje*, 137 IBLA 390, 393 (1997).

Factual Background

On December 2, 2014, appellant signed an Agreement to adopt one horse. *See* Administrative Record (AR) 47. On January 20, 2015, appellant signed an Agreement to adopt two other horses. *See* AR 16. Among the provisions in the Agreements is a requirement to be “financially responsible for providing proper care.” AR 17. To meet her responsibilities under the Agreements, appellant boarded the three horses at a facility in Bartow, Florida. However, on April 15, 2015, the owner of that facility contacted BLM because appellant was not paying her adopted horses' boarding fees and was “not caring for the animals properly.” AR 1. Appellant then moved the adopted horses to a ranch (Ranch) in Dover, Florida. *Id.* On May 16, 2015, BLM learned the Ranch owner had been charged with animal cruelty and instructed appellant to immediately find a new boarding facility for the adopted horses. *See* AR 1, 15, 46. Appellant did not relocate the horses to another facility. AR 2. At some point in time, a foal was born to one of the adopted horses. AR 10.

On June 3, 2015, BLM inspected the adopted horses at the Ranch. The inspector documented that one of the horses, Freeze Mark No. 03745353, was too thin. The inspector rated the horse a 4 on the Henneke Body Condition Scoring Chart (Henneke Scale). AR 9. The Henneke Scale is a scientific method for judging a horse's body condition. Condition 1 is poor, Condition 2 is very thin to emaciated, Condition 3 is thin, Condition 4 is moderately thin, Condition 5 is moderate, and so on. *See Wild Horse Organized Assistance*, 172 IBLA 128, 131, n.3 (2007). The inspector told appellant to increase the “availability of hay and grain to [the thin horse] and to contact a veterinarian to inspect the [horse] for any illness.” AR 2. The inspector again instructed appellant to immediately change facilities “because there was not

adequate shelter or forage at [the] location.” *Id.* The inspector gave appellant “a verbal warning that a future inspection would take place,” and if the horse did not gain weight, BLM “would be forced to remove all of her animals from her care.” *Id.*

On August 3, 2015, the Ranch owner contacted BLM to report the adopted horses were still there, that appellant would not pay the boarding fees for the animals, and that BLM should remove the animals from the property. AR 2.

Because appellant would not pay for costs associated with boarding and sheltering the adopted animals, BLM issued the decision cancelling the Agreements on August 3, 2015. BLM’s rationale for its decision was that appellant “no longer [had] a facility to provide adequate care” for the adopted horses. *See* AR 4.² On August 9, 2015, BLM repossessed the horses and the foal. AR 2, 3.³ This appeal followed.

Analysis

The issue in this case is: Has appellant shown by a preponderance of the evidence that BLM abused its discretion by cancelling her Agreements and repossessing the adopted horses because she failed to pay for proper shelter for three horses. After thoroughly reviewing the record and appellant’s arguments presented in support of her appeal, we find BLM had a rational basis for cancelling the Agreements and removing the horses from appellant’s possession. Appellant has not shown that BLM abused its discretion by issuing the decision.

[1] By entering into the Agreements, appellant agreed, as required by 43 C.F.R. § 4750.4-1(e), to be financially responsible for the proper care given to her

² On August 9, 2015, BLM conducted a follow-up inspection at the Ranch. The BLM inspector found the thin horse, Freeze Mark No. 03745353, had become even thinner, rating only a 2-3 on the Henneke Scale. AR 2, 7. The inspector noted in his report that the horse “was starving.” AR 8. Under the terms of the Agreements and the regulations, appellant was obligated to provide proper care, including adequate feed, to her adopted horses. *See* 43 C.F.R. § 4750.3-2(a)(3)(iv). BLM may cancel an Agreement upon learning the animal subject to the Agreement is in a deteriorated condition. *See Mary Magera*, 101 IBLA 116, 119 (1988).

³ Although the facts are not clearly set forth in the record, it appears BLM inexplicably returned the foal to appellant, even though the foal remained the property of the United States since it was born to an adopted horse titled to the United States. *See* Petition to Stay; Statement of Reasons (SOR) at unpaginated (unp.) 4; Reply at unp. 11-12.

adopted horses. The terms of the Agreements reiterate the regulatory requirement that adopters “are financially responsible for providing proper care.” AR 17.

The record shows BLM received several complaints from different boarding facility operators indicating appellant refused to pay boarding costs for her adopted horses. *See* AR 1. Appellant has proffered no evidence that these disputes are not accurate. Appellant concedes she had not paid the last facility (the Ranch) for boarding. *See* SOR at 1. Moreover, nothing in the record demonstrates appellant arranged to relocate the horses to another facility after BLM instructed her twice to do so. Once BLM received notice from the Ranch owner that the horses should be removed from her property because appellant would not pay the facility fees, BLM acted to protect the animals’ welfare by cancelling the Agreement and repossessing the horses. We therefore conclude appellant’s failure to provide adequate facilities violated her Agreements and 43 C.F.R. § 4750.4-1(e). *See Mark L. Williams*, 130 IBLA 45, 48 (1994).

[2] In her SOR, and again in her reply, appellant contends any financial disputes she may have had with boarding facilities are insufficient to support cancelling her Agreements. *See* SOR at unpag. 1-4; Reply at unpag. 4. Appellant explains: “Any contract that was made with these [facility] owners has no bearing on the love or care I personally provided to my horses. But is a private contract between me and them.” SOR at 4. Appellant also contends the owner of the Ranch was responsible for the poor conditions and that is why she was not paying her. *See* SOR at unpag.1-2. Regardless of her reasons, the fact as demonstrated in the record is appellant did not pay for boarding the adopted horses. Based on the applicable regulations and terms of her Agreement, appellant was required to financially support and in fact provide proper care of her adopted horses. She did not.

Under the circumstances, we find that BLM did not abuse its discretion. BLM properly relied upon the inspector’s observations and documentation of the lack of financial support for the animals. Appellant has not shown that BLM’s decision was inconsistent with her Agreements and applicable law. BLM therefore properly canceled appellant’s Agreements.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and the petition to stay is denied as moot.

_____/s/_____
Eileen Jones
Chief Administrative Judge

I concur:

_____/s/_____
Amy B. Sosin
Administrative Judge