

THE PROTECTION OF WILD HORSES UNDER THE WILD & FREE ROAMING HORSES AND BURROS ACT

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THE PROTECTION OF WILD HORSES UNDER THE WILD & FREE ROAMING HORSES AND BURROS ACT

Introduction

The Political Climate

In November, 1993, a group of Western senators defeated the attempt of the Clinton Administration to increase the fees paid by ranchers to graze cattle and sheep on public lands. Bruce Babbitt, the then-new Secretary of the Interior, had made the increase in grazing fees one of his first priorities. The Western senators responded to his initiative by threatening to sabotage President Clinton's economic package if the increase was put into effect. Babbitt's second attempt was likewise greeted with a threat to kill the North American Free Trade Agreement. Determined that the President's prestige not be damaged by losing the NAFTA vote, and facing a fourth Republican filibuster in the Senate, Babbitt was prevailed upon to withdraw the fee increase proposal.

Senator Craig summed up the essence of this confrontation between the Department of the Interior and the ranchers in a statement in November, when he noted that this was not a fight over the discrete issue of grazing fees, but rather a struggle to determine who set policy for public lands in the West -- the ranchers or Bruce Babbitt.

When the Republicans swept to a majority in the 1994 Congressional elections, all chance of changing grazing policy in the West to preserve the ecosystem and the wild animals living in it, faded as pro-ranching interests prevailed.

This is just the most recent page in the long history of the struggle of ranchers to control public lands. The battles have been fought in the public arena around issues such as grazing fees and grazing seasons, but underlying each confrontation is a long battle to exploit the public lands without restriction and to essentially recharacterize a grazing privilege on public lands as a property ownership right.

This battle is exemplified by the current controversy concerning the protection of wild horses on public lands. In many ways, wild horses have come to symbolize the mythic images of the American West. There is considerable fossil evidence that horses were indigenous to the Americas. Wild horses roamed across the Western plains many thousands of years ago. They certainly died out, however, and were reintroduced to the West with the advent of the Spanish explorers and colonists. Horses that escaped from the Spanish or were captured by Native Americans became a mainstay of the Native American culture. Their numbers increased when cattlemen moved into the West and brought their horses with them.

The last remaining herds of wild horses, composed of the descendants of the Spanish horses and quarterhorses who came from the cattlemen's stock, are centered in Nevada. Smaller numbers are found in surrounding states, but Nevada is the last main range of the mustang.

Their presence on the public lands has long infuriated cattlemen, because horses compete with cattle for the scant forage of the Nevada plains. Cattlemen solved the problem in their typical manner. They killed thousands of wild horses that "encroached" on their grazing lands.

The Wild & Free-Roaming Horses & Burros Act

In 1971, when the public learned that wild horses were being rounded up and sold to slaughter, the outcry was so strong that Congress passed the Wild and Free-Roaming Horses and Burros Act. 16 U.S.C. § 1331 et seq. The Congressional findings and declaration of policy that introduce the Act state that "wild and free-roaming horses are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses are fast disappearing from the American scene." The legislation was enacted to reflect Congressional intent "that wild free-roaming horses and burros shall be protected from capture, branding, harassment or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331. The legislation was aimed at curbing the abuse of horses that had been occurring unchecked in the West.

Despite this protective legislation, however, huge numbers of wild horses have been shot, poisoned and rustled for sale to slaughterhouses. These illegal acts, nearly all of which have gone unpunished, are not the greatest threat to the remaining wild horses, however. It is the action of our own government, charged with the protection of these animals, that threatens to drive wild horses to the edge of extinction. Since 1973, the Bureau of Land Management ["BLM"], the section of the Department of the Interior that exercises jurisdiction over these magnificent animals, has rounded up 146,000 wild horses. BLM appears to be intent on "managing" the wild horse herds out of existence, in order to further the interests -- and profits -- of cattle owners and sheep owners.

The wide -- and it appeared in some circumstances, almost absolute -- protection afforded wild horses under the 1971 Act was modified by initiatives that became the 1978 Public Range Lands Improvement Act. Under this modified scheme, the Secretary of the Interior "shall manage wild free-roaming horses

and burros in a manner that is designed to achieve and maintain a thriving ecological balance." 16 U.S.C. § 1333(a).

As part of this management scheme, when the Secretary determines, after review of data concerning the number of wild horses on public lands and the environmental and ecological conditions in those areas, "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." *Id.* at § 1333(b)(1). Under these provisions, the Secretary is authorized to conduct round-ups of wild horses from their herds and offer them to the public for adoption. There is increasing evidence that these amendments to the legislation have authorized and facilitated the very abuse and slaughter that the Act was designed to prevent.

The Ecological Problem

Approximately 530,000 cattle and 225,000 sheep graze on the scant forage of the 48 million acres of public land in Nevada, which has suffered during the long drought in the area. While commercial interests maintain over three-quarters of a million grazing animals, destined to be slaughtered for food, on Nevada's public lands, the BLM has decided that wild horse herds, whose numbers they set at 25,000, are the real "problem" and so must be removed. All this is possible under the rubric of the maintenance of a "thriving, natural ecological balance."

The very concept of establishing and maintaining a thriving natural ecological balance between wild horses and cattle on public lands shows the folly of this approach. Cattle ranchers wish to extract all possible use from the areas that they lease on the public lands, and wish their cattle to get to the heaviest slaughter weight as quickly as possible. This approach and process contradict and manipulate the natural processes by which a biotic community sustains itself in any environment. The presence of commercially exploited cattle on public lands prevents, by definition, the establishment or maintenance of a thriving natural ecological balance. It is clear that when an agency chooses to "manage" land according to a grazing model, its determinations will be very different from those of an agency following a wildlife model.

Despite the common conception that the West is "cattle country", ranching in Nevada, as in other Western states, is extremely inefficient. Less than 3% of the beef produced in the United States comes from the cattle grazed on the public lands in the eleven Western States. Wisconsin has three times as many cows as Wyoming. Nebraska's cattle and sheep production is over 16 times that of Nevada.

The arid Western ranges are simply unsuitable for grazing cattle and sheep and have already sustained serious damage from overgrazing. As an average steer eats 12,000 pounds of plant range material and 2850 pounds of feedlot food before slaughter, ranching on the Western public lands puts insupportable pressure on the forage and water resources. Ranchers are therefore determined to remove competitors for the scarce resources that they wish to devote to meat production. In this case, the competitors are the wild horses. The Bureau of Land Management is complying with the wishes of the ranchers and removing herds of wild horses in massive numbers.

Wild Horse Round-Ups

The Animal Rights Law Center continues to represent a group of concerned activists in the West who have gathered data that evidence how extreme the threat to the horses has become. The Public Lands Resource Council was formed to challenge the administration of the public lands. The group undertook an aerial count of Nevada's wild horses, to show the public that the size of the wild horse herds has been seriously and intentionally misrepresented by the BLM.

The BLM conducts counts of the wild horse herds to decide how many must be removed from the range to "protect" the forage conditions in Nevada. It has become clear that the number of horses has been greatly exaggerated so that large horse removals are "justified". For example, in 1993, Senator Harry Reid of Nevada estimated that there were 75,000 horses. The Secretary of the Interior said that 60,000 remained. The BLM's own count found 33,000 horses. But an independent count of Nevada's wild horses conducted in 1993 by the Public Lands Resource Council, which included individuals who have previously conducted horse counts for the BLM and are expert in local conditions, led activists to believe that BLM censuses are greatly inflated.

BLM's horse management methods betray their lack of interest in the wellbeing and preservation of wild horses. There is an inherent conflict of interest in entrusting the census of wild horses to persons who will participate in the round-ups. The persons rounding up the horses are paid based on the number of horses that are removed from the range. The incentive to overestimate the horse population is obvious. Moreover, the BLM has awarded the contract to carry out the round-up plans to individuals who have pled guilty to various horse-related crimes. The wellbeing of the horses that are rounded up, and the accuracy of the data on which round-up decisions are made, are being entrusted to persons who have been convicted of illegally killing wild horses.

There is substantial evidence that ranchers have made side-deals with BLM personnel in order to illegally remove wild horses from the public lands for which they hold leases. These horses are not processed for adoption, but are killed as soon as they are rounded up or are shipped for slaughter. No one has been convicted of killing the wild horses whose bodies have been found in piles by the hundreds since the passage of the federal laws that are supposed to protect them. A federal investigation has found evidence that horses that were adopted after they were rounded up were then sent to slaughter, sometimes with the knowledge and assistance of BLM officials. The horses continue to be killed, and blind eyes are being turned on these abuses. There is so much money to be made out of the killing.

Challenging Round-Up Decisions

Challenging the BLM's round-up decisions and methods has proved a difficult process. The basic problem is the power of the cattlegrazers in Nevada. The number of cattle that can be grazed on public lands is determined by "Animal Unit Months" [AUMs], a unit that determines how many animals an acre of land can support. The wild horse and burro legislation requires these Animal Unit months to be allocated between wildlife and the cattle that the holder of a grazing permit wishes to graze. As wild horses are included in the assessment of how much wildlife can be sustained in an area, there is a direct connection between the number of wild horses on a leaseholder's land and the amount of cattle that the leaseholder can place on the land. The presence of wild horses costs the cattle owner money. The leaseholders and cattle owners include some of the most powerful corporations, and some of the most politically well-connected individuals. In this scenario, the wild horses can only lose.

The BLM, now aware of the public interest in and outrage concerning the wild horse round-ups, has taken extraordinary steps to ensure that the public does not have a voice in the round-up decisions. Until recently, the round-up plans were circulated to interested parties for comment. Once the public comments were reviewed, a final decision concerning the round-up was made. Persons who had objected to the round-up proposal were permitted to bring an administrative appeal of the final decision and the round-up would be halted pending the outcome of that process.

The BLM is now following a tighter procedure that has made public input into horse management decision virtually ineffective. The BLM is facilitating the slaughter of wild horses while making itself unaccountable to the public. After the initial comment period, the round-up decisions are being signed

by local district managers who have the new power to place their decisions into "full force and effect". The round-up decision is not stayed pending the determination of the merits of an appeal. Anyone challenging a round-up decision cannot stop the agency's actions even if it is later determined to be unjustified or illegal. The challenger has the hollow victory of being declared correct, but the horses will be already gone. Then, a challenger's only avenue of further protest is to file a proceeding in federal court. The BLM is well aware that most people who are interested in wild horses do not have the resources or expertise to initiate federal lawsuits. Such actions take time, considerable amounts of money, and the services of a lawyer.

Undaunted, the BLM -- which regards horses as completely fungible commodities and does not countenance the individual tragedies being inflicted on these horses -- just promises that, if it is determined that it acted in error in determining that there is an excess of horses (and therefore violated the law that protects the horses), it will just take fewer next time. No matter that large numbers of wild horses will have been driven by helicopters in round-ups, forced into trucks to take them --terrified -- to corrals where they will be processed for adoption, exposed to diseases against which they have no natural resistance, abused and humiliated by a handling process that seeks to subdue into manageability animals that have never had human contact, and sent as far as Florida for adoption.

The potential for abuse of horses and abrogation of the protections of the Wild and Free-Roaming Horses and Burros Act was immediately apparent when the full force and effect power was delegated to lower-level officials within the BLM. As the Animal Rights Law Center continued to file challenges to individual round-up proposals, we became aware of how potent a grant of power this had been, when combined with an apparent agency determination to eviscerate the protection of wild horses. In April 1994, the Center filed a federal lawsuit, seeking a declaratory judgment that the extension of the power to place a decision into full force and effect to local BLM officials violated the Wild and Free Roaming Horse and Burros Act and the Administrative Procedure Act. The District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit refused to hear oral argument on the matter and determined that the Secretary could, apparently without any restriction, delegate the power to make a final agency decision, to any and all local officials of the BLM. We found this decision to be remarkable and inconsistent with general principles of administrative law and statutory construction, and we are left with a difficult fight when challenging plans to remove wild horses from the public lands.

We will continue to contest the BLM's count of the wild horses in Nevada and argue that no round-ups should take place until the vast discrepancy between the BLM count and the private count is explained. We are seeking to dismantle the vast apparatus of secrecy, deceit and corruption that characterizes the present management of public lands and the horses that live on them.

Legal Materials

There follows an example of a challenge to a wild horse round-up decision that may be used as a model. We are also providing the pleadings and main affidavits filed in the federal court challenge to the "full force and effect" regulation.

- 🌸 Case 1: *Blake v. Babbitt* --federal court challenge to 'full force and effect' regulation

Complaint in *Blake v. Babbitt*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MICHAEL BLAKE, X9 Ranch, :
Vail Arizona 85641; TIMOTHY WILSON, 505 :
Brown Street, Reno, Nevada 89509 : Civil Action
PUBLIC LANDS RESOURCE COUNCIL : Case No. _____
243 California Avenue, Suite 4 :
Reno, Nevada 89509, :
: :
: :
Plaintiffs, :
V. :
: :
BRUCE BABBITT, Secretary of :
the Interior, 1849 C Street NW, :
Washington, D.C. 20240; :
CARSON CULP, Acting Director of the :
Bureau of Land Management, :
1849 C Street NW, Washington, :
D.C. 20240; in their official :
capacities, :
: :
Defendants. :

COMPLAINT - seeking injunctive, declaratory and other relief:

Plaintiffs Michael Blake, residing at X9 Ranch, Vail, Arizona 85641; Timothy Wilson, residing at 505 Brown Street, Reno, Nevada 89509; and Public Lands Resource Council, 243 California Avenue, Suite 4, Reno, Nevada 89509 respectfully submit:

JURISDICTION AND VENUE

This action arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331-1340. This court has jurisdiction over this action pursuant to 28 U.S.C. 1331 (federal question).

This Court has the authority to review the actions of the defendants complained of herein, and to grant the relief requested, pursuant to the Administrative Procedure Act, 5 U.S.C. 553 and 702. The relief sought is authorized under 28 U.S.C. 2201 (Declaratory Judgment) and 28 U.S.C. 2202 (Injunctive Relief). Venue is proper in this Court under 28 U.S.C. 1391(e).

PARTIES

Plaintiffs

1. Plaintiff Michael Blake is an award-winning author and winner of an Academy Award for his screenplay "Dances With Wolves," based on his book of the same name. Michael Blake has written and lectured widely concerning the preservation of Americas wildlife, in particular wild horses. Mr. Blake became interested in the Bureau of Land Managements programs for managing of wild horses in the spring of 1991. He has travelled extensively in Nevada to observe wild horses and intends to make such visits in the future. He has conducted extensive research into the history of the controversy concerning wild horses on public lands, and into present horse management programs. He is writing a screenplay on the subject of wild horses in Nevada, specifically the illegal killing of approximately 600 horses near Austin, Nevada in 1988.

2. Plaintiff Michael Blake had meetings with Bureau of Land Management officials in Nevada, including the State Director, Bill R. Templeton. Mr. Blake actively promoted the Bureau of Land Management's wild horse adoption program and himself adopted two wild horses. As he became more familiar with the Bureau of Land Management's policies and procedures, he realized that wild horse removals and adoption programs were not an effective way to manage wild horses. In July 1992, Mr. Blake called for an independent count of Nevada's wild horses, and a moratorium on horse round-ups pending development of accurate horse population statistics. Mr. Blake provided funding for an aerial census of Nevada's wild horses conducted by plaintiff Public Lands Resource Council, and flew on a number of census flights.

3. Plaintiff Michael Blake has submitted comments to the Bureau of Land Management opposing proposed round-ups of wild horses in Nevada that were distributed to interested parties by the Bureau of Land Management. As a party aggrieved by the decisions of the Bureau of Land Management to implement such wild horse round-ups, he has appealed these agency actions to the Interior Board of Land Appeals.

4. Plaintiff Timothy Wilson is a lifelong resident of Nevada. He is a location manager for motion pictures filmed in the western United States. He is a contractor for the State of Nevada Department of Economic Development, motion Picture and Television Division. He frequently is called upon to feature wild horses in the productions that he manages. The presence of wild horses is, therefore, a determining factor for Mr. Wilson's ability to find a suitable location for such projects in Nevada. Mr. Wilson flew on a number of plaintiff Public Lands Resource Council's wild horse census flights. He is familiar with the condition of wild horses in Nevada and with the Bureau of Land Management's policies and procedures for managing wild horses on public lands in Nevada.

5. Plaintiff Timothy Wilson has submitted comments to the Bureau of Land Management opposing proposed round-ups of wild horses in Nevada that were distributed to interested parties by the Bureau of Land Management. As a party aggrieved by the decisions of the Bureau of Land Management to implement such wild horse round-ups, he has appealed these agency actions to the Interior Board of Land Appeals.

6. Plaintiff Public Lands Resource Council ("PLRC") is an association whose members include residents of Nevada. PLRC is dedicated to and one of its purposes is the promotion of the welfare and protection of wild horses, specifically the survival of America's remaining wild horses on public land. In 1992, PLRC conducted an aerial survey of Nevada's wild horses, following the grid system established by the Bureau of Land Management. The PLRC census concluded that the number of wild horses on public lands in Nevada is significantly lower than the number estimated by the Bureau of Land Management to be present. PLRC counted approximately 8,000 horses in contrast to the approximately 33,000 alleged to be present by the Bureau of Land Management.

7. PLRC's goals are shared by the individually named plaintiffs, Michael Blake and Timothy Wilson, both of whom are members of PLRC. Mr. Blake contributed financially to the aerial survey of Nevada's

wild horses. Mr. Blake and Mr. Wilson both acted as spokespersons for PLRC when publicizing PLRC's concerns about the true number of wild horses remaining in Nevada.

8. Among the members of plaintiff PLRC are residents of Nevada and nearby states who have in the past, and have the right in the future, to be users and enjoyers of the lands, wildlife, and horses affected by the regulation being challenged in this action.

9. Plaintiff PLRC has submitted comments to the Bureau of Land Management opposing proposed round-ups of wild horses in Nevada that were distributed to interested parties by the Bureau of Land Management. As a party aggrieved by the decisions of the Bureau of Land Management to implement such wild horse round-ups, it has appealed these agency actions to the Interior Board of Land Appeals.

Defendants

10. Defendant Bruce Babbitt is the Secretary of the Interior. Secretary Babbitt is charged with the management of federally owned public lands, specifically the protection and management of wild free-roaming horses and burros on public lands.

11. Defendant Carson Culp is the Acting Director of the Bureau of Land Management, which is charged with the administration of federal law and policy concerning public lands, specifically the protection and management of wild horses and burros on public lands.

FACTUAL BACKGROUND

12. Defendant Secretary of the Interior ("Secretary") is charged with the management of federally owned public lands, specifically the protection and management of wild free-roaming horses and burros on public lands pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 et seq. This Act states that "wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered ... as an integral part of the natural system of the public lands." *Id.* Wild horses are to be managed "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. 1333(a). The Act further requires the Secretary to ensure that "[a]ll management activities shall be at the minimal feasible level." *Id.* The Secretary is required to maintain "a current inventory of wild-free-roaming horses and burros" and may only remove wild horses from the range if it is determined that there is an excess of wild horses in a given area of the public lands." 16 U.S. C. 1333(b)(2) .

13. The Bureau of Land Management ("BLM") administers programs for the protection and management programs for wild horses in Nevada pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 et seq. As part of its program of management, the BLM engages in removals from public lands of wild horses deemed to be in excess of the number considered by BLM to be the appropriate management level in a designated herd management area.

14. Interested parties, i.e., those who would be affected by a decision to remove wild horses, are given notice by the BLM of pending removal plans and an opportunity to comment thereon.

15. Comments of interested parties are addressed by the BLM and a final decision is issued regarding the proposed removal.

16. Interested parties are able to challenge, at the administrative level, BLM decisions to remove wild horses, by filing a notice of appeal with the Interior Board of Land Appeals.

17. Prior to August 5, 1992, the filing of such notice, pursuant to BLM regulation 43 C.F.R. 4.21(e) , would automatically stay the removal decision pending disposition of the appeal. The authority to effect immediate removals of wild horses was reserved for the Secretary, pursuant to 16 U. S.C. 1333(b)(2) , which states "that if 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." A removal decision signed by the Secretary is a final agency action, which is not appealed to the Interior Board of Land Appeals, and which is not automatically stayed if an aggrieved party appeals the agency's decision in federal court.

18. In 1992, BLM amended its regulations governing administrative appeals of wild horse removal decisions. Pursuant to the amended regulation, 43 C.F.R. 4770.3(c), effective August 5, 1992, "[An] authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands . . . Full force and effect decisions shall take effect on the date specified, regardless of an appeal."

19. The practical consequence of 43 C.F.R. 4770.3(c) is to permit "authorized officers" of the BLM to effect "immediate" removals of wild horses.

20. As enacted, 43 C.F.R. 4770.3(c) is in contravention of provisions of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 et seq., as section 1333(b)(2) of this Act expressly provides that only the Secretary of the Interior may immediately remove wild horses.

21. As enacted, 43 C.F.R. 4770.3(c) creates a bias in favor of removing wild horses rather than livestock when removals are necessary to protect resources.

22. This bias in favor of removing wild horses is contrary to the protected status accorded wild horses by the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 et seq.

23. As enacted, 43 C.F.R. 4770.3(c) violates the Administrative Procedure Act, 5 U.S.C. 553 and 702, as this regulation is in excess of, and contrary to the authority granted by Congress relating to the management of wild horses.

24. On January 6, 1993, the Bureau distributed to interested parties a notice of a proposed round-up of horses in the Buffalo Hills and Granite Range Herd Management Area.

25. On Wednesday, February 3, 1993, plaintiffs' representative telephoned Bud Cribley, the Bureau of Land Management's Area Manager in the Sonoma-Gerlach Resource Area of the Winnemucca District of Nevada, to ascertain if a final decision to remove horses in that area had been made. Mr. Cribley stated that he had signed the recommendation for the final removal plan, and that Ron Wenker, the District Manager, would sign the decision on February 9, 1993, which decision would be placed into full force and effect.

26. On February 9, 1993, Mr. Wenker signed the decision to remove horses, and placed that decision in full force and effect under 43 C.F.R. 4770.3(c). Mr. Cribley confirmed by telephone to plaintiffs' representative that the removal of horses began on February 9, 1993.

27. The final removal decision was mailed to interested parties. The copy mailed to plaintiffs' representative was postmarked February 9, 1993. This was received by certified mail some eleven days later on February 20, 1993. The removal of horses from the Granite Range was completed on February 20, 1993. Thus, the Bureau of Land Management had completed the removal from the Granite Range Allotment before interested parties even received notification of approval of the removal plan from which they could appeal.

28. On January 25, 1993, Ron Wenker, the District Manager of the Bureau of Land Management's Winnemucca District Office, approved an Emergency Wild Horse Gather Plan to remove horses immediately from the Fox and Lake Range Herd Management Area. The Plan was not circulated to plaintiffs or other interested parties, and the decision to remove wild horses was placed in full force and effect although it was not signed by the Secretary.

COUNT ONE

Injunctive Relief

29. Paragraphs 1 through 28 are hereby incorporated as if fully set forth herein.

30. As a consequence of 43 C.F.R. 4770.3(c), plaintiffs and others similarly situated have suffered and will suffer great and irreparable injury, particularly, among other injuries: mismanagement of wild horses because of removal decisions made by local officials with stronger ties to local areas and political interests and more subject to local prejudices than the Secretary of the Interior; the inability to obtain administrative review prior to the removal of horses; the disruption of wild horse social units, foraging habits, and breeding patterns; increased potential for wild horse management decisions that exceed the statutorily required "minimal feasible level."

31. Plaintiffs have no adequate or speedy remedy at law for the above-mentioned conduct of the BLM, and this action for injunctive relief is plaintiffs only means for securing relief.

32. WHEREFORE plaintiffs request that this court:

- (a) Issue a permanent injunction perpetually enjoining and restraining defendants, the Secretary of the Interior, the Bureau of Land Management and its officers and agents, and all those in active concert or participation with the BLM, from enforcing 43 C.F.R. 4770.3(c), as enacted;
- (b) Award to plaintiffs their costs in this action, as well as reasonable attorney fees; and
- (d) Award plaintiffs such other and further relief as this court may deem proper.

COUNT TWO

Declaratory Judgment

33. Paragraphs 1 through 32 are hereby incorporated by reference as fully set forth herein.

34. WHEREFORE, plaintiffs request that this court:

- (a) Issue a declaratory judgment declaring that 43 C.F.R. 4770.3(c) is in contravention of the Wild Free-Roaming Horse and Burro Act and the Administrative Procedure Act and is therefore null and void;
- (b) Award to plaintiffs their costs in this action, as well as reasonable attorney fees; and
- (c) Award plaintiffs such other and further relief as this court may deem proper.

Dated: April 1993

Respectfully Submitted,

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**Blake affidavit in
*Blake v. Babbitt***

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL BLAKE, X9 Ranch, Vail	:	
Arizona 85641; TIMOTHY WILSON, 505:	:	
Brown Street, Reno, Nevada 89509	:	Civil Action
PUBLIC LANDS RESOURCE COUNCIL	:	No. 93-276
243 California Avenue, Suite 4	:	
Reno, Nevada 89509,	:	Judge R.C. Lamberth
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BRUCE BABBITT, Secretary of	:	
the Interior, 1849 C Street NW,	:	
Washington, D.C. 20240; JAMES	:	
BACA, Director of the	:	
Bureau of Land Management,	:	
1849 C Street NW, Washington,	:	
D.C. 20240; in their official	:	
capacities,	:	
	:	
Defendants.	:	

AFFIDAVIT OF MICHAEL BLAKE IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MICHAEL BLAKE, being solemnly sworn, deposes and says:

1. I am a writer of novels, screenplays, essays and poetry. I am fully familiar with all the facts and circumstances set forth herein. I make this affidavit in support of Plaintiffs' Motion for Summary Judgment.
2. I have written and lectured widely concerning the preservation of America's wildlife. I have been especially concerned with the protection of the wildlife of the Western states. I have worked to preserve the remaining mountain lions, wolves and wild horses. I have travelled extensively to observe these animals in their natural habitats on the public lands. In recognition of this work, I was the 1992

recipient of the Performing Animal Welfare Society's "Amanda Award" and the Wolf Recovery Foundation's "Alpha Award." I was named 1992 Humanitarian of the Year by the Animal Protection Institute for my efforts on behalf of wild horses. The preservation of the West and its wildlife was a central theme of my novel "Dances with Wolves," which has been translated into twenty languages. I was the winner of the Academy Award for my screenplay of the same name.

3. When I began research in 1991 for a screenplay concerning the killing of approximately 600 wild horses which occurred near Austin, Nevada in 1988, I was introduced to the crisis occurring on public lands in the West, and in particular the plight of the remaining wild horses.

4. I made numerous trips to Nevada, to gather more information concerning the administration of public lands by the Bureau of Land Management ["BLM"] and its implementation of the provisions of the Wild and Free-Roaming Horses and Burros Act. I interviewed numerous officials and field workers from the Bureau of Land Management. I met with the State Director, Bill R. Templeton. I also interviewed members of the Nevada Wild Horse Commission, and persons active in efforts to secure the preservation of wild horses.

5. I travelled widely in Nevada, and visited sites where wild horses have been shot by a person or persons unknown. I also viewed many remaining herds of wild horses as part of my enjoyment of the public lands.

6. I cooperated with the Bureau of Land Management in an effort to make the program to adopt wild horses removed from public lands more effective. Because my name had become associated with the preservation of Western wildlife through the success of the book and film of "Dances with Wolves", I agreed to be a spokesperson for the BLM "Adopt-A-Horse" program. I sponsored "Adoption Days" as part of this program, as the BLM believed that my reputation as the author of "Dances with Wolves" would increase attendance at such events and increase the number of horses adopted.

7. I lobbied the Nevada state legislature in 1991 and 1992 on behalf of proposed legislation making it a felony to shoot wild horses.

8. In 1991, I adopted two wild horses. One of these horses, a stallion, was captured at 20 years of age and officially declared unadoptable. I adopted a wild mare as a companion for the stallion. These horses live with me on my ranch in Vail, Arizona.

9. As I became more familiar with the circumstances of the administration of the public lands by the BLM in Nevada, I realized that the wild horse removals and adoption programs were not an effective or humane way to manage wild horses. I also concluded that the removal of wild horses in preference for grazing cattle was in contravention of the protections afforded by the Wild and Free-Roaming Horses and Burros Act. I became an opponent of the Adopt-A-Horse program.

10. Based on my extensive observation of wild horses, and consulting with others who have worked to protect the remaining herds of wild horses, I became convinced that the BLM estimates of the number of wild horses that remain in Nevada were considerably inflated. Although persons seeking to protect these horses had been convinced that the true number of horses remaining was far lower than the BLM statistics, no independent, comprehensive census had been undertaken, upon which a challenge to the BLM statistics could be based. In July, 1992, I therefore called for an independent census of the wild horses in Nevada, and a moratorium on the round-up of horses pending development of accurate horse population statistics.

11. I organized and financed the first one-time, comprehensive census and survey of Nevada's wild horses, conducted by plaintiff Public Lands Resource Council during the period from August to October 1992.

12. In July and August, 1992, I also organized, supported and directed volunteers in a two-week operation that observed the government capture of wild horses in Northern Nevada.

13. In 1993, I have continued to fight for the preservation of wild horses in Nevada. My visits to the state of Nevada were interrupted while I received chemotherapy treatment for Hodgkin's disease. Despite the gravity of my illness, I have actively worked to protect the wild horses. Even at times when I have had to abandon my professional writing because of illness, I have continued to apply my energy to the protection of wild horses. I have again lobbied the Nevada legislature in support of the 1993 version of the legislation to render the shooting of wild horses a felony. When I was not able to visit the sites of wild horse round-ups this spring, I arranged for members of the Public Land Resource Council to visit me in my home in Arizona to give first-hand accounts and videotape of the BLM operations.

14. I organized volunteers to spot-check compliance procedures in the Adopt-A-Horse program, and to visit the Palomino Valley corral to witness the arrival of horses taken from the public lands in BLM round-ups.

15. I began a national billboard campaign to raise public awareness concerning the threat to the existence and wellbeing of the remaining herds of wild horses. This is the latest action in my three-year campaign to protect wild horses on the public lands, and to educate the public concerning the grave threats that exist to wild horses under present BLM administration. I have dedicated thousands of hours, my professional reputation, and approximately one hundred thousand dollars of my personal funds in these efforts to save wild horses.

16. I have made numerous visits to Nevada to attempt to ensure that wild horses are given the protection afforded by federal legislation to safeguard their wellbeing. I intend to continue to make such frequent trips to monitor the administration of public lands particularly concerning the protection of wild horses. As part of my enjoyment of the public lands in Nevada, I wish to see wild horses roaming free.

17. I will also spend considerable periods of time in Nevada for business purposes, as I fulfill a contract to write the screenplay for a film concerning the illegal killing of wild horses in Nevada. The ability to make this film will depend on the continued presence of herds of significant numbers of wild horses in Nevada.

18. During this three-year period of study of the threat to wild horses in Nevada, I have concluded that the present administration of the public lands and the wild horses by the BLM on Nevada contravenes the Wild and Free-Roaming Horses and Burros Act. I have sought administrative remedies. I have submitted comments to the BLM opposing proposed round-ups of wild horses in Nevada that were distributed to interested parties by the Bureau of Land Management. As a party aggrieved by the decisions of the Bureau of Land Management to implement such wild horse round-ups, I have appealed these agency actions to the Interior Board of Land Appeals. These appeals are pending.

19. In April, 1993, I became a plaintiff in this suit to challenge the validity of a regulation, 43 C.F.R. § 4770.3(c), giving local officials of the Bureau of Land Management the power to put decisions to round up horses into full force and effect. At the time that this suit was filed, no horses were being removed from the public lands during the horses' foaling season.

20. It is the policy of the BLM to resume wild horse removals in July. Despite the pendency of this suit, the BLM has placed a decision to round-up horses in the Butte Herd Management Area in the Ely District into full force and effect, although the decision was not signed by the Secretary of the Interior. I submitted comments opposing this round-up proposal. I have appealed the final round-up decision to the Interior Board of Land Appeals and petitioned for a stay of the decision to round-up horses. This appeal is pending.

21. As a consequence of the full force and effect regulation, I have suffered and will suffer great and irreparable injury, if the regulation is implemented in order to place decisions such as that approving the roundup of wild horses in the Butte Herd Management Area into full force and effect.

22. Among other injuries, there is an immediate threat of irreparable harm through mismanagement of wild horses. Removal decisions, made by local officials with stronger ties to local areas and political interests and more subject to local prejudices than the Secretary of the Interior, will be placed into full force and effect. Under this scheme, interested and aggrieved parties are unable to obtain administrative review of a round-up decision prior to the removal of wild horses. Yet, because the decisions are not signed by the Secretary, aggrieved parties must exhaust their administrative remedies and cannot immediately seek review of the decision, or the issuance of a temporary restraining order or preliminary injunction, by a federal court. The implementation of round-up decisions pursuant to the full force and effect regulation greatly creates the imminent threat of irreparable harm resulting from the disruption and destruction of wild horse social units, foraging habits, and breeding patterns. Such implementation permits local BLM officials to effect wild horse management decisions in excess of the required "minimal feasible level" pursuant to 16 U.S.C. § 1331 et seq. under the Wild and Free-Roaming Horses and Burros Act.

Michael Blake

Subscribed and sworn to
before me this day of
July, 1993.

Notary Public

Wilson affidavit in *Blake v. Babbitt*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MICHAEL BLAKE, X9 Ranch, Vail	:	
Arizona 85641; TIMOTHY WILSON, 505:	:	
Brown Street, Reno, Nevada 89509	:	Civil Action
PUBLIC LANDS RESOURCE COUNCIL	:	No. 93-276
243 California Avenue, Suite 4	:	
Reno, Nevada 89509,	:	Judge R.C. Lamberth
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BRUCE BABBITT, Secretary of	:	
the Interior, 1849 C Street NW,	:	

Washington, D.C. 20240; JAMES :
BACA, Director of the :
Bureau of Land Management, :
1849 C Street NW, Washington, :
D.C. 20240; in their official :
capacities, :
 :
Defendants. :
_____ :

AFFIDAVIT OF TIMOTHY WILSON IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TIMOTHY WILSON, being solemnly sworn, deposes and says:

1. I am a lifelong resident of the state of Nevada. I am fully familiar with all the facts and circumstances set forth herein. I make this affidavit in support of Plaintiffs' Motion for Summary Judgment.
2. I have been a continuous and regular user and enjoyer of the public lands in Nevada. I observe the wildlife living on public lands frequently and regularly, and will continue to do so. I have a particular concern for the preservation and protection of wild horses on the public lands.
3. The protection and preservation of Nevada's wild horses is also of great importance to my work. I am a location manager for motion pictures filmed in the Western United States. I am a contractor for the State of Nevada Department of Economic Development, Motion Picture and Television Division. I am frequently called upon to feature wild horses in the productions that I manage.
4. My longstanding interest in the wellbeing of wild horses intensified in 1991. I was hired by Universal Pictures to research the existence and location of herds of wild horses on public lands in Nevada, and manner in which they are managed by the Bureau of Land Management ["BLM"]. In particular, I researched the killing of approximately 600 wild horses which occurred near Austin, Nevada in 1988.
4. Over a four-month period in 1991, I conducted extensive research into the tragic and appalling situation that exists on the public lands in Nevada, which situation was exemplified by the unsolved killing of these 600 wild horses that were supposed to be protected by the Bureau of Land Management.
5. As part of my research into the plight of the remaining wild horses, I became familiar with the program of wild horse management implemented by the Bureau of Land Management. I met with numerous BLM officials, including the State Director, Bill R. Templeton, the Deputy Director, the State Wild Horse Specialist, and law enforcement officers of the BLM. I also met with the federal prosecutor to discuss the investigation into the unsolved killing of horses, and other crimes committed against wild horses.
6. In order to fully inform myself concerning the administration of the public lands, I also had many meetings with persons who were active in the effort to preserve the remaining wild horses. I spoke to ranchers who were concerned that the continued existence of wild horse herds was seriously threatened by the activities of the BLM and by illegal activities of persons who profited from the destruction of wild horses or the removal of horses from the public land. I also consulted ranchers who advocated the removal of wild horses from the public lands so that more cattle could graze on those lands. Through this process of investigation, I became fully familiar with the plight of the remaining wild horses on the public lands in Nevada.

7. In 1991, I toured a number of Herd Management Areas in Nevada, and researched the location and management of grazing allotments. I researched the history of compliance with the provisions of grazing permits awarded to ranchers.

8. In 1991, I observed four separate round-ups of wild horses conducted by the Bureau of Land Management. These round-ups had been authorized by the BLM after they had concluded that there were "excess" horses on the public lands. I witnessed the tremendous stress, fear, and humiliation to which the wild horses are subjected. I also witnessed the injuries, some of which were fatal, that they sustained as a result of their terror at being herded by helicopters and herded into transportation vehicles.

9. I made frequent visits to the Palomino Valley Adoption facility to which wild horses are transported after being removed from the public lands. This facility is located close to both my home and office, and I visited it frequently over a period of sixteen months, beginning in 1991. I witnessed the fear experienced by the horses in totally alien and frightening surroundings. I witnessed their trepidation at being approached and handled by the persons working at the facility. I saw many foals, some of whom were injured, who were separated from their mares during round-ups and transportation. Many of these foals were not reunited with their mares. I saw that horses quickly became sick, from the stress of the round-up and transportation, from the dust that is generated by the use of helicopters and the fearful movements of horses in the traps, and from exposure to diseases against which they had developed no immunity in the wild.

10. During these visits to the Palomino Valley Adoption facility, I observed wild horses being adopted in large numbers under the "Fee Waiver" program instituted by the BLM to by-pass the usual restrictions placed on the adoption of wild horses. As a result of much information, and considerable adverse publicity for the BLM, that horses adopted pursuant to the Fee Waiver provisions were intended for commercial use and were being shipped to slaughterhouses, the Fee Waiver system was suspended.

11. My growing familiarity with the management of wild horses in Nevada convinced me that their existence and wellbeing was threatened by the BLM's administration of the Wild and Free Roaming Horse and Burros Act, the very statute that was intended to afford the horses protection in their natural environment from harassment and death. I also concluded that the removal of wild horses from the public lands in Nevada and their placement in the adoption program was neither effective nor humane as a management program. I joined with other advocates for wild horses in calling for examination and reform of the administration of the public lands by the BLM.

12. In 1992, I participated in the organization of the plaintiff Public Lands Resource Council ["PLRC"]. This association was formed to promote the welfare and protection of wild horses on the public lands. In July, 1992, we began to organize an independent census of the remaining wild horses in Nevada. As a result of my personal experiences and observation of wild horses, I agreed with many other wild horse advocates that the BLM estimate of the number of remaining wild horses far exceeded their true numbers. We began an independent census upon which a challenge to the BLM statistics could be based. We asked for a moratorium on all round-ups until accurate data on wild horse herds could be developed.

13. As a member of PLRC, I participated in this census of all Herd Management Areas in Nevada that was conducted from August to October, 1992. This was achieved by flying fixed-wing aircraft carrying experienced wild horse "spotters" over the grid system utilized by BLM itself. To ensure the accuracy of the PLRC census, one area was double-counted. The difference between the two-counts was found to be insignificant.

14. I dedicated substantial amounts of my time and resources to this enterprise. I flew as an observer on

many PLRC flights. As the result of my observations during approximately 80 hours flown on these census flights, I am convinced that PLRC's count is accurate.

15. PLRC shared its findings concerning the number of wild horses remaining on public lands with the State Director of the BLM, at his request. Several, widely diverging estimates of the number of wild horses remaining has been made by the Department of the Interior and BLM. BLM's own census figures assert that 33,000 horses remain. PLRC's comprehensive and controlled census found only 8,231 wild horses in Nevada.

16. In July and August, 1992, I also organized, supported and directed volunteers in a two-week operation that observed the government capture of wild horses in northern Nevada. I observed between three and four round-ups of horses in different Herd Management Areas in Nevada.

17. The BLM has continued to hire persons who have plead guilty to federal crimes of illegally herding wild horses by helicopter, as members of crews to conduct the captures of wild horses. I have opposed the further use of tax revenues to hire such persons to be involved with the management of wild horses in any way.

18. In 1993, I have continued to fight for the preservation of wild horses in Nevada. I have continued to visit the Palomino Valley Adoption center to monitor the arrival of wild horses rounded up from public lands and to observe the conditions in which they are held at the facility.

19. I have lobbied the Nevada state legislature on behalf of proposed legislation making it a felony to shoot wild horses.

20. In April, 1993, I became a plaintiff in this suit to challenge the validity of a regulation, 43 C.F.R. § 4770.3(c), giving local officials of the Bureau of Land Management the power to put decisions to round up horses into full force and effect. At the time that this suit was filed, no horses were being removed from the public lands during the horses' foaling season.

21. The BLM, despite the particular threat of injury to young foals, resumes wild horse removals in July. Although this suit is pending, the BLM has placed a decision to round-up horses in the Butte Herd Management Area in the Ely District into full force and effect, although the decision was not signed by the Secretary of the Interior. I submitted comments opposing the draft horse removal plan. My comments were not incorporated into the final round-up proposal. I have appealed the final round-up decision to the Interior Board of Land Appeals and petitioned for a stay of the decision to round-up horses, providing an extensive Statement of Reasons as to why this removal should not proceed. This appeal is pending.

22. As a consequence of the full force and effect regulation, I have suffered great injury and irreparable injury. I will continue to suffer great and irreparable injury if the regulation is implemented in order to place decisions such as that approving the roundup of wild horses in the Butte Herd Management Area into full force and effect.

23. Among other injuries, there is an immediate threat of irreparable harm through mismanagement of wild horses. My personal observation and experience have led me to conclude that removal decisions, made by local officials with stronger ties to local areas and political interests, are likely to be subject to local prejudices. Decisions made by such local officials of the BLM, rather than the Secretary of the Interior, will be and have been placed into full force and effect pursuant to the challenged regulation. Under this scheme, interested and aggrieved parties are unable to obtain administrative review of a round-up decision prior to the removal of wild horses. Yet, because the decisions are not signed by the Secretary, aggrieved parties must exhaust their administrative remedies and cannot immediately seek review of the decision, or the issuance of a temporary restraining order or preliminary injunction, by a federal court.

24. The implementation of round-up decisions pursuant to the full force and effect regulation creates the imminent threat of irreparable harm resulting from the disruption and destruction of wild horse social units, foraging habits, and breeding patterns. I have witnessed the great harm suffered by wild horses by wild horses during capture, transportation, and adoption. The immediate implementation of round-up decisions pursuant to the full force and effect regulation permits local BLM officials to effect wild horse management decisions in excess of the required "minimal feasible level" pursuant to 16 U.S.C. § 1331 et seq. under the Wild and Free-Roaming Horses and Burros Act.

Timothy Wilson

Subscribed and sworn to
before me this day of
July, 1993.

Notary Public

Opinion in *Blake v. Babbitt*

MICHAEL BLAKE, et al., Plaintiffs, v. BRUCE BABBITT,
Secretary of the Interior, et al., Defendants.

Civil Action No. 93-0726 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

837 F. Supp. 458 (D.D.C. 1993)

November 18, 1993, Decided

November 18, 1993, Filed

COUNSEL: For Plaintiff: RICHARD H. CHUSED, GEORGETOWN UNIVERSITY LAW CENTER,
WASHINGTON, D.C., GARY L. FRANCIONE, RUTGERS LAW SCHOOL, NEWARK, NJ.

For Defendant: TERI T. THOMSEN, UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON, D.C.

JUDGES: Lamberth

OPINION BY: ROYCE C. LAMBERTH

[*459] MEMORANDUM AND ORDER

This matter comes before the court on cross-motions for summary judgment. The court finds that there are no genuine issues of material fact, and that defendants are entitled to summary judgment as a matter of law, dismissing this case.

At issue is the validity of a regulation of the Bureau of Land Management ("BLM") of the United States Department of Interior, 43 C.F.R. @ 4770.3(c), that allows a delegated field officer ("authorized officer") of BLM to make and place in full force and effect a decision to remove wild horses or burros pursuant to the Wild and Free-Roaming Horses and Burros Act ("Wild Horse Act", or "the Act"), 16 U.S.C. @ 1331 et seq.

The Wild Horse Act was enacted in 1971, and it "extended federal protection to wild horses and empowered BLM to manage horses roaming public ranges as a part of the Agency's management of the public lands." *American Horse Protection Association v. Watt*, 224 U.S. App. D.C. 335, 694 F.2d 1310, 1311 (D.C. Cir. 1982).

Because overpopulation of wild horses and burros resulted from passage of the 1971 Act, Congress in 1978 amended the Act through the Public Rangelands Improvement Act of 1978. These amendments seemed to strike a new balance between "protecting wild horses and competing interests in the resources of the public range." *American Horse Protection Association v. Watt*, 694 F.2d at 1316. The amendments made clear the importance of management of the public range for multiple uses, rather than emphasizing wild horse needs. *Id.* The legislative history makes clear that one of Congress' goals was to "deal with range deterioration in areas where excess numbers of wild-free roaming horses and burros exist." H.R. Rep. No. 1122, 95th Cong., 2nd Sess. 9 (1978). The House Report indicated that the Wild Horse Act had been so successful that the numbers of wild horses and burros "now exceed the carrying capacity of the range."

Excess numbers of horses and burros pose a threat to wildlife, livestock, the improvement of range conditions, and ultimately their own survival." *Id.*, at 21.

The Wild Horse Act was specifically amended, then, to require "immediate" removal of excess horses. 16 U.S.C. @ 1333(b)(2). When a determination is made that there is an over-population of wild horses, action is required based on the knowledge currently available, even if it is not complete. *American Horse Protection Association v. Watt*, 224 U.S. App. D.C. 335, 694 F.2d 1310 at 1317. Adjustments can be made later, but the endangered and rapidly deteriorating range cannot wait. *Id.*

Another part of the legislative history of the 1978 Amendments clearly sets forth Congress' goal:

[*460] "The goal of wild horses and burro management, as with all range management programs, should be to maintain a thriving 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."

H.R. Rep. No. 1737, 95th Cong., 2nd Sess., 15 (1978).

By 1991, it became clear to BLM that it was having difficulty complying with the Congressional mandate to take "immediate" action when there were determined to be excess wild horses and burros. Because any person adversely affected had a right to appeal to the Interior Board of Land Appeals ("IBLA"), and because Interior Department regulations generally did not allow the decision to take full force and effect until IBLA's ruling, many removal decisions were delayed up to two years. Even when the Interior procedures were followed to allow decisions to be placed in full force and effect pending a final decision by IBLA, there was always a delay of months.

After publishing a proposed rule for notice and comment in 1991 (56 Fed. Reg. 30372), the final rule at issue here was adopted on June 5, 1992, published in the Federal Register on July 6, 1992, and became effective August 5, 1992. 57 Fed. Reg. 29651. The Wild Horse Act specifically authorizes the Secretary to adopt such regulations "as he deems necessary" to carry out the Act. 16 U.S.C. @ 1336.

The regulation at issue, 43 C.F.R. @ 4770.3(c), provides that:

"The authorized officer may place in full force and effect decisions to remove wild horses and burros from public or private lands if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part."

The revised regulation therefore allows an "authorized officer" to place in full force and effect a decision to remove wild horses and burros, while still allowing persons adversely affected to appeal. The change is that the adversely affected person now must obtain a stay, either from IBLA or from a U.S. District Court, to stop the decision from being implemented while an appeal is pending. Prior to the change, there was an automatic stay until the appeal was decided unless BLM succeeded in getting the automatic stay lifted.

The scope of judicial review here, pursuant to the Administrative Procedure Act, is quite narrow. If an agency's construction of a statutory provision that the agency is responsible for administering is "reasonable," the court must defer to the agency's interpretation if the statutory language is not clearly to the contrary, unless the agency's interpretation is contrary to the purposes of the Act in question. *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Plaintiffs complain that allowing delegation of removal decisions to field officials of the BLM will result in mismanagement because field officials are "more subject to local prejudice than the Secretary of the Interior." Complaint, at 10. There is nothing in the Wild Horse Act that constricts the Secretary's power to delegate final decision-making power, and the court rejects this "inside-the-Beltway" argument. The font of all knowledge is not in Washington. The Secretary, through IBLA or otherwise, can always act to correct any decision caused by local prejudice. But Congress' goal of "immediate" decisions is clearly better met by allowing delegation of decision-making authority to the lowest responsible level.

Plaintiffs question defendants' representations to this court that a full force and effect decision becomes the final decision of the Secretary and is final agency action for the purpose of seeking judicial review pursuant to the Administrative Procedure Act. There is nothing unique or novel or improper about the agency's determination that the federal courts have immediate jurisdiction to review [*461] agency action currently being implemented, even if there are permissive administrative remedies that remain available. The regulations do not purport to preclude judicial review until after administrative remedies are exhausted. Moreover, in light of the representations made to this court, defendants would be estopped from urging any federal court to decline to review a removal decision being given full force and effect by the agency.

The statutory language and the legislative history of the Wild Horse Act, as amended, are not contrary to the Secretary's actions here in promulgating these new regulations, and the court defers to the Secretary's "reasonable" interpretation.

Plaintiffs' motion for summary judgment is DENIED.

Defendant's motion for summary judgment is GRANTED. Judgment is hereby entered for defendants, dismissing this action with prejudice.

Having now decided the merits of this case, plaintiffs' motion for preliminary injunction is DENIED as moot.

SO ORDERED.

Royce C. Lamberth
United States District Judge
DATE: NOV 18 1993

Footnotes

[FN1] Indeed, 43 C.F.R. @ 4.21(b) provides the following under the heading "Exhaustion of Administrative Remedies":

"No decision which at the time of its rendition is subject to appeal ... shall be considered final so as to be agency action subject to judicial review made under [the Administrative Procedure Act] ... unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section."

Paragraph (a) of 43 C.F.R. @ 4.21 then expressly provides that except "as otherwise provided by law or other pertinent regulation" a decision will not be effective while an appeal is pending. The regulation at issue in this case is clearly a "pertinent regulation" that meets this exception. Properly read, the agency's regulations make clear that the agency construes a decision that is given full force and effect to be final agency action that is immediately subject to judicial review under the Administrative Procedure Act.

Brief in
Blake v. Babbitt

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Brief in
Blake v. Babbitt

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

TIMOTHY WILSON, 505 Brown Street,	:	
Reno, Nevada, 89509; MICHAEL	:	
BLAKE, X9 Ranch, Vail, Arizona,	:	
85641; PUBLIC LANDS RESOURCE	:	Civil Action
COUNCIL, 243 California Avenue,	:	Case No. 93-5401
Suite 4, Reno, Nevada, 89509,	:	
	:	
	:	
Appellants,	:	
	:	
v.	:	
	:	
BRUCE BABBITT, Secretary of	:	
the Interior, 1849 C Street NW,	:	
Washington, D.C. 20240; MICHAEL	:	
DOMBECK, Acting Director of the	:	
Bureau of Land Management,	:	
1849 C Street NW, Washington,	:	
D.C. 20240; in their official	:	
capacities,	:	
	:	
	:	
Appellees.	:	

Brief in
Blake v. Babbitt

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellants Timothy Wilson, Michael Blake and Public Lands Resource Council ["PLRC"] respectfully submit this brief, appealing the decision of the Honorable Royce C. Lamberth in *Blake v. Babbitt*, 837 F. Supp. 458 (D.C. Cir. 1993), which denied their motion for summary judgment and granted appellees'

motion for summary judgment.

Appellants challenge the validity of a regulation promulgated by the Department of the Interior at 43 C.F.R. § 4770.3(c) [reproduced as an Addendum to this brief], which contravenes the provisions of the Wild Free Roaming Horses and Burros Act, 16 U.S.C. § 1331, et seq. The district court had jurisdiction over this question of federal law pursuant to 28 U.S.C. § 1331.

The district court issued a Memorandum and Final Order [Appendix at 299], filed on November 18, 1993, which disposed of all claims with respect to all parties. Appellants having filed a timely Notice of Appeal [A 306], this court has jurisdiction to decide this appeal pursuant to 28 U.S.C. § 1291 (1988).

Brief in ***Blake v. Babbitt***

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in its interpretation of the scope of its review of the "full force and effect regulation" at 43 C.F.R. § 4770.3(c), by misinterpreting the test set out in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and in deferring to the agency's interpretation of the statutory language of the Wild Free Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq.?
2. Did the district court err in denying appellants' motion for summary judgment and appellants' motion for a preliminary injunction, under the correct interpretation of *Chevron*?

Brief in ***Blake v. Babbitt***

STANDARD OF REVIEW

The district court entered summary judgment in this case. When there is no question of fact and only a question of law presented on appeal, the applicable standard of review is plenary. *Pennington Seed Inc. v. United States*, 10 F.3d 6, 9 (D.C. Cir. 1993). In this appeal, the facts are undisputed and the interpretation of the statute raises a pure question of law, therefore, the standard of review for this court is plenary. The court may examine de novo the issues decided by the district court.

Brief in ***Blake v. Babbitt***

STATEMENT OF THE CASE

This action arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 ["Act"].

Pursuant to this Act, Appellee Secretary of the Interior ["the Secretary"] is charged with the protection and management of wild horses on public lands. The Secretary has delegated certain powers to the Appellee Bureau of Land Management ["BLM"], which administers the programs for Department of the Interior ["DOI"]. [Reference to appellees hereinafter "the Secretary"]

The Act provides that

Where the Secretary determines ... that an overpopulation exists in a given area of the public lands and that action is necessary to remove animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels.

16 U.S.C. 1333(b)(2). The Act thus provides that the Secretary shall make the final decision on the need to remove "excess" wild horses and burros.

On August 5, 1992, a new regulation concerning the removal of wild horses and burros went into effect. The regulation, 43 C.F.R. § 4770.3(c,) allows "authorized officers" of the BLM to place in immediate "full force and effect" decisions to remove excess wild free-roaming horses and burros from public or private land:

The authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part.

On April 8, 1993, appellants filed this action in the district court. They sought a declaratory judgment that the regulation violated the Wild Free-Roaming Horses and Burros Act, pursuant to which it was promulgated, because it gave to local officials of the Bureau of Land Management the power to render final agency decisions concerning the removal of wild horses. This power is reserved to the Secretary under the Act. Appellants sought a declaratory judgment that the regulation was invalid and a permanent injunction against its further implementation.

Appellants and the Secretary filed cross-motions for summary judgment and appellants subsequently filed an application for a preliminary injunction. Judge Lamberth denied appellants' request for a preliminary injunction and summary judgment and granted the Secretary's motion for summary judgment. The district court misapplied the framework for statutory analysis required under the test of *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

The district court did not analyze the Act to determine which officials may render decisions that are final and placed in immediate effect even if such a decision is appealed. It only stated that "[i]f an agency's construction of a statutory provision that the agency is responsible for administering is 'reasonable' the court must defer to the agency's interpretation, if the statutory language is not clearly to the contrary, unless the agency's interpretation is contrary to the purposes of the Act in question." [A 302]. The district court did not examine the language of the Act, except to conclude that the Secretary had acted reasonably under his power to promulgate regulations "as he deems necessary to carry out the Act" [A 301], pursuant to 16 U.S.C. § 1336.

Appellants now seek reversal of the decision of the district court and grant of their motion for summary judgment.

Brief in *Blake v. Babbitt*

SUMMARY OF ARGUMENT

In the first part of this brief, appellants will argue that the district court erred when it failed to perform the statutory construction of the Wild Free-Roaming Horses and Burros Act as required under the test set out by the Supreme Court in *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). The district court improperly focused its inquiry instead on whether the agency's interpretation of the statute was reasonable. [A 302]

In the second part of this brief, we will argue that the full force and effect regulation, analyzed under a proper application of the Chevron test, is inconsistent as a matter of law with the Act pursuant to which it was promulgated, and is therefore invalid for several reasons.

First, as a matter of law, the regulation improperly gives local lower-level BLM officials the power to make a final decision to immediately remove excess wild horses and burros from public land. It is clear from the plain language of the Act, and from its legislative history, that Congress expressly intended only the Secretary of the Interior to have the power to make a final decision to immediately remove excess wild horses and burros.

Second, it is clear as a matter of law that this regulation enables local BLM officials to remove horses without that the removal decision being subject to effective review on appeal. See 57 Fed. Reg. 29,652 (July 6, 1992). Removal decisions made by lower level officials proceed without the review or approval of an official within the Department of the Interior having the power to make final agency decisions. Even if an appellant may seek judicial review of a full force and effect decision, as urged by the Secretary and accepted by the district court, this does not cure the fact that the regulation is an ultra vires grant of power. Moreover, access to the federal courts is effectively denied in practice because of the manner in which the BLM implements decisions.

Second, as a matter of law, the regulation's unwarranted expansion of local BLM officials' authority is also at odds with the Congressional mandate contained in the Act, as expressed in the language and design of the Act as a whole, since the Act requires that BLM's management activities of wild horses be maintained at the "minimal feasible level." 16 U.S.C. § 1333(a). BLM's own regulations also require wild horse management to be at "the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans." 43 C.F.R. § 4710.4. The inability of an appellant, as noted above, to effectively challenge a full force and effect increases the likelihood that improper removal decisions will be fully implemented. The full force and effect regulation violates Congressional intent as expressed in the Act.

Fourth, as a matter of law, the full force and effect regulation creates a bias in favor of removal of horses rather than removal of cattle in order to achieve the thriving natural ecological balance required by the Act. In order to place a decision to remove cattle from the public lands, there must be an "emergency" situation. The fact that a local BLM official can immediately remove horses without showing such an emergency, shows an impermissible bias in favor of removing horses, as a matter of law. This bias denies wild horses the protections of the Wild Free Roaming Horses and Burros Act, pursuant to which they are to be managed as part of a thriving ecological balance on the public lands. Appellants therefore first seek a reversal of the district court's decision granting the Secretary's motion for summary judgment. Appellants request that 43 C.F.R. § 4770.3(c) be declared violative of

the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-40. Finally, appellants further seek a permanent injunction preventing any further implementation of the full force and effect regulation.

Brief in ***Blake v. Babbitt***

Argument

PART I

In this part of the brief we will show that the district court failed to perform the statutory analysis required in order to reach its conclusion that the "full force and effect" regulation did not violate the Wild Free Roaming Horses and Burros Act as a matter of law. The decision of the district court improperly deferring to the Secretary's interpretation of Act should be reversed.

THE DISTRICT COURT ERRED WHEN IT GAVE DEFERENCE TO AN AGENCY'S CONSTRUCTION OF A REGULATION WHICH CLEARLY VIOLATES CONGRESSIONAL INTENT.

The district court erred when it characterized the scope of its review of the full force and effect regulation as "quite narrow." [A 302]. It stated that "[i]f an agency's construction of a statutory provision that the agency is responsible for administering is 'reasonable' the court must defer to the agency's interpretation, if the statutory language is not clearly to the contrary, unless the agency's interpretation is contrary to the purposes of the Act in question." [A 302].

The judgment of the district court reveals that it did not perform the required statutory construction of the Wild Free Roaming Horses and Burros Act. The district court did not analyze the Act to determine the crucial question before the court: whether the Secretary may delegate the power to render decisions concerning the removal of wild horses from public lands that are final and placed in immediate effect even if such a decision is appealed. The district court did not examine the language of the Act, except to conclude that the Secretary had acted reasonably under his power to promulgate regulations "as he deems necessary to carry out the Act" [A 301], pursuant to 16 U.S.C. § 1336.

The district court erred when, instead of performing the required statutory analysis, it only considered whether the agency's reasons for promulgating the regulation were arbitrary and capricious and failed to evaluate the powers of the Secretary under the Act. See *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to an agency interpretation at odds with the plain language of the statute itself.") Where the court "find[s] that the statute's text forecloses the Secretary's contention...[the court should] accord no deference to his interpretation." *Atlanta College of Medical and Dental Careers, Inc. v. Riley*, 987 F.2d 821, 827 (D.C. Cir. 1993). See *LaRouche v. Federal Election Comm'n*, 996 F.2d 1263, 1266 (D.C. Cir. 1993) (rejecting the Commission's interpretation of the Matching Payment Act on the grounds that "we find the language, structure and purpose of the Act to be inconsistent with the Commission's interpretation.")

When determining whether an agency's interpretation of its enabling statute is correct, the court must use traditional methods of statutory construction. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is

the law and must be given effect." *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). See *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (id.). In *Chevron*, the Supreme Court developed a two prong test that a court must use when it reviews an agency's construction of a statute which that agency administers. The first prong of the *Chevron* test requires that a court determine whether Congress had articulated its intent on the matter at issue. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 (emphasis added).

In making this determination, the court examines the language of the statute, and if necessary, the legislative history. If the language of the statute is clear and unambiguous, the plain language of the statute controls, without further analysis. Id. at 841.

Congressional intent is ascertained by the court's examination of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). In appropriate cases, the court may look to the legislative history of the statute for guidance. *Amalgamated Transit Union*, 894 F.2d at 1368; *Chemical Manufacturers Ass'n v. United States Environmental Protection Agency*, 919 F.2d 158, 162 (D.C. Cir. 1990); *Ohio v. United States Department of the Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989).

In this case, the intent of Congress is clear and explicit from the language and legislative history of the Wild Free- Roaming Horses and Burros Act. As Congress has directly spoken to the precise question at issue, the inquiry ends here and the court must preserve and enforce the unambiguous congressional intent evidenced in the statute and its history. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id. at 843 n.9. A regulation that subverts congressional intent cannot be upheld.

The district court erred in construing the statute under the analysis of the second prong of the *Chevron* test, instead of the first, as set out above. Only when the court finds that Congress has not specifically addressed the question at issue, does the second prong of the *Chevron* test become relevant. Id. at 843. Then, the court must determine whether the agency's interpretation of a statute which is silent or ambiguous with respect to a specific issue "is based on a permissible construction of the statute." Id.

Chevron makes clear, however, that an agency's construction of the statute which it administers is accorded no special deference in instances where congressional intent may be ascertained by the court. *Atlanta College of Medical and Dental Careers*, 987 F.2d at 827. Where the court discerns congressional intent "on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

Appellants therefore ask this court to reverse the decision of the district court and reanalyze the question of the invalidity of the full force and effect regulation.

PART II

In this part of the brief, appellants present four arguments that demonstrate that, when the Wild Free Roaming Horses and Burros Act is correctly analyzed under *Chevron*, and when this court considers whether the full force and effect regulation violates the intent of Congress expressed in that Act, the Secretary has promulgated an invalid regulation in this instance. The decision of the district court, upholding the regulation, must therefore be reversed, and appellants request that this court grant their motion for summary judgment.

A. THE FULL FORCE AND EFFECT REGULATION DELEGATES AUTHORITY TO LOCAL OFFICIALS OF THE BUREAU OF LAND MANAGEMENT THAT IS CONTRARY TO THE INTENT OF CONGRESS

Having determined that the district court erred in applying the second prong of the Chevron test in deferring to the interpretation of the agency, this court must reexamine the Wild and Free Roaming Horses and Burros Act de novo and determine whether the full force and effect regulation is a valid delegation of the powers of the Secretary of the Interior.

Under the Act, as amended, the Secretary is required to maintain "a current inventory of wild free-roaming horses and burros". 16 U.S.C. §1333(b)(1). The amended Act allows the Secretary of the Interior to effect immediate removal of horses from the range:

Where the Secretary determines ... that an overpopulation exists in 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)..

The full force and effect regulation at issue here constitutes an improper ultra-vires delegation of power to officials of the BLM to administer the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-40, using authority reserved for the Secretary.

The regulation states:

[t]he authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part.

43 C.F.R. § 4770.3(c). "Authorized officer" is defined as "any employee of the Bureau of Land Management to whom has been delegated the authority to perform the duties described herein." 43 C.F.R. § 4700.0-5.

A federal agency's power under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702, is limited to the authority delegated to that agency by Congress. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"). Regulations promulgated by an agency must be consistent with statutory provisions enacted by Congress. See *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 (1931). The full force and effect regulation permits lower-ranked officials of the BLM to exercise authority that Congress reserved for the Secretary of the Interior. "If any of the regulations go beyond what Congress can authorize, or beyond what it has authorized, those regulations are void..." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 410 (1917). This regulation, permitting an exercise of authority contrary to that intended in the Act, is therefore invalid.

The Wild Free-Roaming Horses and Burros Act was passed in 1971 after Congress found that wild horses and burros were "fast disappearing from the American scene." This legislation reflected the outpouring of constituent concern that the future of wild horses on public lands was seriously threatened by extant policies favoring livestock grazing on public lands. The Act specifically stated, "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture,

branding, harassment, or death; and to accomplish this they are to be considered...as an integral part of the natural system of the public lands." 16 U.S.C. § 1331.

Although the 1978 Public Rangelands Improvement Act amended the original Act to make protection of the range from overgrazing an important additional objective, wild horses are still to be managed "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. §1333(a). From the time of the original passage of the Act throughout its amendments, congressional intent has always included broad protection of the wild horses and burros.

The full force and effect regulation grants the BLM new powers that effectively give local officials the power to effect final decisions concerning immediate removals of horses, which, under the Act, Congress has explicitly and unambiguously restricted to the Secretary. While the Act makes clear that such drastic action as an immediate roundup can only be undertaken by the Secretary, the new regulation allows such measures to be taken by local officials of the BLM without the approval of the Secretary.

Congressional intent in the Act is clear. A comparison of the language of the Act and the full force and effect regulation demonstrates that congressional intent has been thwarted and perverted by the agency's delegation of this important responsibility to immediately remove horses to officials other than the Secretary, to whom Congress explicitly delegated this authority. 16 U.S.C.A. 1333(b)(2).

The Act delineates when actions should be taken by the Secretary alone and when actions or decision-making authority can be delegated. Congress has clearly expressed its ability and intention to differentiate between the powers that are reserved for the Secretary and those for which power may be delegated to lower level officials.

In other parts of the Act, for example, particularly the sections describing the authority to gather animals that have strayed off public lands and the authority to arrest persons who have tried to steal horses, the Act specifically speaks of delegated duties. The section of the law permitting immediate removals, however, speaks only of the Secretary's decision-making power.

When horses or burros stray off the public land, private land owners are to notify the "agent of the Secretary, who shall arrange to have the animals removed." 16 U.S.C. § 1334 (emphasis added). Individuals maintaining wild free-roaming horses and burros on their private land or land leased from the government are required to inform "the appropriate agent of the Secretary" of the number of animals so maintained. *Id.* When a person is suspected of removing a wild horse, "[a]ny employee designated by the Secretary of the Interior . . . shall have power, without warrant, to arrest any person committing [such a violation.]" 16 U.S.C. § 1338(b) (emphasis added).

Similarly, the Act provides that the capture and transportation of wild horses and burros may be supervised by a lower level official pursuant to an exercise of the full decision-making powers of the Secretary:

§ 1338a. Transportation of captured animals; procedures and prohibitions applicable.
In administering this chapter, the Secretary may use or contract for the use of helicopters or, for the purpose of transporting captured animals, motor vehicles. Such use shall be undertaken only after a public hearing and under the direct supervision of the Secretary or of a duly authorized official or employee of the Department. The provisions of section 47(a) of Title 18 shall not be applicable to such use. Such use shall be in accordance with humane procedures prescribed by the Secretary.

Thus, within a single provision of the Act, Congress differentiated between delegable and non-delegable powers. As Congress expressly and unambiguously differentiates between such powers, and

the power to immediately remove horses is reserved to the Secretary of the Interior, a final decision concerning horse removals must be made by an official having the power to render a final agency decision. The full force and effect regulation's delegation of authority to officials of the BLM who do not act with the Secretary's power to render a final agency decision, is thus contrary to the intent of Congress and therefore invalid.

The Secretary argued before the district court [Memorandum in Support of Motion for Summary Judgment at 15, A 79] that it was proper for a local BLM official to make final and immediate removal decisions. The Secretary stated:

Additionally, 43 C.F.R. § 4720.1, a regulation dealing with wild horse and burro removal, neither cited nor challenged by plaintiffs, provides that:

Upon examination of current information and a determination by the authorized officer that an excess of wild horses and burros exists, the authorized officer shall remove the excess animals immediately...

Thus, the authority to make removal decisions had been delegated to BLM officials prior to the promulgation of 43 C.F.R. § 4770.3(c), authorizing full force and effect removal decision. [sic]

The Secretary misunderstands appellants' argument. It is not their position that the Secretary must personally make every wild horse management decision, or even every removal decision. That was not the situation before the promulgation of the full force and effect regulation and it is not the situation for which appellants now argue. As the Secretary conceded to the district court, "[P]rior to the amendment of 43 C.F.R. § 4770.3(c), removal decisions that were appealed were stayed pending the outcome of the appeal before the IBLA." This was the case because the removal decisions of the district manager or other local official was not a final agency decision, because those persons did not have the authority to make a final agency decision. Therein lies the crux of the invalidity of the full force and effect regulation. The former administrative scheme conformed to the chain of authority within the agency: the present regulation does not.

A Bureau of Land Management district manager does not have the authority to render final agency decisions. Administrative law decisions rendered by the Interior Board of Land Appeals demonstrate that the IBLA recognizes that authority for certain actions can only be delegated so far down the chain of command. The presence or absence of the signature of the Secretary, Deputy Secretary or Assistant Secretary on an agency decision is the determining factor in deciding whether an agency decision is "final." See *Blue Star, Inc.*, 41 IBLA 333 (1979).

The IBLA has recognized that it has no jurisdiction to hear an administrative appeal from a final agency decision: such decisions must be challenged in court. Decisions made by lower officials are not final and appellants therefore have the administrative appeal avenues open to them. *Id.* at 335; see *Justheim Petroleum Co.*, 67 IBLA 38, 41 (1982) (when "it is not the order of the Assistant Secretary which is the subject of [an] appeal but, rather, the decision of officials of the BLM ... this Board [the IBLA] has specific jurisdiction."). Decisions made by the Secretary or one of the various Assistant Secretaries on the other hand are not appealable to the IBLA "since the full authority of the Secretary would have been exercised." *Id.* Furthermore, the IBLA has explicitly delineated the jurisdictional impact of decisions made with the authority of the Secretary as opposed to decisions made by officials of the BLM. IBLA has stated that if "it is not the order of the Assistant Secretary which is the subject of (an) appeal but, rather, the decision of officials of the BLM...this Board (the IBLA) has specific jurisdiction." *Justheim Petroleum Co.*, 67 I.B.L.A. 38, 41 (1982).

Because the regulation constitutes an impermissible delegation of the Secretary's power to render a final decision, appellants request that this court grant their motion for summary judgment permanently enjoining the BLM from placing removal decisions into full force and effect be granted.

B. THE FULL FORCE AND EFFECT REGULATION DENIES AN APPELLANT AN EFFECTIVE OPPORTUNITY TO APPEAL.

The BLM's full force and effect regulation is in violation of and subverts the intent of Congress as articulated in the Wild Free-Roaming Horses and Burros Act. It facilitates BLM's implementation of invalid wild horse Herd Management Area Plans, including the unauthorized removal of wild horses, while leaving persons who have standing to challenge such decisions without a voice before the IBLA or in the courts.

Before the passage of the full force and effect regulation, a BLM removal decision would be automatically stayed pending the filing of an appeal:

A [BLM] decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

43 C.F.R. § 4.21(e). A person challenging a BLM decision to remove horses had an administrative remedy before the roundup began. If the administrative appeal were successful, the roundup and its harmful effect on the horses would be averted.

Under the new full force and effect regulation, a decision to remove horses can be put into immediate effect and the roundup begun on the very same day. This affords the appellant challenging such a decision no real or effective remedy since the roundup may be well under way or finished before the aggrieved party even learns of the approval for the roundup and seeks a stay or a temporary restraining order.

In its comments on the full force and effect regulation, the BLM admitted that the new rule would lead to the removal of horses prior to the hearing of appeals. "[U]nless the appellant is granted a stay of the agency's decision, the excess animals would normally be removed prior to a ruling on the merits of the appeal by the Interior Board of Land Appeals." 57 Fed. Reg. 29,652 (1992) (emphasis added).

The administrative appeal route must remain open concerning decisions made by lower officials. The District Manager does not act with the authority of the Secretary of the Interior. The full force and effect regulation, however, allows a District Manager to exercise a power that the Act reserves for the Secretary or Assistant Secretary.

This exercise of power through the full force and effect clause serves to deny an interested party any effective right of appeal before the IBLA. Once a decision is in full force and effect, the round up will be completed before the aggrieved party can appeal the decision. Even if the appellant is granted a stay and wins the subsequent appeal, the damage to the horses has been done. Thus, if a lower official can put a removal decision into full force and effect, that official's decision may very well be "final" for the horses and land management area involved. Such finality of decision has been granted only to the Secretary and his direct subordinates, which do not include BLM District Managers.

The Secretary sought to persuade the district court that this reservation of power to the Secretary would make the efficient administration of the public lands impossible, as decisions would have to be made at the highest level. See Defendant's Memorandum in Support of Summary Judgment at 14 [A 78]. In fact, the BLM had a simple and effective means of swiftly implementing roundup decisions to avoid any delays occasioned by appeals from aggrieved parties. The removal decision was approved by an

official wielding the full power of the Secretary to make the final decision.

For example, the final Antelope Wild Horse Herd Management Area Plan in the Ely BLM District of Nevada was recommended by the District Manager, Kenneth Walker, on October 13, 1992, and the State Director, Billy R. Templeton, on October 14, 1992. It was approved by the Assistant Secretary, Land and Minerals Management, on October 19, 1992, which constituted the final decision of the Department of the Interior, and appeal to the IBLA was thus precluded:

The Assistant Secretary of the Interior signed the final decision for the herd management area plan and supporting capture/removal plans for the Antelope and Antelope Valley herd management areas on October 19, 1992. As such, there is no right of appeal for this decision within the Department of the Interior.

Letter of 12/1/92 from Billy R. Templeton to Gary L. Francione [A 195]. This decision was properly made according to the language of the Act and the administrative structure of the regulations. A final decision was made by an Assistant Secretary who has the power to make final decisions. See Blue Star, 41 IBLA at 335. The full force and effect regulation permitting other officials to make "final" decisions violates the Act.

The regulations of the Department of the Interior permit parties aggrieved by a wild horse removal decision made by a District Manager to appeal to the IBLA. Under these procedures, interested parties may participate in the public comment and approval process by which removal decisions are made. Comments of interested parties are addressed by the BLM and a final decision is issued regarding the proposed removal. Interested parties who have submitted comments criticizing aspects of the roundup proposal, but whose comments are not incorporated into the BLM's final roundup plan, are considered aggrieved by the roundup decision. These parties are able to challenge BLM roundup decisions, at the administrative level, by filing a notice of appeal with the Interior Board of Land Appeals.

Prior to August 5, 1992, the filing of such notice, pursuant to BLM regulation 43 C.F.R. § 4.21(e), would automatically stay the removal decision pending disposition of the appeal. The roundup would not take place until the IBLA had determined that BLM's decision to remove wild horses was necessary.

Under the amended version of this regulation, which became effective on February 19, 1993, the filing of a Notice of Appeal no longer automatically suspends the effect of the decision pending resolution of the appeal. See 58 Fed. Reg. 4939 (Jan. 19, 1993). Rather, an appellant who desires a stay must file, together with the Notice of Appeal, a petition for a stay that contains sufficient justification as to why a stay should be imposed. *Id.* The amended regulation provides that the removal decision "will not be effective during the time in which a person adversely affected may file a notice of appeal." 43 C.F.R. § 4.21(a)(1) as amended.

Under this scheme, if the aggrieved party files a Notice of Appeal and Petition for a Stay of the decision to remove wild horses, the Director or the Appeals Board must grant or deny the petition for a stay within 45 calendar days of the expiration of the time for filing the Notice of Appeal. 43 C.F.R. § 4.21(b)(4) as amended. The amended regulation makes explicit that the aggrieved party must exhaust administrative remedies in seeking to prevent a removal of wild horses but during this period of exhaustion of administrative remedies, the removal decision is not implemented. 43 C.F.R. § 4.21(c). Under this regulatory scheme, the aggrieved party is not denied judicial review at the point where the removal decision is implemented.

This scenario is in sharp contrast to that of the full force and effect regulation, effective August 5, 1992, whereby "[an] authorized officer may place in full force and effect decisions to remove wild horses or burros from public or private lands. . . Full force and effect decisions shall take effect on the date

specified, regardless of an appeal."

Under the regulatory scheme in operation at the time the full force and effect regulation went into effect, such a decision was not a final agency decision, however, because it was not signed by the Secretary or his immediate subordinates, and therefore an aggrieved party was forced to exhaust administrative remedies to challenge the decision, rather than being able to begin the speedy process of seeking a temporary restraining order and preliminary injunction in federal court.

The aggrieved party had to exhaust administrative remedies, because

[n]o decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be an agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section.

43 C.F.R. § 4.21(b).

43 C.F.R. § 4.21(a) explicitly describes how such a decision may be made final: "the Director or an Appeals Board may provide that a decision or any part of a decision shall be in full force and effect immediately." The decision of the local BLM official, therefore, was not a final agency action that might be reviewed by a court. The comments on the proposed regulation at 57 Fed. Reg. 29,652 (July 2, 1992) anticipated this scenario:

The proposed rule would in no way reduce the public's opportunity to file an appeal nor would it increase the appellant's burden of proof to show why the agency's action was incorrect. Nonetheless, unless the appellant is granted a stay of the agency's decision, the excess animals would normally be removed prior to a ruling on the merits of the appeal by the Interior Board of Land Appeals (IBLA). If, on appeal, the IBLA were to subsequently rule that a BLM removal was incorrect, there are at least two courses of action for mitigating the effects of erroneously removing animals. First, a similar number of animals from another herd area could be moved to the area where animals were removed in error. Second... future removals could be deferred until the herd size increases through normal reproduction and population levels are consistent with maintenance of a thriving natural ecological balance. Thus even if a full force and effect removal action was invalidated by the IBLA, an appellant would still receive the full benefit from filing an appeal.

The full force and effect regulation, however, effectively denies an interested party a meaningful right of appeal, because the horses will be removed before a determination is made by a reviewing administrative judge that the decision to proceed with the roundup was correct.

The Secretary asserts that a full force and effect decision made by a local official of the BLM becomes the final decision of the Secretary and is thus a "final agency action" for the purpose of seeking judicial review pursuant to the Administrative Procedure Act. He contends:

(u)nder the new rule, interested persons wishing to appeal a removal decision that is placed in full force and effect may seek a stay of the agency's decision from the IBLA, until the IBLA can make a ruling on the merits of the appeal. 57 Fed. Reg. 29651, 29652 [Exhibit A]. Also a full force and effect decision becomes the final decision of the Secretary and is considered final agency action for the purpose of seeking judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. See 43 C.F.R. § 4.21(c); Southern Utah Wilderness Alliance, 123 I.B.L.A. 13 (1993). Thus, interested persons may seek an injunction in a district court.

Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 18. [A 82] If a full force and effect decision is thus a final decision by the operation of such rules, it should be made in the first instance by an officer with the power to make final agency decisions, as is explicitly required under the Act. The possibility of judicial review, which is effectively denied because of the manner in which the BLM implements decisions, does not "rehabilitate" a full force and effect decision which was not initially made by the Secretary, as required by the Act.

The comments which follow the publication of 43 C.F.R. § 4770.3(c) clearly demonstrate that the drafters of the full force and effect provision intended full force and effect decisions to be appealed within the administrative agency before being considered "final." In the comment section the BLM stated: "We agree that the proposed rule would require filing a Petition for Stay of a removal decision [with the IBLA] if the appellant wished to stop a planned removal action prior to the IBLA's final decision on the merits of the appeal.... Nonetheless, if a Petition for Stay were denied by the IBLA the appellant could request a judicial review of the BLM's removal action in Federal Court." 57 Fed. Reg. 29,652 (July 6, 1992) (emphasis added).

"Agency action is not final if it is only 'the ruling of a subordinate official.'" *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). In order to be a final agency decision, "the action must represent a terminal, complete resolution of the case before the [agency]." *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984) (citation omitted). Also relevant is "whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *American Dairy of Evansville v. Bergland*, 627 F.2d 1252, 1260 (D.C. Cir. 1980). Since the decisions rendered by local, lower-level BLM officials are subject to review by the IBLA, judicial review by a district court would disrupt the ordinary appeals process.

The decisions to give horse removal plans full force and effect are clearly made by subordinate officials. Moreover, the decision does not constitute a "complete resolution of the case before the agency" and appealing them may be pursued following the administrative appeals procedure. ("Appeals and petitions for stay of decisions shall be filed with the IBLA." 43 C.F.R. § 4770.3(c)) (emphasis added). Because of this, appeals taken to the District Court will disrupt the administrative decision-making process. Furthermore, comments in the Federal Register regarding the full force and effect regulation specifically provide for judicial only when the IBLA denies a petition for a stay: "if a Petition for Stay were denied by the IBLA, the appellant could request a judicial review of the BLM's removal action in Federal court." 57 Fed. Reg. 29652 (July 6, 1992). Only then was the full force and effect decision proposed to be made final for judicial review purposes.

IBLA case law clearly supports the conclusion that decisions made by lower agency officials and not approved by the Secretary or an Assistant Secretary are not final. Thus, these decisions must be subject to the jurisdiction of the IBLA. The full force and effect regulation should not be allowed to authorize final decisions concerning wild horse removals except when the action is by the Secretary of the Interior or his immediate subordinates, as required by the Act.

"Where a decision has been made by an Assistant Secretary of the Interior or at his direction, that decision is not subject to review on appeal to [the IBLA] under the procedures prescribed in 43 C.F.R. Part 4 (Department Hearings and Appeals Procedures), and the [IBLA] has no jurisdiction in the matter." *Blue Star*, 41 IBLA 333, 335 (1979). When, however, "it is not the order of the Assistant Secretary which is the subject of [an] appeal but, rather, the decision of officials of the BLM ... this Board [the IBLA] has specific jurisdiction." *Justheim Petroleum Co.*, 67 IBLA 38, 41 (1982).

This is so because only the Office of Hearings and Appeals and the Assistant Secretaries have been

delegated the Secretary's authority to render decisions as final. 43 C.F.R. § 4.1 makes the Office of Hearings and Appeals, of which the IBLA is a principal component, an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

Furthermore, the IBLA has held that the authority which has been delegated to the Office of Hearings and Appeals and to its Director, for the purpose of its specific functions, is the equivalent of that delegated to each of the several Assistant Secretaries, i.e., 'all of the authority of the Secretary.' Accordingly, each has power to act with finality on matters within his or her own province. ...

Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be reviewed in the Office of Hearing and Appeals since the full authority of the Secretary has been exercised.

The Moran Corp., 120 IBLA 245 (1991) (emphasis added).

All other administrative decisions and approvals, however, do not carry the authority of the Secretary's approval and thus must be appealed to the IBLA. 43 C.F.R. § 4.410 governs which cases may be appealed to the IBLA. It states:

(a) Any party to a case who is adversely affected by a decision of an Officer of the Bureau of Land Management or of an administrative law judge shall have the right to appeal to the Board (IBLA), except--

(3) Where a decision has been approved by the Secretary[.]

Thus, all decisions not approved by the Secretary or officials authorized to represent the Secretary must be appealed to the IBLA. This conclusion is supported by the IBLA's ruling in Marathon Oil Co., 108 I.B.L.A. 177 (1989). In that case, an Assistant Secretary approved a decision by the Director of the Minerals Management Service. The IBLA ruled that this approval rendered the decision "final for the Department and [thus] the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision." Id. Consequently, if a division within the Department of the Interior makes a decision which is not approved by the Secretary or an authorized representative, that decision is not final and is subject to the specific jurisdiction of the IBLA.

If the Secretary wishes to have the full force and effect decision construed in such a manner that an aggrieved party has immediate access to federal court to seek review of a roundup decision, the language of the regulation and the intent of its drafters, is rendered nonsensical. Only the Secretary or his direct subordinates possess the authority to make final decisions without them being subject to the review of the IBLA. Only these persons, therefore, and certainly not local BLM officials, can make "full force and effect" decisions under the Act, which final agency decisions are then immediately subject to judicial review.

Moreover, the BLM in Nevada is placing decisions in full force and effect following a chronology that effectively denies an aggrieved party the opportunity to seek review of any kind, whether before an administrative body or before a federal court, at a point where the wild horses would remain on the range. Wild horse specialists and other BLM personnel are notified of the roundup decision and date so that they may be present in the field during the operation. The contractor is notified of the decision and date so that the helicopter, other roundup equipment and the contractors' team can be present at the site.

These activities take place after the District Manager makes what James Elliot, District Manager of the Carson City District of the BLM in Nevada, characterized to Anna Charlton as a "decision to make a decision." Charlton Aff. at 40. [A 286] The only interested party not informed of the impending roundup when this "decision to make a decision" has been made is the aggrieved party who would seek a stay or injunction against the roundup. The aggrieved party must await notification of the final decision, which may be made as late as the day on which the actual roundup operation is commenced. Aggrieved parties are thereby deliberately enmeshed in a procedural limbo, unaware of when an appealable decision is made, and thereby denied any possibility of a remedy that would protect the horses. The BLM District offices proffered no management concern that would justify this extreme "brinkmanship." By deliberately delaying the final decision to authorize the roundup until the contractor is prepared to conduct the capture and then notifying interested parties by regular mail, BLM officials have ensured that their decisions to remove horses are immune to challenge.

The Charlton affidavit describes several instances in which the BLM delayed making the official decision to conduct a roundup, even though they possessed, for several months, information which they claimed justified the removal of wild horses from public lands. The decisions were delayed until the contractor had been notified and been allowed time to make the necessary preparations for the commencement of the removal. BLM representatives had actually been dispatched to the roundup sites before the "decision" was actually made. The threat of repetition of such situations constitutes a threat of irreparable harm against which appellants seek a permanent injunction.

For example, the decision of the Winnemucca District Manager to remove horses in the Sonoma-Gerlach Resource Area was put into full force and effect on February 9, 1993 under 43 C.F.R. § 4770.3(c). The removal of horses from the Granite Range allotment began on February 9, 1993 and was completed by February 20, 1993. The final removal decision was mailed to interested parties. The copy of the final decision mailed to appellants' representative was postmarked February 9, 1993. This was received by certified mail eleven days later on February 20, 1993. Thus, the removal of horses from the Granite Range allotment was completed before interested parties even received notification of approval of the removal plan from which they could appeal.

Such practices foreclose the possibility that an aggrieved party can seek effective review, in any forum, of a decision to roundup horses. This is a grant of power to the BLM which: (1) has no statutory authority; (2) directly contravenes the public policy of protecting wild horses; and (3) is consequently devastating to and sometimes deadly for the wild horses. There is no effective challenge to the BLM's roundup decisions before the animals undergo the trauma of being rounded up by helicopter, transported to the adoption facility, nor before BLM undertakes the expense of a wild horse roundup.

If BLM conducts a wild horse roundup and it is subsequently determined that the horses should not have been removed, then BLM must take remedial measures in an attempt to correct its error. Wild horses are needlessly removed from the rangelands and replaced as though fungible commodities, in order to correct an administrative error. Instead, the horses ought to be respected as the "living symbols of the historic and pioneer spirit of the West." Certainly, Congressional intent was clear the Wild Horses and Burros Act required that horses be protected from "capture, branding, harassment, or death." 16 U.S.C.A. § 1331. The full force and effect regulation presently increases the likelihood of such events, rather than implementing the protection of the Act.

C. THE FULL FORCE AND EFFECT REGULATION VIOLATES THE STATUTORY REQUIREMENT THAT ALL WILD HORSE MANAGEMENT ACTIVITIES BE KEPT AT THE "MINIMUM FEASIBLE LEVEL."

The Secretary of the Interior is required to conduct all wild horse activities at the "minimal feasible

level" of management:

The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands. .
. All management activities shall be at the minimal feasible level.

16 U.S.C.A. § 1333(a).

Moreover, BLM management of wild horses must be constrained to "the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans." 43 C.F.R. § 4710.4.

The statute's minimal feasible level requirement is effectively violated when there is no proper determination of excess. Under the new regulation, no independent objective determination of excess will be possible for aggrieved parties appealing a removal decision. The ability of local BLM officials to place removal decisions in full force and effect greatly increases the possibility that unnecessary removal plans will be implemented. While an appeal is pursued, the wild horses are subjected to the stress and danger of a round up, herded by helicopters to trap sites. The complex social structures of the herd are destroyed and young or weak animals may die or be injured. Pregnant mares may abort their foals. The surviving horses are placed in crowded holding pens where many become sick from the constant dust and close confinement. The horses subsequently become susceptible to common domestic diseases to which they previously had not been exposed. The wild horses are then loaded onto trucks and brought to auction centers. Horses have died from stress during transportation to adoption sites. Many of the horses are never adopted. Others are eventually sold to slaughterhouses. These removals cause trauma and suffering to wild horses from which many never recover.

The effects of an improper removal underscore the importance of a proper determination, to which the full force and effect regulation is contrary, as a matter of law. Once the removal has been effected, no "remedy" that was contemplated in the comments on the proposed full force and regulation can prevent the unnecessary infliction of harassment and death upon wild horses whose individual well-being is ensured by the Act.

In the comment section of the proposed full force and effect regulation, it was noted that:

The proposed rule would in no way reduce the public's opportunity to file an appeal nor would it increase the plaintiff's burden of proof to show why the agency's action was incorrect. Nonetheless, unless the plaintiff is granted a stay of the agency's decision, the excess animals would normally be removed prior to a ruling on the merits of the appeal by the Interior Board of Land Appeals (IBLA).

57 Fed. Reg. 19,652 (July 6, 1992).

This very statement shows the danger of the full force and effect regulation because it virtually guarantees that management of wild horses will not be at the minimum feasible level, as required by the Act. Removal of horses without a proper determination that an "excess" of horses is present within a Herd Management Area is in violation of the Act and goes against specific Congressional intent: "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death, and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands," 43 U.S.C. 1331.

The full force and effect regulation permits a District Manager or other local BLM official to make a determination that an immediate removal of horses is required, without the approval or even knowledge of the Secretary or an official within the Department of the Interior acting with the full powers of the

Secretary. The District Manager or local official may then proceed with the removal of wild horses before an administrative judge has considered the arguments of an interested party aggrieved by the roundup decision, greatly increases the likelihood that a management decision will not be at the "minimal feasible level" as required, and that horses will be improperly removed without a proper determination of "excess."

In the supplementary information accompanying final publication of the full force and effect rule, BLM set forth two courses of action which could be taken should IBLA rule on appeal that BLM had erroneously removed wild horses. 57 Fed. Reg. 29,651-52 (July 6, 1992). BLM proposed that it could 1) relocate a similar number of animals from another herd to replace animals removed in error, and 2) future removals could be deferred until herd size returns to the proper level. *Id.*

The proposed remedial courses of action, 57 Fed. Reg. 29,651-52 (July 6, 1992) illustrate the misguided nature of BLM policy. Furthermore, neither course of action provides a satisfactory remedy. With each wild horse removal, the genetic stock of America's wild horses is irreparably altered. The relocation of animals from another herd (which would necessarily impact the herd from which those animals were removed) or the deferral of subsequent roundups cannot repair the damage done, the death and destruction of individual animals. The Act not only seeks to guarantee that wild horses thrive in acceptable numbers on public lands, but it protects the interests and well-being of individual animals. See 16 U.S.C. § 1331. This concern for the well-being of the horses, not simply for the maintenance of an acceptable total number of animals in each Herd Management Area, was completely overlooked when the regulation was passed.

Comments to the final regulation stated that [E]ven if the IBLA were to ultimately find the BLM removal to be incorrect, animals that were removed in error could either be replaced with animals from another herd area having excess animals or the herd could be allowed to increase through normal reproduction until the population again reached a thriving natural ecological balance. Consequently, no permanent or significant damage would result from failure of the IBLA to hear a Petition for Stay of a Decision prior to completion of a removal action.

57 Fed. Reg. 29,653 (July 6, 1992).

This conclusion is erroneous, as it completely disregards the concern that wild horses not be individually harassed or harmed. Protection of the horses was the Act's central intent. The full force and effect regulation jeopardizes the protection afforded to each wild horse by violating the minimum feasible level requirement of the Act.

D. THE FULL FORCE AND EFFECT REGULATION CREATES BIAS IN FAVOR OF CATTLE OVER WILD HORSES THAT VIOLATES THE ACT

The full force and effect regulation violates the Wild Free- Roaming Horses and Burros Act by creating a bias against wild horses as a matter of law that violates that intent of Congress. Faced with resource deterioration of the forage on public lands, BLM policy favors the removal of horses rather than cattle. More roundups of wild horses are completed and the well-being of more horses is put in jeopardy, with no guaranteed adoption places. The full force and effect regulation makes it more rather than less likely that wild horses will be jeopardized and harassed. BLM's bias in favor of removing horses violates Congressional concern for a "thriving natural ecological balance on the public lands" as expressed in the Act. 16 U.S.C. § 1332(f).

Examination of the regulations of grazing on public lands demonstrates this bias against horses. The BLM manages public lands pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 et seq. and the Federal

Land Policy Management Act, 43 U.S.C. § 1701 et seq. Under these statutes, the BLM issues grazing permits that authorize use of the public lands for the purpose of grazing livestock. 43 C.F.R. §§ 4100.0-5, 4130.1 et seq. The total number of animal unit months of livestock apportioned to land controlled by a permittee is referred to as the permittee's "grazing preference." 43 C.F.R. § 4100.0-5. . The regulation pertaining to an appeal of the decision of an authorized officer of the BLM concerning grazing permits or leases, and the circumstances under which a grazing decision may be placed in full force and effect clearly illustrates the BLM's bias in favor of removing horses, rather than cattle or sheep in its programs to improve the condition of the range on public lands.

A period of thirty days after receipt of the final decision is provided for filing an appeal. Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. Except where grazing use the preceding year was authorized on a temporary basis under § 4110.3-1(a) of this title, an applicant who was granted grazing use in the preceding year may continue at that level of authorized active use pending final action on the appeal. The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal.

43 C.F.R. § 4160.3(3) (emphasis added).

When faced with choices about how to manage natural resources on public lands, the BLM's implementation of 43 C.F.R. § 4770.3(c), the full force and effect regulation concerning wild horses, creates a bias in favor of removing horses when compared to the BLM's regulations governing active use reductions for livestock, 43 C.F.R. § 4160.3(c).

First, the regulations concerning grazing mandate that changes in active use in excess of 10 percent shall be implemented over a 5-year period. 43 C.F.R. § 4110.3-3. Moreover, to place an active use reduction decision into full force and effect to protect resource deterioration requires an emergency. 43 C.F.R. § 4160.3(c). No such "emergency is required to place a horse removal decision into full force and effect: a determination of "excess" will suffice. Furthermore, there is no mandatory phase in of decisions to remove more than 10 percent of the horses in a given area.

This scheme creates a preference for livestock grazing and protecting the commercial interests of grazing permittees that is contrary to the requirement of Congress explicit in the Act, 16 U.S.C. § 1333(a), that BLM manage wild horses "in a manner that is designed to achieve and maintain a thriving ecological balance on the public lands." More importantly, this preference exalts the position of livestock over that of wild horses, a result contrary to the protective status that Congress expressly accorded wild horses in the Wild Free-Roaming Horses and Burros Act.

BLM has not sought to achieve and maintain a "thriving natural ecological balance," by removing cattle or effectively restricting grazing rights simultaneously with the determination that a wild horse removal decision should be immediately implemented. The full force and effect regulation results in a situation where no time is allotted for the study intended by Congress when roundups are permitted so easily. It results in substantially less protection for the wild horses that have received so much public concern. The public interest lies in the protection of wild horses from unjustified and unnecessary removals in the process of rangeland management. For this reason, the public interest would be strongly served by the issuance of a permanent injunction against further use of the full force powers granted under this regulation. Appellants' application for a permanent injunction should be granted.

Brief in *Blake v. Babbitt*

CONCLUSION

The full force and effect regulation, 43 C.F.R. § 4770.3, is an ultra vires grant of power to lower-level officials that violates the Wild Free Roaming Horses and Burros Act. Congress reserved the authority to make a final decision to immediately remove wild horses to the Secretary and his immediate subordinates who are able to make final decisions with the full power of the Secretary. It prevents an interested party from filing an effective appeal. Moreover, the regulation exacerbates BLM's existing impermissible policy bias against horses and in favor of the grazing of livestock. It also increases the potential for management of horses above the "minimal feasible level" that is required by the Act.

The district court erred when it failed to analyze the regulation at 43 C.F.R. § 4770.3(c) as required under the Chevron test, and deferred to the interpretation of the statute given by the agency. When correctly analyzed under the Chevron framework, the regulation violates the clear and unambiguous intent of Congress as expressed in the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40.

Accordingly, for all the reasons set out in this brief, we respectfully request that this court reverse the decision of the district court. We further request that this court enter a declaratory judgment that 43 C.F.R. § 4770.3(c), as enacted, violates the Administrative Procedure Act, 5 U.S.C. §§ 553 and 702 in that it delegates to the BLM more authority than that intended by Congress. Appellants further request a judgment permanently enjoining the Secretary from applying 43 C.F.R. § 4770.3(c) as enacted; and that the Court grant other and further relief as it may deem appropriate.

Dated: May 24, 1994

Respectfully Submitted,

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Attorneys for Appellants

✿ Case 2: *Blake v. Babbitt* --wild horse round-up administrative challenge

Notice of Appeal in *Blake v. Babbitt*

BOARD OF LAND APPEALS

IN THE OFFICE OF HEARINGS AND APPEALS

OFFICE OF THE SECRETARY

MICHAEL BLAKE, TIMOTHY WILSON, :
PUBLIC LANDS RESOURCE COUNCIL, :
 :
Plaintiffs-Appellants, :
 :
 :
v. :
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 :
BRUCE BABBITT, Secretary of :
the Interior; JAMES BACA, :
Director of the Bureau of :
Land Management; BILL R. :
TEMPLETON, Nevada State Director, :
Bureau of Land Management; KENNETH :
G. WALKER, District Manager, :
Ely District, in their official :
capacities, :
 :
 :
Defendants. :

NOTICE OF APPEAL

REQUEST FOR STAY

OF AGENCY ACTION

REQUEST FOR

EXPEDITED HEARING

Notice of Appeal of Butte Wild Horse Management Area Plan

Number 4700 (NV-047), Environmental Assessment NV 040-02-22

and and Decision Record/Finding of No Significant Impact,

Ely District, June 3, 1993.

Plaintiffs-Appellants Michael Blake, residing at X9 Ranch, Vail, Arizona 85641; Timothy Wilson, residing at 505 Brown Street, Reno Nevada 89509; and Public Land Resource Council, 243 California Avenue, Suite 4, Reno, Nevada 89509 respectfully submit:

Statement of Standing

1. On December 22, 1992, Michael Blake, Timothy Wilson, and Public Lands Resource Council submitted comments opposing the proposed draft Butte Wild Horse Herd Management Area Plan circulated by Kenneth G. Walker, District Manager of the Ely District Office, on November 19, 1992. They are adversely affected by the decision to remove wild horses from the Butte Herd Management Area, approved by Kenneth G. Walker on June 3, 1993.
2. Plaintiff-Appellant Michael Blake is an award-winning author and winner of an Academy Award for his screenplay "Dances With Wolves," based on his book of the same name. Michael Blake has written and lectured widely concerning the preservation of America's wildlife, in particular wild horses. Mr. Blake became interested in the Bureau of Land Management's programs for managing of wild horses in the spring of 1991. He actively promoted the Bureau of Land Management's wild horse adoption

program and himself adopted two wild horses. As he became more familiar with the Bureau of Land Management's policies and procedures, he realized that wild horse removals and adoption programs were not an effective way to manage wild horses. In July 1992, Mr. Blake called for an independent count of Nevada's wild horses, and a moratorium on horse round-ups pending development of accurate horse population statistics. Mr. Blake provided funding for an aerial census of Nevada's wild horses conducted by plaintiff Public Lands Resource Council, and flew on a number of census flights.

3. Plaintiff-Appellant Tim Wilson is a lifelong resident of Nevada. He is a location manager for motion pictures filmed in the western United States. He is a contractor for the State of Nevada Department of Economic Development, Motion Picture and Television Division. He frequently is called upon to feature wild horses in the productions that he manages. Mr. Wilson flew on a number of plaintiff Public Lands Resource Council's wild horse census flights. He is familiar with the condition of wild horses in Nevada and with the Bureau of Land Management's policies and procedures for managing wild horses on public lands in Nevada.

4. Plaintiff-Appellant Public Lands Resource Council ("PLRC") is an association whose members include residents of Nevada. PLRC is dedicated to and one of its sole purposes is the promotion of the welfare and protection of wild horses, specifically the survival of America's remaining wild horses on public land. In 1992, PLRC conducted an aerial survey of Nevada's wild horses, following the grid system established by the Bureau of Land Management. PLRC found that the number of wild horses remaining in Nevada was drastically lower than the number estimated by the Bureau of Land Management.

5. PLRC's goals are shared by the individually named plaintiffs, Michael Blake and Tim Wilson, both of whom are members of PLRC. Mr. Blake contributed financially to the aerial survey of Nevada's wild horses. Mr. Blake and Mr. Wilson both acted as spokespersons for PLRC when publicizing PLRC's concerns about the true number of wild horses remaining in Nevada.

6. Among the members of plaintiff Public Lands Resource Council are residents of Nevada and nearby states who have in the past and have the right in the future to be users and enjoyers of the lands, wildlife, and horses affected by the regulation being challenged in this action.

Notice of Appeal

7. Pursuant to 43 C.F.R. 4.1 et seq. the Plaintiffs-Appellants hereby give notice of appeal, as specified in 43 C.F.R. 4.410 to 413, regarding the final decision of officers and agents of the Bureau of Land Management and other named defendants, approved on June 3, 1993 by Kenneth G. Walker, Ely District Manager, to gather and/or round-up wild horses from the Butte Wild Horse Management Area in the Ely District in Nevada. The decision was issued with Full Force and Effect pursuant to the regulations at 43 C.F.R. 4770.3(c) to allow for immediate removal of wild horses.

8. Also pursuant to 43 C.F.R. 4.1 et seq. the Plaintiffs-Appellants hereby give notice of appeal, as specified in 43 C.F.R. 4.410 to 413, regarding the Environmental Assessment and Finding of No Significant Impact, made on June 3, 1993.

9. Pursuant to 43 C.F.R. 4.412 the Plaintiffs-Appellants will file a separate statement of reasons within the 30-day period after this Notice of Appeal is filed.

10. Pursuant to 43 C.F.R. 4.22(e), 4.401(a), and 4.412(a) this Notice of Appeal has been made in a timely fashion.

Request for Stay of Agency Action

11. Because the Plaintiffs-Appellants will suffer irreparable and irreversible injury if the within agency

action proceeds prior to adjudication of this appeal, Plaintiffs-Appellants request that the proposed agency action be stayed pending the outcome of this matter.

12. The decision was issued with Full Force and Effect pursuant to the regulations at 43 C.F.R. 4770.3(c) to allow for immediate removal of wild horses. On April 8, 1993, Plaintiffs- Appellants filed a complaint in the United States District Court for the District of Columbia, seeking a declaratory judgment that the Full Force and Effect regulation violates the provisions of the Wild and Free-Roaming Horse and Burro Act, 16 U.S.C. 1131-1340. This action, Case Number 93-0726, is pending in the District Court before Judge Lamberth. No removal of wild horses under the regulation challenged in that action should proceed until the District Court has ruled on the validity of the challenged regulation.

Request for Expedited Hearing

13. Plaintiffs-Appellants hereby request an expedited hearing in this matter, as Plaintiffs-Appellants will present evidence bearing on the material issues in this matter.

Dated: June 15, 1993 Respectfully Submitted,

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Attorney for Plaintiffs/Appellants

**Reasons in Support of Notice of Appeal in
*Blake v. Babbitt***

**BOARD OF LAND APPEALS
IN THE OFFICE OF HEARINGS AND APPEALS
OFFICE OF THE SECRETARY**

MICHAEL BLAKE, TIMOTHY WILSON, :
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BRUCE BABBITT, Secretary of :
the Interior; JAMES BACA, :
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Land Management; BILL R. :
TEMPLETON, Nevada State Director, :

Bureau of Land Management; KENNETH:
G. WALKER, District Manager, :
Ely District, in their official :
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:
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**Statement of Reasons in Support of Notice of Appeal
of Butte Wild Horse Management Area Plan
Number 4700 (NV-047), Environmental Assessment NV 040-02-22
and Decision Record/Finding of No Significant Impact,
Ely District, June 3, 1993.**

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1. On December 22, 1992, Michael Blake, Timothy Wilson, and Public Lands Resource Council submitted comments opposing the proposed draft Butte Wild Horse Herd Management Area Plan circulated by Kenneth G. Walker, District Manager of the Ely District Office, on November 19, 1992. They are adversely affected by the decision to approve the plan ["Plan"] to remove wild horses from the Butte Herd Management Area, approved by Kenneth G. Walker on June 3, 1993. On June 15, 1993, they filed a Notice of Appeal of this decision. They submit this Statement of Reasons to support that Notice of Appeal.
2. Plaintiff-Appellant Michael Blake is an award-winning author and winner of an Academy Award for his screenplay "Dances With Wolves," based on his book of the same name. Michael Blake has written and lectured widely concerning the preservation of America's wildlife, in particular wild horses. Mr. Blake became interested in the Bureau of Land Management's programs for managing of wild horses in the spring of 1991. He actively promoted the Bureau of Land Management's wild horse adoption program and himself adopted two wild horses. As he became more familiar with the Bureau of Land Management's policies and procedures, he realized that wild horse removals and adoption programs were not an effective way to manage wild horses. In July 1992, Mr. Blake called for an independent count of Nevada's wild horses, and a moratorium on horse round-ups pending development of accurate horse population statistics. Mr. Blake provided funding for an aerial census of Nevada's wild horses conducted by plaintiff Public Lands Resource Council..
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system established by the Bureau of Land Management. PLRC found that the number of wild horses remaining in Nevada was drastically lower than the number estimated by the Bureau of Land Management.

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6. Among the members of plaintiff Public Lands Resource Council are residents of Nevada and nearby states who have in the past and have the right in the future to be users and enjoyers of the lands, wildlife, and horses affected by the regulation being challenged in this action.

Statement of Reasons

7. Pursuant to 43 C.F.R. 4.1 et seq. the Plaintiffs- Appellants hereby submit their Statement of Reasons in support of their Notice of Appeal, as specified in 43 C.F.R. 4.412. This Appeal concerns the final decision of officers and agents of the Bureau of Land Management and other named defendants, approved on June 3, 1993 by Kenneth G. Walker, Ely District Manager, to gather and/or round-up wild horses from the Butte Wild Horse Management Area in the Ely District in Nevada. The decision was issued with Full Force and Effect pursuant to the regulations at 43 C.F.R. 4770.3(c) to allow for immediate removal of wild horses.

8. Also pursuant to 43 C.F.R. 4.1 et seq. the Plaintiffs-Appellants submit a Statement of Reasons, as specified in 43 C.F.R. 4.412, regarding the Environmental Assessment and Finding of No Significant Impact, made on June 3, 1993.

9. Pursuant to 43 C.F.R. 4.412(a) this Statement of Reasons has been submitted in a timely fashion.

10. The proposed round-up plan must be rejected because the Bureau of Land Management lacks the statutory authority to conduct a round-up of horses unless it determines that there are "excess" horses in a Herd Management Area. All BLM management activities under the Wild, Free-Roaming Horse and Burro Act, "shall be at the minimal feasible level," 16 U.S.C. 1333(a), and must be "designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.*

11. The Horse Management Area Plan reveals that the BLM does not have sufficient information to determine that there are an excess of horses, and in the absence of such a determination, the BLM lacks authority to proceed with the proposed round-up. The BLM admitted in its draft HMAP at 19-20, that [a]t present, the AML within the Butte HMA is not fully established... Based on the most recent census there will be an estimated AML of 150 wild horses within the HMA on all allotments within the HMA, including Medicine Butte and those with evaluations not yet complete. The entire HMA is scheduled to be evaluated by the end of the fiscal year 1994 and at that time a total HMA AML will be established.

The final Plan as approved concedes that, as yet, the Appropriate Management Level ["AML"] "within the Butte HMA is not fully established." (Plan at 19). It states that the "AML determined through allotment evaluations will provide the midpoint for a +/- 15% allowable herd fluctuation. Removals will be to the lower level on evaluated allotments only." (*Id.*) Although BLM anticipates establishing an AML for the Herd Management Area by 1994, interested parties will have no opportunity to comment on the overall management practices established for the entire HMA once the total HMA AML is established, because the "HMAP will not be reviewed by the public each time a future FMUD is issued establishing an AML within an allotment. This plan defines the management practices within the HMA regardless of AML." The contention that it permitted to place a management decision into full force

and effect, when BLM concedes that it does not have crucial information concerning the herd that it proposes to thus "manage," contravenes the restrictions placed on BLM activities by the Wild and Free Roaming Horses and Burros Act.

12. The Rationale stated by Ely District Manager Kenneth G. Walker states:

The decision to implement this HMAP will allow for effective multiple use management in a coordinated manner within this area. Better resource management will be implemented through the activity plan and will ultimately result in better distribution of the wild horses within the HMA, improved habitat conditions, more uniform utilization of the forage resource, maintenance of a thriving ecological balance, and optimum wild horse use based on a sustained yield of the forage resource.

Unfortunately, despite the District Manager's hortatory statement, the Plan itself establishes that BLM does not have the information to manage in a manner which is likely to attain such goals. For example, "[c]urrently no Wildlife Habitat Management Plans (HMP) or livestock-grazing Allotment Management Plans exist within the confines of the Butte HMA. Future AMPs and HMPs will be written upon completion of the evaluation process." Plan at 15. In the absence of a wild horse AML and management plans for wildlife and livestock, there is no possibility that the BLM can fulfill its defined objective "to maintain and manage the wild free-roaming horse population as a recognized component of the public land environment, in balance with its habitat and other resource use." *Id.* at 18. Such management practices are explicitly required by the Wild and Free Roaming Horses and Burros Act.

13. In the absence of information about the Butte herd, the BLM proposes, *id.* at 10, to rely on data gathered from neighboring herds:

Population demographics decisions made concerning the Butte HMA will be dependent on information obtained from previous Buck and Bald gathers. Buck and Bald information is being used since there is presently not population information available for the Butte HMA, and these two herds are closely related and interact along their borders regularly.

Without such important demographical information, there is no way for the BLM to establish that the removal of horses under this management plan will achieve the stated goal of attaining a thriving ecological balance, with conservation of forage resources. There is no means of ensuring, or even surmising, that the proposed removal will relieve grazing pressure as wished, because BLM lacks information about events that assertedly caused a massive and highly unusual increase in the size of the Butte herd.

14. The BLM estimated that the Butte herd has increased in size considerably over the past few years. Again, the BLM proposes to remove horses in the face of lack of data and supported only by supposition:

Several possibilities may exist to explain this [increase]. Increased mining activity within the Buck and Bald mountains may have pushed horses from that area eastward to the Pony Springs area. Population increases and the 1986 and 1989 gathers within the Buck and Bald HMA in combination with increased mining activity may have forced increased immigration into the Butte HMA. Whatever the reason(s), the Butte herd increased 88% between the 1990 and 1991 census. (Plan at 6)

15. The BLM conclusion that "whatever the reason(s)" the herd increased at four times the usual reproductive rate for wild horses, lacks the requisite factual determinations upon which herd management must be based.

16. The proposed round-up plan must be rejected because it is based on extremely inaccurate estimates of the size of the herds in the areas affected by the round-up proposal. Public Lands Resource Council

conducted an aerial survey and count of the wild horses in Nevada. In conducting this count, the survey followed the BLM's own herd management areas. To ensure the accuracy of the count, one area was double counted. The difference between the two counts was found to be insignificant. Public Lands Resource Council discovered that the number of horses that were observed fell far below the number of horses estimated to exist by the BLM, on which figure BLM relied in its herd management plans. For example, BLM estimated that the Butte herd has 505 horses. Public Lands Resource Council counted only 143. If the appropriate AML is 150 for the Butte herd, there is no excess of horses that would justify the proposed round-up. The discrepancy between the two counts of this herd indicates a drastic failure of BLM herd census techniques, rendering the BLM incapable of accurately determining population numbers or reproductive rates. The proposal that is based on this inaccurate data must be rejected.

17. BLM has not established that there is overutilization of the forage resources in the Butte herd management area that would justify removal of any horses from that area. The HMAP itself concedes that BLM does not presently have the current information to address the situation where "[g]razing conflicts between livestock and wild horses is the major issue within the Butte HMA." (Plan at 15.) BLM lacks the data on which to comply with its Washington Office "direction to evaluate range conditions and allocate forage for livestock, wildlife, and wild horses to achieve a thriving natural ecological balance among all multiple users." *Id.* As stated *supra*, this evaluation is not presented in the Plan and does not form the requisite basis for the plan to remove wild horses. The Plan does not establish that overuse of key species of vegetation is taking place, that it is attributable to grazing by wild horses, or that the planned removal will make improvements in the ecological conditions within the HMA.

18. In the face of such grave deficiencies of monitoring data on which the determination that an excess of horses exists must be based, the BLM's unjustified and imprudent plan to ameliorate whatever depredation of the range may exist by removing approximately 450 wild horses from the range is arbitrary and capricious.

19. As the resource planning management process proposed by the BLM is based on monitoring information that either has not been presented or is so fundamentally flawed, resulting herd management plans, capture plans and associated environmental analyses are invalid. As interested parties, we assert that the information upon which the round up proposal is made is so inaccurate that it cannot form the basis of a proper exercise of the power to manage the wild horse herds in accordance with the process set out in 43 C.F.R. section 4700 et seq.

20. No wild horses should be removed, in this or any other proposed round-up until a comprehensive environmental impact statement is prepared to conform with the requirements of NEPA, which mandates that such an EIS be prepared for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

21. The wild horse removal plan should be rejected because BLM has failed to consider an alternative plan that would keep management activities at the minimal feasible level. Moreover, because of the egregious miscalculations and lack of statutory authority on which this proposed round-up is based, and the failure to prepare an environmental impact statement for this action, the round-up proposal should be rejected, and any further BLM herd management activity stayed, as BLM has no authority to remove wild horses without proper data and justification.

22. Because the Plaintiffs-Appellants will suffer irreparable and irreversible injury if the within agency action proceeds prior to adjudication of this appeal, Plaintiffs-Appellants request that the proposed agency action be stayed pending the outcome of this matter. As stated in this Statement of Reasons, this decision to remove horses contravenes the requirements of the Wild and Free-Roaming Horses and

Burros Act. The Plan has not established that there is an emergency in the Butte HMA that would cause harm to the BLM if this decision was not immediately implemented. The unauthorized removal of horses is, however, a violation of the Wild and Free-Roaming Horses and Burros Act that would cause immediate and irreparable harm to the Plaintiffs-Appellants.

23. The District Manager's decision was placed in Full Force and Effect pursuant to the regulations at 43 C.F.R. 4770.3(c) to allow for immediate removal of wild horses. On April 8, 1993, Plaintiffs-Appellants filed a complaint in the United States District Court for the District of Columbia, seeking a declaratory judgment that the Full Force and Effect regulation violates the provisions of the Wild and Free-Roaming Horse and Burro Act, 16 U.S.C. 1131-1340. This action, Case Number 93-0726, is pending in the District Court before Judge Lamberth. Both sides are preparing Motions for Summary Judgment in response to Judge Lamberth's instruction on July 12, 1993. No removal of wild horses under the regulation challenged in that action should proceed until the District Court has ruled on the validity of the challenged regulation.

24. Plaintiffs-Appellants hereby repeat their request for an expedited hearing in this matter, as Plaintiffs-Appellants will present evidence bearing on the material issues in this matter.

Dated: June 14, 1993

Respectfully Submitted,

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