

INTERIOR BOARD OF LAND APPEALS

American Mustang and Burro Association, Inc., and Dave Hillberry

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AMERICAN MUSTANG & BURRO ASSOCIATION, INC.
DAVE HILLBERRY

IBLA 96-8 Decided May 28, 1998

Appeals from a Decision Record of the Area Manager, Little Snake Resource Area, Colorado, Bureau of Land Management, adopting a Wild Horse Removal Plan for the Sand Wash Herd Management Area. EA No. CO-016-95-060.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A BLM plan for removing wild horses from a herd management area will be affirmed where BLM has concluded that removal is necessary to restore the range to a thriving ecological balance, and the appellants have failed to demonstrate that BLM committed any error in reaching such conclusion.

APPEARANCES: Barbara M. Flores, Director, American Mustang and Burro Association, Inc., Greeley, Colorado, for the American Mustang and Burro Association, Inc.; Dave Hillberry, Craig, Colorado, pro se; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The American Mustang and Burro Association, Inc. (AMBA), and Dave Hillberry have separately appealed from an August 31, 1995, Decision Record (Decision) of the Area Manager, Little Snake Resource Area, Colorado, Bureau of Land Management (BLM), adopting the Sand Wash Herd Management Area Removal Plan (Removal Plan). The Herd Management Area (HMA) is located in northwestern Colorado, and encompasses portions of the Sand Wash, Sheepherder Springs, Nipple Rim, and Lang Springs grazing allotments.

On August 31, 1995, BLM finalized environmental assessment (EA) No. CO-016-95-060, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994). The EA analyzed the environmental consequences of adopting the proposed Removal Plan and alternatives thereto, including no action. Based on that EA, the Area Manager adopted the proposed Removal Plan, which would reduce the

number of wild horses within the Sand Wash HMA from 455 to an Appropriate Management Level (AML) of 217. He concluded that such action, combined with limitations on livestock (sheep) and wildlife use, was necessary to maintain and improve the health and productivity of browse (shrub) and, to a lesser extent, grass species in the HMA.

Along with his Decision, the Area Manager issued a finding of no significant impact, concluding that adoption of the Removal Plan would not result in a significant impact to the Sand Wash HMA wild horse herd, its habitat, or the overall human environment, and that preparation of an environmental impact statement under section 102(2)(C) of NEPA was not required.

His Decision also placed the Removal Plan into full force and effect pursuant to 43 C.F.R. § 4770.3(c) until the number of wild horses was reduced to the number identified in the Removal Plan. However, in accordance with Instruction Memorandum (IM) No. 95-87, interested parties were allowed a "courtesy window" between the date of the Decision and actual start of the gather in which to submit comments. The gather began October 3 and was completed October 8, 1995.

AMBA and Hillberry timely appealed from the Area Manager's August 1995 Decision, and both petitioned the Board to stay its effect. BLM filed an answer and an opposition to the petitions for stay. By Order dated November 7, 1995, we denied both petitions.

We note that shortly after it filed its appeal with the Board, AMBA, along with other parties, filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the District of Colorado on October 6, 1995, in an action styled American Mustang & Burro Association v. Babbitt, No. 95-K-2573 (D. Colo.). AMBA asked the court to declare that the Area Manager's Decision violated the Wild Free-Roaming Horses and Burros Act (WFHBA), as amended, 16 U.S.C. §§ 1331-1340 (1994), and to temporarily and permanently enjoin BLM from implementing any gathering of wild horses in the Sand Wash HMA. By Order dated October 12, 1995, the court denied the emergency relief requested, provided that further relief must be obtained after final agency action, and dismissed the case without prejudice.

In the case at hand, AMBA contends that BLM miscalculated the AML for wild horses in the Sand Wash HMA, arguing that there was no "excess" number of wild horses in the HMA at the time of the Area Manager's August 1995 Decision because the range within the HMA at that time had sufficient grazing capacity to maintain the existing number of wild horses. Thus, AMBA concludes that BLM had no authority under the WFHBA and its implementing regulations (43 C.F.R. Part 4700) to remove any wild horses from the HMA. Also, AMBA asserts that BLM did not meet any of the criteria for placing the Decision in full force and effect outlined in IM No. 92-369.

Appellant Hillberry argues that the Decision is based on erroneous information and was unduly influenced by the livestock interests.

Before we address the arguments of Appellants, an overview of the applicable law is appropriate.

[1] BLM is required by section 3(b)(2) of the WFHBA, as amended, 16 U.S.C. § 1333(b)(2) (1994), to remove "excess" wild horses from an area of the public lands when it is demonstrated, by current available information, that to do so is necessary to restore the range to a thriving natural ecological balance between wild horse and burro populations, wildlife, domestic livestock, and vegetation, and protect it from the deterioration associated with an overpopulation of wild horses. See 16 U.S.C. § 1332(f) (1994); 43 C.F.R. §§ 4700.0-6(a) and 4720.1; Animal Protection Institute of America, 117 IBLA 208, 216 (1990). Excess wild horses are those that exceed an AML, which is designed to achieve the objectives of the statute. 16 U.S.C. § 1333(b)(2) (1994); Craig C. Downer, 111 IBLA 332, 336 (1989).

BLM need not wait until the number of wild horses has reached the point that there is no longer a thriving natural ecological balance and the range has suffered deterioration; rather, BLM may take preventative action to avoid damage to the range. American Horse Protection, 134 IBLA 24, 26 (1995). Moreover, the Board will not substitute its judgment for that of BLM when, as in the instant case, BLM's decision is based upon its technical expertise. American Horse Protection, 134 IBLA at 27. Such decision will not be reversed by the Board unless it is arbitrary and capricious, and not supported on any rational basis. Klump v. BLM, 124 IBLA 200, 204 (1992).

Further, the burden is upon the person challenging such decision to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its analysis, or that the decision generally is not supported by a record that shows that BLM considered all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. American Horse Protection, 134 IBLA at 27. That burden is not carried by mere expressions of disagreement with BLM's analysis and conclusions. Animal Protection Institute of America, 117 IBLA 4, 8 (1990).

In this case, AMBA argues that BLM's assessment of the carrying capacity of the range had shown that the utilization of browse and grass species within 84 percent of the HMA had experienced a marked decrease during 1994. It notes that among grass species, which are preferred by wild horses, all utilization levels are in the light range. AMBA admits that there are no utilization figures for 1995, but argues that, if the trend of decreasing levels has continued, there is even less utilization in 1995.

BLM determined the carrying capacity of the HMA on the basis of a forage utilization study. That study relied on monitoring data concerning the condition of the forage obtained from the HMA each spring, and actual use by wild horses and livestock, during the 6-year period from 1989 to

1994. Such data revealed that, within 84 percent of the HMA, the utilization of browse and grass species had ranged from light to severe between 1989 and 1994, with much of the heavy to severe use coming in the years before 1993. This was so even though almost half of the authorized sheep use had not been taken.

BLM calculated, given actual use figures for livestock and wild horses, the extent of overall actual utilization (ranging from 29 to 79 percent of current year's growth on grass and browse species), and the level of desired utilization (50 percent), the desired grazing use within the 84-percent area each year from 1989 to 1994. (EA, Appendix 3, at 2-3.) This use started at 12,823 animal unit months (AUM's) in 1989, fluctuated greatly, and finally reached 19,410 AUM's in 1994, yielding an average of 11,040 AUM's. Id. at 3. Since wild horses had accounted for an average of 24.7 percent of the grazing use within this area during the 6-year period, BLM determined that the desired wild horse number within that area was 182. Id. This translated to 217 wild horses throughout the HMA. Id.

AMBA has not demonstrated that BLM committed any error in collecting or analyzing the above data. Nor has it made its own carrying capacity determination.

AMBA contends that BLM's calculation of the AML for wild horses is "totally inaccurate," because it was based on the erroneous conclusion that one wild horse consumes 1.25 AUM's, rather than 1 AUM. (Statement of Reasons (SOR) at 3.) An AUM is generally defined as the amount of forage needed to sustain one cow, or its equivalent, for 1 month. 43 C.F.R. § 4100.0-5. BLM based its carrying capacity calculations on the opinion that one wild horse actually consumes 1.25 AUM's, since this was taken from valid research:

After studying wild horse impacts to the range, the recommendation was made in a 1982 National Research Council report that 1 wild horse equate to 1.25 AUMs. This recommendation was based upon actual research of not only what wild horses consume, but also * * * [of] the overall impact to their habitat.

(EA at 13-14; see EA, Appendix 3, at 2 n.3.)

AMBA has provided only one contrary opinion, which is not sufficient to establish error in BLM's opinion. Thus, we uphold BLM's use of the 1.25-AUM factor in its calculations. See American Horse Protection, 134 IBLA at 31-32.

AMBA also contends that BLM improperly provided for the removal of wild horses based on the erroneous assumption that, if the holders of Federal grazing permits were to convert their authorized sheep grazing use from voluntary nonuse to active use, there would not be enough forage for

both wild horses and sheep. According to AMBA, even if such conversion occurred, there would be little or no problem because wild horses prefer grass species, while sheep prefer browse species.

In general, BLM concluded that a reduction of utilization of browse, and to a lesser extent grass, is necessary to maintain or improve the vegetation resource in the Sand Wash HMA. (EA at 1-2, 13, 16.) However, the record also establishes that there is not enough forage, especially browse species, throughout the HMA for sheep and wild horses, even without the reactivation of any voluntary nonuse. (EA at 1, 13, 15; EA, Appendix 3, at 2 n.4.) Thus, reactivation will only aggravate the existing situation of overutilization of the forage in parts of the HMA and the threat of overutilization in other parts of the HMA:

Should the permittees determine a need to re-activate their non-use, this factor, taken in conjunction with the estimated 20% annual increase in the wild horse population, would cause [a] rapid decline in range conditions, and would allow substantial, long[-]term impacts to all animals which inhabit the [Sand Wash] Basin.

(EA at 2; see EA, Appendix 3, at 4.) AMBA has provided no evidence to the contrary.

Further, there is evidence of a dietary overlap between wild horses and sheep since, while wild horses prefer grass species in the spring, summer, and fall, they turn to browse species, which are then preferred by sheep, during the winter. (EA at 2; Brief at 2-3.) In addition, grass species are consumed by both wild horses and sheep during the early spring, when sheep are also licensed for use. (EA at 2.) Thus, they are at times in direct competition for forage.

Next, AMBA contends that BLM improperly decided to reduce the number of wild horses based on the incorrect assumption that they account for the very high level of consumption of browse species during the winter months. Rather, it argues that such use is "directly and unquestionably attributable to sheep overgrazing." (SOR at 3.)

BLM did not discount sheep consumption of browse species during the winter months. It recognized that such use occurs and that sheep rely mostly on such species during the winter. (EA at 2; Appendix 3 attached to SOR.) Nor did it overly attribute the consumption of browse species during the winter months to wild horses. Rather, BLM merely noted that wild horses, which also consume browse species (although to a much lesser extent), are likewise contributing to the high level of consumption of such forage during the winter months:

[Utilization data] suggests that [wild] horses make the most use of forage [grass and browse] species during the winter and

spring months. This is the period of time which was identified as a problem. A part of the remaining problem of the overuse on browse species in the winter is therefore attributable to the increasing wild horse population.

(EA at 16; see EA at 2, 14; Appendix 3 attached to SOR; Brief at 2-3.) AMBA fails to support its assertion that the high level of browse species consumption during the winter is "directly and unquestionably attributable to sheep overgrazing." Nor does it identify any other error in BLM's analysis. Accordingly, we find no merit in AMBA's contention.

AMBA also argues that BLM failed to take wildlife use into account when determining whether the Federal range in the HMA was able to sustain the existing number of wild horses. We find no merit in this contention.

There is no data in the record regarding the number of wildlife using the Federal range in the HMA because of the difficulty in gathering such data. (EA at 7; EA, Appendix 3, at 1-2.) Instead, BLM's calculation of the carrying capacity of the HMA is based on the assumption that wildlife use, in terms of the extent and pattern of use, has remained and will remain fairly constant over time. (EA, Appendix 3, at 1.) AMBA has failed to show that BLM's reliance on such assumption is unreasonable, or that BLM must include actual wildlife numbers in its carrying capacity determination.

AMBA also challenges the accuracy of the 1995 Sand Wash HMA census, stating that "[t]he number of wild horses counted in the area is under suspicion due to a history of extreme increases in horse numbers the year a gather is desired, over the previous year[]s census figures. This was evidenced between 1987 (205) and 1988 (418) and from 1994 (223) to 1995 (455)." (Notice of Appeal at 2.) AMBA also notes that BLM may have inadvertently inflated the wild horse number by counting them at a time when their number was swelled by a seasonal migration or by including in the number domestic horses that had escaped from private lands onto the Federal range. Id.

The 1994 horse count was conducted in a fixed-wing aircraft. Because of concern regarding the accuracy of a fixed-wing count, BLM conducted a helicopter count in March 1995 recording 373 animals. In response to comments on the draft EA, BLM counted horses again in August 1995. Participating in that helicopter count was a Colorado Division of Wildlife biologist. The August 1995 count was 350 adults and 105 foals, or a total of 455 horses. AMBA presents no evidence to support its suggestion that the increase is "suspicious," or that BLM inadvertently included wild horses briefly on the Federal range or domestic horses in its wild horse counts. Accordingly, AMBA's arguments as to the accuracy of the census are rejected.

In his Notice of Appeal, Hillberry asserts that BLM's Decision to remove wild horses was "unduly influenced by the livestock interests."

Hillberry provides no evidence in support of his assertion, and we find none. Moreover, AMBA, joined by Hillberry, alleges that BLM's EA and resulting August 1995 Decision is "fraught with inaccuracies, misinterpretation of data, [and] manipulation of that data" so that wild horses could be illegally removed from the range. (AMBA SOR at 4; see Hillberry Notice of Appeal.) Since neither Appellant has offered any credible evidence in support of any of these allegations, we find them to be without merit. Also, AMBA has not shown that BLM failed to consider or inadequately considered any environmental impact expected to result from removing wild horses from the HMA, either to the horses themselves or to any other resource, or that it otherwise did not abide by the dictates of section 102(2)(C) of NEPA.

We find that the record contains a rational basis for the Area Manager's Decision to manage the Federal range in the Sand Wash HMA for an AML of 217 wild horses, based on BLM's determination of the range's carrying capacity. AMBA has failed to demonstrate, by a preponderance of the evidence, that BLM committed any error in its carrying capacity computation or otherwise improperly determined the AML for wild horses. It has also failed to show that BLM "arbitrarily established" the AML. (Notice of Appeal at 2.) Accordingly, we conclude that the Area Manager's August 1995 Decision to adopt the Removal Plan must be affirmed. See American Horse Protection, 134 IBLA at 26-27, 29-31.

Finally, AMBA objects to BLM's Decision to place the August 1995 Decision into full force and effect, arguing that it did not meet "any of the criteria" for doing so outlined by the Director, BLM, in IM No. 92-369, dated September 29, 1992. (SOR at 4; see AMBA Petition for Stay; Hillberry Petition for Stay.)

At the time the Area Manager decided to place his August 1995 Decision into full force and effect, the applicable criteria were set forth in IM No. 94-09, Change 1, dated March 14, 1994. The criteria were largely unchanged from those set forth in IM No. 92-369, and included the "potential for loss or damage to the health of the ecosystem or the animals or unborn foals due to starvation, disease, dehydration, etc." (IM No. 94-09, Change 1, at 1; see IM No. 92-369, at 1.) However, AMBA has made no effort to identify the "criteria" set forth in IM No. 92-369 or IM No. 94-09, Change 1, which BLM failed to consider in deciding whether to place its August 1995 Decision into full force and effect. Thus, AMBA's objection is without merit.

We conclude, therefore, that the Area Manager's Decision placing the Removal Plan into full force and effect was appropriate.

To the extent AMBA and Hillberry have raised arguments not addressed herein, they have been considered and rejected.

Accordingly, 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.

John H. Kelly
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge