

INTERIOR BOARD OF LAND APPEALS

Commission for the Preservation of Wild Horses

145 IBLA 343 (September 23, 1998)

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COMMISSION FOR THE PRESERVATION OF WILD HORSES

IBLA 96-102, 96-103

Decided September 23, 1998

Consolidated appeals from the Decision Record/Finding of No Significant Impact for the Diamond Hills South Herd Management Area removal plan and from the wild horse portion of the Final Multiple Use Decision for the Railroad Pass Allotment issued by the Ely (Nevada) District Manager, Bureau of Land Management. NV-04-95-09; NV-04-95-10.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A decision determining the appropriate management level for wild horses based on monitoring of forage condition, range usage, an inventory of wild horse numbers, and application of a desired stocking formula to determine grazing capacity may be affirmed where the record supports a finding that removal of horses in excess of the appropriate management level is necessary to restore the range to a thriving ecological balance.

APPEARANCES: Catherine Barcomb, Reno, Nevada, for Appellant; Chris Mayer, Acting District Manager, Ely, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Commission for the Preservation of Wild Horses (Commission) has appealed from two decisions issued by the Ely District Manager, Bureau of Land Management (BLM), Ely, Nevada. On November 9, 1995, the Ely District Manager issued a Final Multiple Use Decision (FMUD) for the Railroad Pass Allotment. That decision altered the number of animal unit months (AUM's) and grazing seasons for cattle and sheep in the allotment, determined the number of wild horses constituting an appropriate management level (AML) in the Diamond Hills South Herd Management Area (HMA) to be 22 (on a yearlong basis), and provided for removal of horses in excess of this number to achieve this AML. The appeal of the FMUD has been docketed as IBLA 96-103. A BLM Decision Record/Finding of No Significant Impact issued simultaneously authorized the capture and removal of wild horses in excess of the

AML from the HMA and the allotment. The appeal from this decision has been docketed as IBLA 96-102. ^{1/}

The decisions under appeal determined, based on analysis of monitoring data, that multiple use objectives for the allotment are not being met due to overgrazing by cattle and wild horses. Specifically, with respect to livestock grazing, BLM found that the carrying capacity of the native rangeland within the allotment is 2,055 AUM's (1,364 cattle and 691 sheep) and that an additional 540 AUM's will be allowed within the Corta Seeding. (FMUD at 4.) Regarding wild horse use, BLM found that a "thriving natural ecological balance will be obtained by maintaining wild horse use at 260 AUMs or 22 wild horses yearlong" which was found to be the AML for wild horses. Id.

Encompassing approximately 28,840 acres of Federal land and 160 acres of private land, the Railroad Pass Allotment is "a category 'I' allotment located on the east side of the Diamond Mountains," with the mountains forming a natural boundary to the west and with fenced north, south and east boundaries. (Railroad Pass Allotment Evaluation (AE) at 2-3.) The objectives for this allotment include improving the condition of the native range. Id. at 4. The current ecological status of the allotment has been found to be mid-seral. (AE at 7, Table 4.) This category means that the varieties, proportions, and numbers of plants are between 26 and 50 percent of those found in the potential natural community for the site. See U.S. Bureau of Land Management, Rangeland Monitoring: Analysis, Interpretation, and Evaluation (Technical Reference 4400-7) (1985), at 39.

The BLM decisions were based in significant part on the AE issued in December 1993. Monitoring studies were conducted for the allotment between 1988 and 1992. The data collected during that time was analyzed in the allotment evaluation process which concluded that "allowable use levels have been exceeded on portions of the allotment grazed by wild horses and cattle." (AE at 9.) In particular, BLM calculated the actual range use in AUM's by cattle, sheep, and wild horses for the years from 1988 through 1992. Id. at 7, Table 5. ^{2/} Actual forage use in percentage of available forage disclosed by monitoring was adjusted by a yield index factor consisting of the ratio of that year's rainfall to the normal level of precipitation to arrive at an adjusted level of forage utilization. Id. at 7, Table 6. Using 50 percent as a desired level of forage utilization, the proper stocking level was then determined by applying a formula in which the ratio of the actual use (in AUM's) to the adjusted forage utilization equals the ratio of the desired use (in AUM's) to the desired level of forage utilization. Id. at 7-8. Using this formula, the average proper stocking level was found to total 2,315 AUM's for cattle, sheep, and wild horses. Id. at 8.

^{1/} The two appeals were consolidated by Order of the Board dated Feb. 28, 1996, which also denied Appellant's motion for stay of the decisions.

^{2/} Wild horse AUM's were based on annual census figures for the wild horse population in the allotment. See AE at 1.

Because BLM range use monitoring found that sheep use did not contribute to the areas of overuse, BLM subtracted sheep use in the amount of 691 AUM's from the average proper stocking level to determine a balance of 1,624 AUM's to be allocated between wild horses and cattle. Id. Finding that use by wild horses would be eliminated if the reduction in use were prorated based on the percentage of use by the offending animal (74 percent of actual use by wild horses and 26 percent of actual use by cattle), BLM opted to prorate the available use on the basis of the proportion of AUM's for livestock (84 percent) and for wild horses (16 percent) set forth in the existing land use plan. (Management Selection Report, Railroad Pass Allotment, Aug. 7, 1995, at 1.) This resulted in an allocation of 260 AUM's for wild horses (22 horses yearlong) and 1,364 AUM's for cattle use. (AE at 8.) These were the figures used to establish the allocation of AUM's for cattle grazing and for wild horses in the FMUD.

In the Statement of Reasons for Appeal (SOR) from the FMUD, Appellant asserts that the carrying capacity calculations are flawed in that the census of wild horse use includes a foal as a full AUM. Further, Appellant contends that since sheep did not contribute to overgrazing they should have been excluded from the actual use computation in order to determine the AML. Appellant argues that the result of these mistakes is to inflate the grazing capacity of the allotment and the allocation of forage for wild horses and livestock. Further, Appellant alleges that BLM Technical Manual 4400-77 does "not allow weight averaging use pattern mapping data when production and utilization are not uniform on the allotment." (SOR at 2.) Additionally, Appellant challenges use of yield index utilization data to determine forage capacity where it was found that allowable use levels were not met. Id. Further, Appellant asserts that establishment of proportional levels of use between wild horses and livestock was not the purpose of the land use plan. Id. Finally, Appellant contests the FMUD on the ground that the BLM approach compared livestock preference rather than actual use creating "paper cow" AUM's and taking AUM's away from existing wild horses. Id.

A response has been filed on behalf of BLM to the appeal of the FMUD. It is noted that the counting of a foal as one AUM has been a longstanding policy of BLM in view of the fact that a calf does not consume significant forage until the age of 6 months whereas this is not true of foals. (BLM Response at 3.) Further, BLM contends that "use by domestic sheep must be included in the carrying capacity calculations for the simple fact that by their presence they will consume forage" and failure to include them would create overuse. Id. Additionally, BLM asserts that it did not use "weight averaging" in the evaluation of use in the allotment, but rather employed "use pattern mapping information" in which the midpoint of the use class (as set out in BLM Technical Manual 4400-7) observed is utilized to determine the proper stocking level. Id. With respect to adjustment of the raw utilization data observed by factoring in the yield index, BLM explains that it is not minimizing the extent of overuse of forage, but adjusting the computation of carrying capacity to reflect the impact of weather conditions on the observed extent of usage. It is also acknowledged by

BLM that the proportion of the decrease in forage use for cattle and wild horses is not dictated by the relative numbers established in the land use plan, but noted that this was deemed the most reasonable way to avoid overuse in that livestock operators constituted 26 percent of actual use whereas wild horses accounted for 74 percent of actual use. *Id.* at 4-5. Further, BLM responds that it is required by regulation to make adjustments to livestock grazing use from permitted use. *Id.* at 5.

With respect to the wild horse removal decision, Appellant contends that the decision does not adhere to the policy of maintaining the herd at a count of 50 to insure genetic viability. (SOR at 1.) Further, Appellant asserts that the Environmental Assessment and Finding of No Significant Impact are inadequate because they fail to ensure that genetic exchange will occur between herd areas. *Id.* at 2. In response, BLM initially notes that it has no minimum standard for numbers to maintain genetic viability in an HMA. (BLM Response at 3.) Further, BLM contends that this HMA is adjacent to two other HMA's (the Diamond HMA in the Battle Mountain District and the Diamond Hills North HMA in the Elko District) and that "movement and genetic exchange occurs among these HMA's as a matter of course." *Id.* 3/

[1] The Secretary of the Interior is required by statute to manage wild free-roaming horses in a manner designed to "achieve and maintain a thriving natural ecological balance." 16 U.S.C. § 1333(a) (1994). Further, the Department is directed to maintain a current inventory of wild horses on the public lands to determine the "appropriate management level" of wild horses, make a determination of whether and where an overpopulation exists, and to determine whether action should be taken to remove "excess animals." 16 U.S.C. § 1333(b)(1) (1994). The statute further provides that when the Secretary determines, on the basis of "all information currently available to him, 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." 16 U.S.C. § 1333(b)(2) (1994). 4/

Thus, the issue generally is whether the record supports a finding that removal of excess horses is necessary to establish a thriving natural ecological balance and preserve a multiple-use relationship in the area. This Board has recognized that the use of stocking rate formulas to determine AML is consistent with monitoring of usage of the public lands by wild

3/ It is pointed out by BLM that (1) the census of animals near the boundaries of the HMA's, (2) the observation of "marker animals" with the herds being sited on adjacent HMA's, and (3) the absence of natural or man-made barriers to movements between adjacent HMA's all lead to the conclusion that the horses intermingle with adjacent herds.

4/ Excess animals include 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).

horses and livestock and of the condition of the range in terms of forage utilization in order to establish a thriving natural ecological balance. See Commission for the Preservation of Wild Horses, 133 IBLA 97 (1995), Animal Protection Institute of America, 118 IBLA 20, 26-27 (1991). Further, BLM has explained why use of the yield index to adjust utilization for climactic conditions is appropriate. 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); see Animal Protection Institute of America, 118 IBLA at 23. We find that the record in this case supports BLM's decisions, which are based on an analysis of monitoring data and trends in range condition. While Appellant has demonstrated a difference of opinion with BLM concerning horse and livestock use on this allotment, the Commission has failed to show error in the BLM decisions.

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 decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

James P. Terry
Administrative Judge