

Committee on Resources

Subcommittee on National Parks & Public Lands

Testimony

**Statement of the Animal Protection Institute
Field Oversight Hearing
House Subcommittee on National Parks and Public Lands
Reno, Nevada, July 13, 1998**

. . . [T]he wild free-roaming horses and burros presently inhabiting the public lands of the United States are living symbols of the historic pioneer spirit of the West *and as such are considered a national esthetic resource.*⁽¹⁾

INTRODUCTION

Thank you for inviting me to testify before the Subcommittee this morning. I represent the Animal Protection Institute (API). API is a not-for-profit⁽²⁾ animal advocacy organization with over 80,000 members nationwide. For more than 20 years, API has worked to preserve and protect wild and free-roaming horses and burros--and their habitat.

This hearing focuses on range issues and problems with the Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331, *et seq.* (Act). Indeed, I believe there are several problems with how the Bureau of Land Management interprets and administers the Act. I will concentrate, however, on API's most critical concern: The BLM's current policy on roundups is rapidly extinguishing populations of wild horses and burros throughout the country.⁽³⁾

To say that API and the BLM have a contentious history would be charitable. API has appealed scores of BLM decisions to the Interior Board of Land Appeals; and has twice challenged the Agency in federal district court.⁽⁴⁾

While I may criticize the BLM today, I am not here to deliver a jeremiad on "animal rights." Yes, I believe animals are entitled to fundamental rights. But I also know that we inhabit a legal universe that is hardly sympathetic to animals, much less to any notion of animal rights. Yet, we have a long history in this country of using the law to protect wild horses and burros.

History

In 1959, at the behest of the late Velma Johnston of Reno, Nevada, Congress passed the first law intended to protect wild horses and burros. 18 U.S.C. § 47. I am told that Mrs. Johnston adopted the name "Wild Horse Annie" after she overheard someone call her that during a congressional hearing in Washington, DC. Perhaps it was this sense of humor that helped to carry Mrs. Johnston through the following decades in her quest to protect these animals.

In the late 1960's, Wild Horse Annie's efforts led thousands of school children across the country to write to members of Congress urging them to protect wild horses and burros. Nicknames notwithstanding, by the early seventies, Wild Horse Annie had rallied the support of both humane associations and horse protection groups, culminating in the passage of the Wild Horses and Burros Act, 16 U.S.C. § 1331, *et seq.*, in 1971.

If we look at the legislative history of the Act, we see that Congress unequivocally intended these

animals to be protected *and* preserved:

. . . . [T]he wild free-roaming horses and burros presently inhabiting the public lands of the United States are living symbols of the historic pioneer spirit of the West and as such are considered a national esthetic resource.⁽⁵⁾

As I said earlier, I am not here to lament the state of animal rights. Rather, I am here to discuss the state of the law and what we might do to save these "living symbols" of our own "rugged independence and . . . pioneer heritage."⁽⁶⁾ I urge you to remember what Congress said so eloquently nearly three decades ago:

[W]ild free-roaming horses and burros . . . belong to no one individual. They belong to all the American people.⁽⁷⁾

" Self-Sustaining Populations"?

When Congress passed the Wild Horses and Burros Act, 16 U.S.C. § 1331, *et seq.*, it declared:

. . . 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 (emphasis added).

The regulations implementing the Act amplify this protection:

(a) Wild horses and burros *shall* be managed as *self-sustaining* populations of healthy animals in balance with other uses and the productive capacity of their habitat.

43 C.F.R. § 4700.0-6 (emphasis added).

There is ample evidence today that the BLM is failing to manage herd areas⁽⁸⁾ as "self-sustaining populations of healthy animals." Nowhere is this more apparent than in the BLM's own report to Congress. The 1995 report, the most recent available, describes numerous herd areas with "Appropriate Management Levels" (AML's) of zero and many areas with AML's that will not sustain healthy populations.⁽⁹⁾

In Nevada, home of the BLM's Wild Horse and Burro Program Office, the Agency has announced that it will extinguish the following ten herd areas:

Armargosa Valley	Last Chance
Antelope Valley	Muddy Mountain
Ash Meadows	Selenite Range
Eugene Mountains	Toano
Humboldt	Trinity Range ⁽¹⁰⁾

One Nevada district court case strongly suggests that the BLM is not authorized to extinguish wild horse populations. *American Horse Protection Ass'n v. Frizzell*, 403 F. Supp. 1206, 1219 (D.C. Nev. 1975). At issue in *Frizzell* was a BLM roundup of 400 wild horses in Stone Cabin Valley, Nevada. The AHPA challenged the roundup under the Wild Horses and Burros Act, 16 U.S.C. § 1331 *et seq.*; the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; (NEPA); and the Administrative

Procedure Act, 5 U.S.C. § 701, *et seq.*

Although the court upheld the roundup, it allowed that "[it] may have been a different case had [AHPA] been able to satisfy the Court that the proposed roundup would extinguish the wild horse population in Stone Cabin Valley." *Id.* Of significance to the court was the fact that some 600 horses remained in the Valley, thereby preserving "human[,] cultural, historical, educational, and scientific interests." *Id.*

The so-called "benchmark test" is whether wild horse population levels will achieve a "thriving ecological balance" on the public lands within the meaning of § 1333(a)⁽¹¹⁾ of the Act. *Dahl v. Clark*, 600 F. Supp. 585, 594 (D.C. Nev. 1984).

Livestock Grazing on Public Lands

Livestock grazing is authorized on approximately 159 million acres, or about 90 percent, of the 177 million acres of BLM lands in the Western United States.⁽¹²⁾ Despite the enormous amount of public lands devoted to livestock grazing, the public lands produce only about two percent of the feed consumed by beef cattle in the United States.⁽¹³⁾

Given the low productivity of these arid lands, why does the BLM allow domestic livestock to degrade so much of this land? Moreover, why does the BLM routinely make wild horses the scapegoat for environmental degradation? Federal courts acknowledge this paradox:

The Nation's public rangelands have been deteriorating for years and, for the most part, are not improving. These vast lands need to be protected through better management by the Bureau of Land Management. Deterioration can be attributed principally to poorly managed grazing by livestock--horses, cattle, sheep, and goats. *Livestock have been permitted to graze on public rangelands year after year without adequate regard to the detrimental effect on range vegetation.*

Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 857 (D.C. Cal. 1985) (citing 1977 General Accounting Office report) (emphasis added).

" Multiple Use"?

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, *et seq.* ("FLPMA"), provides that the Secretary of the Interior . . .

. . . *shall--*

(1) use and observe the principals of *multiple use* and sustained yield set forth in this and other applicable law...

43 U.S.C. § 1712(c)(1) (emphasis added).

"Multiple use" is defined as:

. . . [T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; *the use of some land for less than all of the resources*; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or

the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added).

Central to the land-use planning process is the "Allotment Management Plan." FLPMA defines an AMP as:

. . . a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands . . . in the eleven contiguous Western States and which: prescribes the manner in, and extent to which[,] *livestock operations* will be conducted in order to meet the *multiple-use*, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned . . .

43 U.S.C § 1702(k) (emphasis added).

Under FLPMA's mandate, the BLM cannot give livestock grazing any priority of use. One case vindicating this principal is *National Wildlife Fed'n v. Bureau of Land Management*, No. UT-06-91+1 (U.S. Dept. of the Interior, Office of Hearings and Appeals, Hearings Div.), *aff'd* August 1997.

In this case, the Interior Board of Land Appeals affirmed an administrative law judge's decision holding that the BLM had violated FLPMA by authorizing cattle grazing on a small, but sensitive, portion of a grazing allotment in southeastern Utah. The IBLA ruled that the BLM must balance harms against benefits in authorizing livestock grazing.

Despite the amendments to the grazing regulations in 1995,⁽¹⁴⁾ and the holding in this case, the BLM has yet to implement any changes in the regulations that would require it to evaluate the pros and cons of livestock grazing.⁽¹⁵⁾

The National Environmental Policy Act

Whether all wild horse and burro roundups withstand the scrutiny of NEPA, 42 U.S.C. § 4321, *et seq.*, is yet another question. Many legal challenges to BLM roundups have invoked NEPA. *See e.g., American Horse Protection Ass'n v. Andrus*, 460 F. Supp. 880 (D.C. Nev. 1978), *aff'd in part, vacated in part, and remanded*, 608 F.2d 811 (9th Cir. 1979); *Frizzell*, 403 F. Supp. 1206 (D.C. Nev. 1975).

In *Frizzell*, the court outlined what the BLM can and can't do under NEPA:

This Court is not saying that the BLM is free to round up wild horses whenever a particular range has an overgrazing problem. Nor is the Court saying that every time the removal of wild horses will have a limited, slightly positive effect on the environment of the range, the BLM can proceed to remove a certain number of those horses . . . *In other words, this opinion should not be read as giving the BLM a blank check to order the removal of wild horses without filing an impact statement whenever it determines that a range is overgrazed.*

Id. at 1219+1220 (emphasis added).

CONCLUSION

The BLM is actively extinguishing wild horse and burro populations in violation of the Wild Horses and Burros Act, 16 U.S.C. § 1331, *et seq.* It remains to be seen whether, in carrying out this policy, the BLM is complying with other applicable laws.⁽¹⁶⁾ Where is the so-called "blank check" that permits this?

If the BLM would seriously weigh the effects of livestock grazing in its land-use decisions, it would be free of the Sisyphean burden of endless wild horse roundups. With public lands producing so little of

the feed consumed by beef cattle, is such a shift in policy really so politically impossible?

An estimated 6,000 horses are currently in holding facilities awaiting adoption. The BLM spends approximately \$50,000 each week to care for these animals. Moreover, due to negative publicity on the adoption program, the demand for wild horses is down. As a matter of simple economics, rounding up wild horses is costing the BLM--and the taxpayer--millions of dollars every year.

For all of these reasons, API recommends that the BLM decrease the frequency of wild horse roundups, (17) as well as the number animals removed in each roundup. If roundups *must* continue, API asks that the BLM adhere to the following stipulations:

Wild horse removals must not eliminate individual herd areas or lower the number of animals to such a level that threatens the long-term survival of the herd;

The BLM must take into account the adoptability of the wild horses removed, as well as the impact of the removals on the remaining family and bachelor bands;

The BLM must not schedule roundups during periods when gathering would place undue stress on foals and pregnant mares; and

The BLM must consider decreases in wild horse populations as part of a comprehensive plan to improve range conditions, which must be accompanied by equivalent reductions in the number of grazing livestock.

The BLM's current policy on wild horse removals violates the very Act it is charged with administering. Until this policy changes, API urges Congress not to appropriate funding for wild horse removals in 1999. The funding that would otherwise be dedicated to such removals should be allocated exclusively towards the management and improvement of the public rangelands.

If, as API believes, the Wild Horses and Burros Act protects these animals from extinction, API is willing to work with the BLM to achieve this goal. If the Wild Horses and Burros Act does *not* protect these animals, then Congress must amend the Act or propose new laws that *will* save these "living symbols of the historic and pioneer spirit of the West."

1. S. Rep. No. 242, 92nd Cong., 1st Sess. 2149 (1971).

2. API is a California public benefit corporation organized under § 501(c)(3) of the Internal Revenue Code. 26 U.S.C. § 501(c)(3).

3. U.S. Department of the Interior, Bureau of Land Management, 10th and 11th Report to Congress on the Administration of the Wild Free-Roaming Horses and Burros Act for Fiscal Years 1992 - 1995.

4. *See e.g., Animal Protection Institute of America, et al. v. Babbitt, et al.*, CV-R-85-365-HDM (settled October 15, 1997); *Animal Protection Institute of America v. Hodel*, 671 F. Supp. 695 (D. Nev. 1987), *aff'd*, 860 F.2d 920 (9th Cir. 1988).

5. *See supra* note 1.

6. *Id.*

7. *Id.*

8. A "herd area" means "the geographic area identified as having been used by a herd as its habitat in 1971. 43 C.F.R. § 4700.0-5(d).

9. *See supra* note 3.

10. *Id.* at 20-24. In response to API's recent request under the Freedom of Information Act, 5 U.S.C. § 552, the BLM stated that all but two of the ten herd areas, discussed *supra*, have AML's of zero. The BLM further stated that the Antelope, Eugene Mountains, Humboldt, Selenite, Trinity Range, and Toano herd areas are not managed for horses or burros because of the "checkerboard land ownership pattern." Although the BLM indicated that the Armagosa, Ash Meadows, Last Chance, and Muddy Mountains herd areas are not managed for horses or burros, it gave no reason for this. With respect to the two herd areas not yet scheduled to be zeroed-out, i.e., Last Chance and Muddy Mountain, the BLM stated that it has not yet established AML's for these areas. Letter of June 2, 1998, from Jean Rivers-Council, Associate State Director, Nevada,

BLM, to Sheila Hughes Rodriguez.

11. Section 1333(a) provides " . . . 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 . . . " 16 U.S.C. § 1333(a).

12. Joseph M. Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 Environmental Law Rev. 703 (1995) (citing BLM statistics in Rangeland Reform 94 Draft Environmental Impact Statement at 3-5 (1994)).

13. *Id.* at 704.

14. 60 Fed. Reg. 9894 (1995).

15. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 Public Land and Resources L. Rev. 25, 26 (1996); personal conversation with Joseph Feller, Professor of Law at Arizona State University.

16. < See e.g., NEPA; FLPMA; the Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901, *et seq*; the Administrative Procedure Act, 7 U.S.C. § 706(2)(A).

17. For reasons beyond the scope of this statement, API is not calling for a reduction in the number of wild burros removed from the public lands.

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