

INTERIOR BOARD OF LAND APPEALS

Joey R. Deeg

141 IBLA 67 (October 27, 1997)

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Appeal from a decision of the Billings Resource Area Manager, Bureau of Land Management, Montana, to remove wild horses from the Pryor Mountain Wild Horse Range. MT 4700.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A BLM decision implementing a wild horse area management plan and capture plan based on an appropriate management level which will avert deterioration of the range and preserve a thriving natural ecological balance in accordance with section 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1994), will be upheld where the record demonstrates that the decision is based upon a reasonable analysis of data collected on an ongoing basis.

APPEARANCES: Joey R. Deeg, Bridger, Montana, pro se; Karan L. Dunnigan, Esq., Office of the Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Joey R. Deeg has appealed from an August 9, 1994, Decision of the Billings Resource Area Manager, Bureau of Land Management (BLM), Montana, to remove wild horses from the Pryor Mountain Wild Horse Range (PMWHR). 1/

1/ The PMWHR is located in the southeastern portion of Carbon County, Montana. The PMWHR was created by order of the Secretary of the Interior, on Sept. 9, 1968, and was the first such designation in the United States. The area is administered primarily for the protection and management of wild horses, wildlife, recreation, watershed, archeological, and scenic values. The herd management area designation directs that management of the wild horses be within a balanced program which considers all public values without impairment to the productivity of the land. See American Horse Protection Inc., 134 IBLA 24, 25 (1995).

The Area Manager's Decision states that the 1984 Herd Management Area Plan (HMAP) established an appropriate management level (AML) of 121 head of wild horses plus or minus 5 percent. Removals of wild horses were conducted almost every year until 1993. Because of funding constraints there was no removal in 1993, resulting in a critical need to remove horses in 1994. After taking a census, BLM determined that between 50 and 60 head would be removed, leaving a population of 115 head. The Area Manager determined that the roundup would take place in September 1994 and that healthy horses would be offered for adoption. Citing the adverse impact of excess animals on their habitat, the Area Manager placed his Decision into full force and effect as of August 8, 1994, pursuant to 43 C.F.R. § 4770.3(c).

Deeg filed a "Motion to Stay" pursuant to 43 C.F.R. § 4.21(a). In response, BLM filed an instrument moving to dismiss the Motion to Stay on the ground that Deeg had not filed a notice of appeal within the time frame prescribed by 43 C.F.R. § 4.411(a).

In an Order dated October 3, 1994, the Board denied Deeg's request for a stay and BLM's Motion to Dismiss. Citing Michael Blake, 127 IBLA 109, 110 (1993), and Robert E. Oriskovich, 128 IBLA 69 (1993), we stated that 43 C.F.R. § 4.21(a) was not applicable to decisions to remove wild horses and burros from public lands but that nothing in the regulations at 43 C.F.R. Part 4 precluded the filing of a request for a stay at any time during a proceeding before the Board. While we entertained Deeg's Motion to Stay, we denied it because it failed to demonstrate that a stay should be granted. We denied the Motion to Dismiss on the ground that, even though Deeg's filing was not styled as a notice of appeal, it challenged the findings and conclusions of BLM's Decision and was therefore properly treated as a notice of appeal.

In his appeal, Deeg asserts that utilization studies are to be used in determining the number of horses that are required to be removed to restore a thriving natural ecological balance and denies that BLM provided any utilization studies. Deeg argues that the HMAP "was never subjected to a current Environmental Impact Statement and is not implemented by a current record of decision." (Motion to Stay at 1.) Deeg contends that the

removal plan authorizes all (100%) horses to come off for selective removal in keeping with the strategic plan which violates the minimum feasible management activity of the Wild Horse and Burro Law, intensive, intrusive and invasive management that destroys social structure and takes from wild horses their built-in population defense mechanism and adaptive behavior that allows them to survive!

Id. at 1-2.

The BLM contends that horse removal is necessary to avoid significant horse deaths during the winter, to increase the vigor and viability of the herd, and to prevent further range deterioration due to overgrazing.

[1] Section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act (Act), as amended, 16 U.S.C. § 1333(b)(2) (1994), 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 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). The term "excess animals" is defined in the Act as wild free-roaming horses or burros "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 and burro management is to maintain a thriving natural 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. 16 U.S.C. § 1333(a) (1994); Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984); Michael Blake, 138 IBLA 170, 177 (1997); American Horse Protection, Inc., 134 IBLA at 26; Animal Protection Institute of America, 131 IBLA 175, 178 (1994). 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. Animal Protection Institute of America, *supra*; Animal Protection Institute of America, 117 IBLA 4, 5 (1990). Where the record establishes that an area is either currently experiencing resource damage or there is 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 112, 114 (1989). The BLM may remove horses to prevent their numbers from becoming excessive. American Horse Protection, Inc., *supra*; Animal Protection Institute of America, 118 IBLA 63, 75 (1991). The BLM need not wait until actual damage to the rangeland occurs, but may take preventative action to avoid it. Michael Blake, 135 IBLA 5, 15 (1996); American Horse Protection, Inc., *supra*; Animal Protection Institute of America, 118 IBLA at 75.

The Board will affirm a decision establishing the AML suitable for a herd management area where the decision is predicated on an analysis

of monitoring data such as grazing utilization, trend in range condition, actual use, and other factors that demonstrate that maintenance of the herd at the prescribed levels of horse population will restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with section 3(b) of the Act, 16 U.S.C. § 1333(b) (1994). American Horse Protection, Inc., 134 IBLA at 26-27. We have held that a person challenging a BLM decision to remove wild horses for an area of the public lands bears the burden of demonstrating by a preponderance of the evidence that BLM committed an error in ascertaining, collecting, or interpreting the data upon which it relies in its decision. Michael Blake, 135 IBLA at 14.

Herein, the case record reveals that the Decision implementing horse removal is predicated on a number of factors. The Decision mentions that a portion of the area included in the calculation of the AML, the "Sorensen extension area," which has a carrying capacity of six head, is no longer available for use by wild horses. (Decision at 1.) It also states that in February 1994 there were 143 horses on the PMWHR. Further, it notes that monitoring data show that the range condition trend is downward.

In addition, on appeal, BLM provided a copy of a July 27, 1990, memorandum from the Wild Horse Wrangler to the Billings Resource Area Manager reviewing fluctuations in the PMWHR wild horse population over the period 1971-1990. (Response to Motion to Stay, Attachment 1.) This memorandum, which lists census and mortality statistics for those years, concludes that in years when the number of wild horses exceeded 121 head, there was a much higher mortality rate "in the following year or so until the numbers come back down." Id. at 3. The memorandum also concluded that improvement of the range conditions in the Pryor Mountains depended on keeping "the number of horses within the capacity of the range." Id.

Further, following the filing of the appeal, BLM provided the Board with a copy of a September 22, 1994, letter in which the Forest Service Beartooth District Ranger advised BLM that PMWHR horses, "spilling over onto Forest Plan Management Areas NOT designated for horse management, are jeopardizing joint utilization studies" and would result in the Forest Service "pursuing changes to the allowable land use of the Forest Service portion of the wild horse range [so that] rangeland and watershed conditions are not compromised from overgrazing by wild horses."

As noted in our Order, Deeg does not deny that utilization studies were used to determine the AML set in the HMAP, nor does he deny that the HMAP provides for the selection of animals having certain characteristics to remain on the PMWHR. Moreover, there is no indication that the 1984 HMAP was timely challenged. Finally, Deeg has not explained why an environmental impact statement is necessary to support a capture plan.

We conclude that the record in this case clearly supports BLM's Decision. Deeg has not met his burden of demonstrating that the data upon which BLM based its horse removal action is in error.

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.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James P. Terry
Administrative Judge