

INTERIOR BOARD OF LAND APPEALS

Michael Blake, et al.

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MICHAEL BLAKE ET AL.

IBLA 93-677

Decided February 23, 1996

Appeal from a decision issued by the District Manager, Carson City District, Nevada, Bureau of Land Management, finding no significant impact and implementing the Desatoya Herd Management Area Plan and Capture Plan. N3-93-03.

Affirmed.

1. Rules of Practice: Appeals: Mootness

An appeal of an action is not moot if the action appealed is capable of repetition.

2. Wild Free-Roaming Horses and Burros Act

If the Secretary (or his designate) determines, on the basis of information available, that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, the Secretary has authority to immediately remove excess animals from the range so as to achieve appropriate management levels, restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

3. Wild Free-Roaming Horses and Burros Act

The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation. A determination that removal is warranted must be based on research and analysis, and on monitoring programs which include studies of grazing utilization, trends in range condition, actual use, and climatic factors.

4. Wild Free-Roaming Horses and Burros Act

BLM may take preventative action, and is not required to wait until the range is damaged before management dictates herd reduction before it causes damage to the range land. If the record establishes current resource damage or a significant threat of resource damage, removal is warranted.

APPEARANCES: Gary L. Francione, Esq., Newark, New Jersey, for appellants; Karl Kipping, Carson City District Office, Carson City, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Michael Blake, Timothy Wilson, and the Public Land Resource Council have appealed a finding of no significant impact and decision that the August 2, 1993, Desatoya Herd Management Area Plan and Capture Plan (Desatoya Management and Capture Plan), issued by the District Manager, Carson City District, Nevada, Bureau of Land Management (BLM), should be implemented.

The Desatoya Herd Management Area (Desatoya HMA) contains approximately 124,000 acres of public and private land. Approximately 23,000 acres of this land is within the Carson City District, and two grazing allotments—the Clan Alpine and the Edwards Creek allotments—lie partially within the Desatoya HMA.

The Lahontan Resource Management Plan (Lahontan RMP), issued November 8, 1984, set out the general guidance for the management of the Desatoya HMA. The Lahontan RMP initially set the wild horse population levels at 53 for the Clan Alpine allotment and 72 for the Edwards Creek allotment. BLM also noted that management and capture plans would be promulgated to set out further guidance for wild horse management in herd management areas. Adjustments were to be made to both livestock and wild horse population levels after analysis of monitoring data and consultation with interested parties. The Lahontan RMP also stated BLM's intent to improve the condition and productivity of public rangelands in order to enhance livestock grazing. To achieve this goal, key grass utilization levels were to be limited to 55 percent or less.

In 1992, Multiple Use decisions were issued for Clan Alpine and Edwards Creek allotments. The Multiple Use decisions divided available forage between wildlife, wild horses, and livestock. Each allotment was found to have unique characteristics and the wild horse populations were not evenly distributed throughout the Desatoya HMA. BLM determined that, by establishing Appropriate Management Levels for each allotment, it would be possible to take action in one allotment to correct for overutilization.

while allowing horse population to grow on another. Therefore, specific management levels (Appropriate Management Levels) and horse number ranges were established for each allotment (Desatoya Management and Capture Plan at 4). ^{1/}

The stated purpose of the Desatoya Management and Capture Plan, which is now under review, "is to maintain both a healthy wild horse population and the range in a healthy condition (thriving ecological balance) and multiple use relationship preventing deterioration of the vegetation community in the Desatoya" HMA (Desatoya Management and Capture Plan at 15).

Environmental Assessment (EA) No. NV-030-93-009, which was prepared during the formulation of the Desatoya Herd Management and Capture Plan, was tiered to the Environmental Impact Statement (EIS) for the Lahontan RMP. The preferred proposed management action set out in the EA was to maintain wild horses within a population range of 73-98. A no-action alternative was considered, but BLM concluded that the wild horse herd size would not stay at a level compatible with the environment. The Appropriate Management Level for Clan Alpine was decreased to 43 horses, and the range was set at from 32 to 43 horses. The Edwards Creek allotment Appropriate Management Level was decreased to 55 horses, and a range of from 41 to 55 horses was set. These levels and ranges were based on vegetation monitoring, wild horse census, and actual use by livestock, with the goal of achieving a thriving ecological balance between wildlife, wild horses, livestock, and vegetation. See Desatoya Management and Capture Plan at 4.

Wild horse movement is generally unrestricted in the Desatoya HMA, and the home range of some of the wild horses includes areas outside the Desatoya HMA. BLM stated its opinion that the primary reason for this movement was the presence of a herd larger than the Desatoya HMA could support (Desatoya Management and Capture Plan at 6). The September 1992 census count indicated a population of 109 wild horses in the Desatoya HMA and 155 wild horses outside that area (82 horses in the Clan Alpine allotment and 73 horses in the Edwards Creek allotment). BLM removed 124 of the horses outside the Desatoya HMA in November 1992, leaving those 10 years old and older (Desatoya Management and Capture Plan at 6). None were removed from within the Desatoya HMA.

The August 2, 1993, capture plan for removal of horses in excess of the Appropriate Management Levels was placed in full force and effect

			<u>Appropriate Management Level</u>	<u>Range</u>
^{1/}	Clan Alpine Allotment	43	32 - 43	
	Edwards Creek Allotment	55	41 - 55	

and removal was completed on August 6, 1993. Under 43 CFR 4770.3(c) "the authorized officer may provide that decisions to remove wild horses or burros from public or private lands in situations where removal is required by applicable law or is necessary to preserve or maintain a thriving ecological balance and multiple use relationship shall be effective upon issuance * * *." The District Manager issued a full force and effect decision after concluding that immediate removal of the excess wild horse population was needed to restore the range to a thriving natural ecological balance and avert imminent overgrazing.

[1] An appeal of an action is not moot if it is capable of repetition. Int'l Org. of Masters, Mates & Pilots v. Brown, 498 U.S. 466 (1991); Weinstein v. Bradford, 423 U.S. 147 (1975). Based on the average rate of increase of wild horses, removal will again necessary in 3 or 4 years. Other remedies are also available if BLM's decision is found to be in error. BLM could be directed to repopulate the range with animals taken from its holding areas. Considering these factors, we do not find the appeal to be moot and will consider whether BLM's decision to gather excess animals was properly predicated on an appropriate determination that removal was necessary to restore the range to a thriving natural ecological balance and prevent range deterioration. Animal Protection Institute of America, 109 IBLA 112 (1989).

Appellants assert that BLM lacks statutory authority to conduct a roundup of horses until it determines that there are "excess" horses in a herd management area. They further assert that all BLM management activities under the Wild Free-Roaming Horses and Burros Act (Wild Horse Act) "shall be at the minimal feasible level" and must be "designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a) (1994).

Appellants argue that BLM's plan should be rejected because it was based on extremely inaccurate estimates of the size of the herds. They state that they conducted their own aerial survey and count of wild horses in Nevada, following BLM's herd management areas, and that in most instances their count was much lower than BLM's, although their Desatoya herd count was 217 (nearly double the BLM count). They contend this discrepancy between their count and BLM's indicates a "drastic failure of BLM herd census techniques, rendering the BLM incapable of accurately determining population numbers or reproductive rates" (Statement of Reasons at 5).

Appellants also contend that BLM failed to establish overutilization of the forage resources in the Desatoya HMA justifying removal of horses from that area. They insist that BLM's plan does not establish overuse of key species of vegetation, or, if there is overuse, that overuse is attributable to wild horses, or that horse removal would improve the range conditions. They cite a statement in the Herd Management and Capture Plan for the Clan Alpine allotment that "areas in heavy use comprise only a small

percentage of the Desatoya HMA and would therefore, be difficult to correct with a reduction in horse numbers because the remaining horses would most likely most into the areas vacated by removed horses" (Desatoya Management and Capture Plan at 8). They also assert BLM failed to offer data supporting the finding that it was necessary to remove animals in the Edwards Creek allotment.

In its reply BLM contends that it compiled a sufficient record to support its decision to remove the horses when making allotment evaluations, the Multiple Use decisions, and preparing the draft and final Desatoya Management and Capture Plan. It notes that the Desatoya Management and Capture Plan implements the Multiple Use decision it issued in June 1992, and the Multiple Use decision set allotment specific Appropriate Management Levels for horses, livestock, and wildlife. BLM maintains that the record indicates overuse within the Desatoya HMA, caused by livestock and wild horses, and that modification of livestock use and reduction in horse numbers would alleviate overutilization. It asserts that, by managing the wild horses within the ranges set out in the Multiple Use decisions and modifying livestock use, it is possible to obtain and maintain a thriving ecological balance within the Desatoya HMA.

BLM counters appellants' contention that there was a drastic failure of BLM herd census techniques by alleging that appellants' census numbers are flawed. Noting that appellants conducted their census using a fixed-wing aircraft, BLM maintains that observers using fixed-wing aircraft are not able to effectively detect wild horses in broken or wooded terrain. BLM notes that its censuses are taken from helicopters, using experienced pilots and observers, and the employee who conducted the Desatoya census was a wild horse specialist, who had been conducting wild horse counts within the resource area for over 4 years (Reply at 2). BLM also suggests that the greater number of horses found by appellants in their census was due to a failure to properly identify the Battle Mountain-Carson City District boundary and counting individual horses twice.

Finally, in response to appellants' demand that an EIS be prepared before a roundup, BLM claims a further EIS is not necessary, because one was prepared for the Lahontan RMP, and EA NV-030-93-009 was tiered to the Lahontan RMP EIS. In support of this contention, BLM notes that the EIS for the Lahontan RMP addressed management of soil and vegetation resources and utilization by wildlife, wild horses, and livestock and analyzed the environmental impacts of that management. It states that EA NV-030-93-009 focused on the management of wild horses in the Desatoya HMA as a project specific refinement of the EIS for the Lahontan RMP.

[2] Section 3(b)(2) of the Wild Horse Act, 16 U.S.C. § 1333(b)(2) (1994), provides the statutory authority for the removal of excess wild horses from the public range. Specifically, if the Secretary (or his designate) determines, on the basis of available information,

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) (1994). "[E]xcess animals" are defined in the Act as wild horses "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1994).

The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation. 16 U.S.C. § 1333(a) (1994); Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984); Animal Protection Institute of America, 118 IBLA 20, 23 (1991). A determination that removal is warranted must be based on research and analysis, and on monitoring programs which include studies of grazing utilization, trends in range condition, actual use, and climatic factors. Animal Protection Institute of America, 117 IBLA 4, 5 (1990); Animal Protection Institute of America, 109 IBLA at 120; see Craig C. Downer, 111 IBLA 339 (1989).

On the other hand, an appellant must demonstrate by a preponderance of the evidence that the BLM expert erred when collecting the data. See Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Appellants have failed to carry this burden. They assert that BLM's wild horse count is extremely inaccurate, but fail to show, by a preponderance of the evidence, that BLM erred when making its count or that their count is significantly more accurate. There is no evidence that a count made from fixed-wing aircraft is more accurate, or even as accurate, as a helicopter count, and appellants have not shown whether their counters are familiar with the Desatoya HMA.

Appellants also maintain that BLM has failed to establish overutilization of the forage resources in the Desatoya HMA, or that any overutilization is attributable to wild horses, or that removal of the wild horses would improve ecological conditions.

The Lahontan RMP specified 55 percent utilization levels to improve the condition and productivity of the BLM managed rangelands. BLM subsequently concluded that, with 55 percent utilization, the vegetation in the Desatoya HMA could support 73 to 98 wild horses and be compatible with the other contemplated uses (wildlife and livestock grazing) (Desatoya Management and Capture Plan at 16). Utilization studies and use pattern were mapped in both allotments, documenting utilization levels exceeding 55 percent in some areas. In the Clan Alpine allotment the area of heavy

use was a small percentage of the allotment. However, the utilization levels exceed 55 percent in a substantial portion of the Edwards Creek allotment (Desatoya Management and Capture Plan at 8).

[3] Utilization levels need not exceed 55 percent on the entire Desatoya HMA before BLM may act. BLM may take preventative action, and is not required to wait until the range is damaged. Proper range management dictates herd reduction before it causes damage to the rangeland. Thus, the optimum number of horses is somewhat less than the number that would cause damage. Animal Protection Institute of America, 118 IBLA at 75. The statute requires a finding that the horses to be removed are excess, *i.e.*, that the overpopulation threatens range deterioration and impairment of multiple use relationships. If the record establishes current resource damage or a significant threat of resource damage, removal is warranted. Portland Audubon Society, 128 IBLA 370, 374-75 (1994); Animal Protection Institute of America, 109 IBLA at 114.

The Desatoya Management and Capture Plan also identifies degradation of some springs and surrounding areas, and notes that the springs are no longer in a thriving ecological balance. Some springs have had all of their associated riparian vegetation removed and the Desatoya Management and Capture Plan describes hoof action soil compacting, which could shut off water flow (Desatoya Management and Capture Plan at 9). In the EA, BLM concluded that reducing and limiting the wild horse population to the Appropriate Management Levels would allow natural riparian areas to recover.

The record is clear that overutilization in the Desatoya HMA is due to use by both livestock and horses. The allotment evaluations also recommended deferring livestock grazing to July in the Clan Alpine allotment and to June in the Edwards Creek allotment to give key species the opportunity to reproduce. Vegetation condition would be threatened if horse numbers were not controlled, resulting in damage to key species during their early development. The EA concluded that managing the wild horse population at the Appropriate Management Levels would make forage available for grazing by livestock, which would help meet Lahontan RMP objectives and allow a thriving ecological balance to be obtained and maintained between vegetative community, wildlife, wild horses, and livestock. After reduction of the horse population, key species utilization would decrease to 55 percent.

In this case, the record establishes that the integrity of the range and its forage capability are threatened by an overpopulation of horses. There is no evidence that BLM has established Appropriate Management Levels merely for administrative convenience or in the absence of adequate information. Animal Protection Institute of America, 109 IBLA at 118. The Desatoya Management and Capture Plan contains a summary of horse counts data gathered between 1971 and 1992. These censuses show an increase from 42 wild horses in 1971 to 102 in 1975, a decrease to 68 in 1982 (after a 1981 roundup), and a population increase to 109 in September 1992.

Grazing capacity, actual use by livestock, and precipitation levels have been measured, monitored, and recorded, and a 10-year summary of that data is included in the record. The data shows that utilization levels dropped after each roundup. Therefore, it can logically be concluded that removal of the horses would improve ecological conditions.

Appellants also seek an EIS prior to the conduct of further roundups. They contend that a comprehensive EIS is required under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4322(2)(C) (1988), but tender no evidence that removal actions similar to those contemplated by the decision on appeal would have a significant effect on the quality of the human environment.

The EA BLM prepared when doing the groundwork for the decision on appeal was tiered to the EIS for the Lahontan RMP. That EIS analyzed the general ecological impacts of managing rangelands in the Lahontan area under a program including the monitoring and adjustment of wild horses and livestock. In turn, the EA, a "project specific refinement of the Lahontan RMP/EIS, focused on the management of wild horses in the Desatoya HMA" (Desatoya Management and Capture Plan at 15). BLM satisfied its obligation under NEPA, and was not required to prepare an EIS prior to removing wild horses from the Desatoya HMA.

Appellants also contend that monitoring information either has not been analyzed in the preparation of a herd management area plan or is so fundamentally flawed that the herd management plans, capture plans, and associated environmental analyses are invalid. However, except for their claim regarding the inadequacy of the wild horse censuses, they offer nothing in support of their contention. They merely allege that BLM has failed to justify the removal of wild horses. An appellant must demonstrate by a preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion. Animal Protection Institute of America, 118 IBLA at 76. Appellants have failed to make this showing.

The record reflects substantial monitoring of wild horse and livestock usage and the condition of the range in terms of forage utilization and ecological conditions. Data on precipitation, livestock and wild horse use, and vegetation utilization levels have been collected and evaluated for a decade. BLM has determined the carrying capacity of the area, and did not arrive at its target numbers for horses until after analysis. The case record supports a conclusion that the target numbers were not drawn randomly or for administrative convenience. Rather, BLM demonstrated a continuing rational basis for its determination that the number of horses in excess of the Appropriate Management Levels would interfere with the statutory goal of a "thriving ecological balance" on the range. BLM's decision is affirmed.

Accordingly, 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 affirmed.

R. W. Mullen
Administrative Judge

I concur.

Franklin D. Amess
Administrative Judge