

Interior Board of Land Appeals
Office of Hearings and Appeals
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Arlington, VA 22203

October 10, 2007

RE: Docket #IBLA 2006-292
High Rock Herd Management

I would like to submit additional material for the Interior Board of Land Appeals consideration and review regarding the determination made by the Bureau of Land Managements Surprise Field Office for the removal of wild horses within High Rock Herd Management Area (HMA) in September 2006.

The Appeal of the Surprise Field Offices administrations of the wild horse population in the High Rock HMA addressed multiple issues of concern and questions regarding proper management and legal compliance within the area and the implementation of wild horse removals conducted within the HMA.

The original focus of the Appeal was based on rangeland monitoring data that indicated wild horse populations were not excessive, even at population up to 600% higher than the established Appropriate Management Level (AML).

Further investigations revealed that little current monitoring of rangeland resources had been done within the High Rock HMA. This in turn led to questions regarding the appropriateness of the established AML or the compliance of specific legal conditions that must be satisfied in determining that AML, that without that compliance and adherence to those specific conditions, the basis for BLMs authority to remove "excess" wild horse populations becomes invalid.

One of the primary questions and analysis of the established appropriate management level of the High Rock wild horse population centered around the application of two competing definitions regarding the term "Range" as defined by Congress and the Wild Free-Roaming Horse and Burro Act of 1971, (PL 92-195).

Additional documentation has been found that supports the focus of this Appeal;

- a) That designated wild horse and burro “appropriate management levels” must be established based on specific, lawful mandates that satisfy the *primary intent* of the 1971 Wild Free-Roaming Horse and Burro Act before populations can be deemed excessive and removed and,
- b) The clear definition of “Range” as set forth by Congress, which required the Secretary to administer the areas originally identified as wild horse and burro habitat to be principally devoted for the protection and preservation of wild horses and burros and their federally designated habitats, is being circumvented through a second applied definition that is rendering Public Law 92-195 meaningless and absurd.

Because of the *primary intent* of the Wild Free Roaming Horse and Burro Act was to protect and preserve wild horses, burros and their habitat, management actions within these lawfully designated areas that have been legally withdrawn and reserved for that purpose must be administered towards that end, which includes appropriate management levels established that adhere to the legal mandates that were set forth in order to satisfy that primary intent.

As has already been argued, the standards and laws established through the Federal Lands Management Policy Act and the Public Range Improvement Acts were intended to be applied to *all public lands* and resource management for comprehensive and uniformed management strategies to preserve resource integrity; but specific land use designations and reservations required additional considerations and management implementation to support and uphold the primary purpose and intent of withdrawing those designated public lands for public use.

The designation of wild horse and burro habitat and their populations to be preserved in perpetuity was one of these special reservations and as such, must be administered and managed according to this primary intent and reason for establishing the law.

Failure to acknowledge or adhere to this purpose renders these designated reservations and legal withdrawals of public lands as well as the laws that established them, meaningless.

As such, the following information is provided to support the fact that the primary intent and purpose of Public Law 92-195, The Wild Free-Roaming Horse and Burro Act, was to devote all of the public lands identified at the passage of the Act to be reserved and managed principally, though not exclusively, for the protection and preservation of wild horses and burros, the critical habitat requirements necessary to fulfill this purpose and that population management objectives as expressed as AMLs must be established to support self-sustaining wild populations within the Herd Management Areas before additional resource allocations for other multiple-use applications can be considered.

1. The first of these that support the primary intent of Public Law 92-195 is to place wild horse and burro populations and their habitat requirements as the principal consideration in management decisions comes from BLMs Code of Federal Regulations, Title 43, Part 4700-Protection, Management, and Control of Wild Free-Roaming Horses and Burros:

§4710.5 Closure to livestock grazing.

- (a) If necessary to provide habitat for wild horses or burros, to implement herd management actions, or to protect wild horses or burros from disease, harassment or injury, the authorized officer may close appropriate areas of the public lands to grazing use by all or a particular kind of livestock.
- (b) All public lands inhabited by wild horses or burros shall be closed to grazing under permit or lease by domestic horses and burros.

This regulation and policy clearly illustrates that the original intent and primary objectives in regards to wild horse and burro management and their habitat requirements take precedence over livestock grazing within areas reserved for wild horse and burro protection and preservation.

This regulation supports the Congressional definition of “Range” as supplied in Public Law 92-195, that wild horses and burros are to be the principal consideration within their federally designated and protected habitat on public lands.

2. The second document that supports the Congressional definition of “Range” as defined in Public Law 92-195, that *all* territory originally identified in the Act reserved for wild horse and burro preservation and was to be principally devoted to their welfare is a legal opinion issued in 1998 by Nevada’s Attorney General, AGO 98-16.

The Attorney General’s Opinion was issued in response to a question regarding the authority and jurisdiction of the Nevada Commission for the Preservation of Wild Horses as established in Nevada Revised Statutes (NRS) governing the Commission’s duties.

The question arose as a result of Nevada Revised Statutes defining the Commission’s jurisdiction and authority for involvement in wild horse preservation within Nevada as being limited to “wild horse sanctuaries”.

The focus of Attorney General’s opinion was on the definition that stated the Commission’s primary duties are “*to preserve viable herds of wild horses on public lands designated by the Secretary of the Interior as sanctuaries for the protection of wild horses and burros pursuant to 16 U.S.C.S. 1333 (a)*”

The Wild Free-Roaming Horse and Burro Act provides a second definition of “Range” outside the Congressionally established definition of “Range” under Definitions in the Act, which also cites wild horse and burro *sanctuaries* as “Ranges” to be devoted principally but not exclusively to wild horse and burro protection and preservation.

The resulting confusion from the application of two definitions or meanings to “Range” as currently established in the Act has obviously necessitated the need for a single interpretation and definition to be rendered and in this instance, required the Opinion of the Nevada Attorney General to clarify authority and jurisdiction regarding the preservation and protection of wild horse and burro populations and their federally protected habitat within Nevada.

The historical evidence points to the commonly understood definition of “Range” as interpreted to mean all original territories as identified by Congress in the 1971 Act, as indicated by the Nevada Legislatures definition of Sanctuaries or “Ranges” set forth in the Nevada Revised Statutes governing the jurisdiction and duties of wild horse and burro preservation and management administered through the Nevada Commission for the Preservation of Wild Horses in conjunction with the Bureau of Land Management.

The point of contention that required clarification was Nevada had no wild horse sanctuaries or “specially designated ranges” to be devoted principally towards wild horse and burro preservation. In the Attorney General’s Opinion, this lack of sanctuaries rendered the Commission obsolete if the plain meaning of sanctuaries was applied towards wild horse preservation.

As such, the Attorney General concluded that if the plain meaning of sanctuaries were embraced, the result would be absurd and render many other statutes meaningless and as such, the plain meaning of sanctuaries was inappropriate because a reasonable interpretation was available that avoided absurd results.

The Attorney Generals Opinion stated that if the Commission’s primary duties were limited to sanctuaries, the Commission could not fulfill its directives (of wild horse preservation and management) and its authority would become meaningless.

Issued in 1998, the Attorney Generals Opinion is listed as:

AGO 98-16 ANIMALS: CONSERVATION & NATURAL RESOURCES: WILD HORSES

“Amendment to Wild Horse Commission’s primary duties should be interpreted to mean the Commission should focus on the preservation of wild horses on federally designated wild horse management areas.”

It is submitted to the Court that this reasonable definition and the arguments presented within the Attorney General's Opinion of directives and interpretations of meanings holds true for all wild horse and burro territories, (now known as Herd Areas, Herd Management Areas, and Wild Horse Territories) and that the failure by the Bureau of Land Management and the United States Forest Service to acknowledge these habitats being set aside to be principally devoted towards wild horse and burro welfare and preservation renders the intent of the Wild Free-Roaming Horse and Burro Act and the majority of its regulations and policies, meaningless and absurd.

It is also submitted that the application of the absurd definition currently being implemented by BLM and USFS versus the reasonable one originally intended and defined by Congress, as well as being supported by AGO 98-16, has yielded absurd results that are contrary to both the spirit and intent of Public Law 92-195; the preservation and protection of free-roaming wild horses and burros and their federally protected habitat to insure their survival and continued presence for future generations.

Since the passage of the Act, according to BLM's 2007 National Statistics, over 19 million acres of originally identified Herd Area acreage, or 36% has been completely eliminated from wild horse and burro preservation through the establishment of smaller boundaries now designated as Herd Management Areas.

This loss of habitat could be significantly greater than the 19 million acres currently being reported because there are several instances where BLM just changes the originally identified Herd Area acres in their statistics.

Additionally, a link to the United States Geological Survey provided on BLM's National Wild Horse and Burro website cites 88 million acres of identified wild horse and burro habitat being administered under the Bureau of Land Management's National Wild Horse and Burro Program.

Examples include of known habitat loss include:

High Rock Herd Area, California

2004 Herd Area listed as 211,912 total acres while 2005 Herd Area acres only lists 139,037 total acres, a loss of 72,875 acres of originally identified habitat.

Massacre Lakes Herd Area, California

2004 Herd Area listed as 127,728 total acres while 2005 Herd Area acres only lists 65,658 total acres, a loss of 62,070 acres of originally identified habitat.

White Mountain, Wyoming

2004 Herd Area listed as 1,912,078 total acres while 2005 Herd Area acres only lists 393,073 total acres, a loss of 1,519,005 acres of originally identified habitat.

Big Sandy, Arizona

2004 Herd Area listed as 392,417 total acres while 2005 Herd Area acres only lists 243,905 total acres, a loss of 148,512 acres of originally identified habitat.

In Montana, 8 Herd Areas were originally defined under the mandates of the Act with the Herd Area acres totaling 223,603 acres. Of those originally identified, 7 of them have been completely eliminated, only one herd remains in the entire state, only 37,147 total acres of the total acres identified to be managed under the mandates of the Act for wild horse preservation and protection now remains indicating a habitat loss totaling 186,456 acres.

Wild burro populations have been devastated nationally through the application of the current absurd and unreasonable definition of "Range".

According to BLM records from 1974, when it is commonly believed the first reasonably accurate census was performed on wild populations nationally, wild burro populations were estimated at numbering over 14,000.

Today, BLMs National wild burro population objectives expressed as the National AML is 2,956, almost five times lower than when they were declared a federally "protected" species.

Additionally, this National AML is deceptive in that an increase of this AML by 261 wild burros is being applied where *no reported populations exist*. The actual wild burro population objectives expressed as a National AML is only 2,695.

Even by the often disputed 1971 reported populations of 8,045 wild burros, wild burro populations were still *almost three times higher* than what BLMs population objectives for wild burros are today.

In the Southern California region, at the time of passage of the California Desert Conservation Area Plan (1980) there were 19 recognized Herd Management Areas that could be managed for burros and 14 were officially designated for that purpose within the Conservation Area alone. The combined AMLs totaled 2,747 wild burros and their available habitat was 3,500,465 acres.

Today, this same area has seen a 90% reduction in both habitat and wild burro populations with only two herds remaining with an established AML of 229 wild burros on less than 300,000 acres of habitat.

California as a whole has seen over three million acres of habitat completely eliminated from use or 75% of the wild burros former range and California's entire combined AML is merely 345 wild burros throughout the state. California was once home to the largest wild burro population in the country.

There are 26 wild burro herds still remaining within the United States. Of these 26 herds, only 5 have been issued AMLs that can be considered genetically viable or capable of self-sustaining populations with no threat of inbreeding according to the best available science on equine genetics and herd viability and 11 herds have been issued levels that are commonly acknowledged as non-genetically viable populations.

As for wild horse populations, it is estimated that over 70% of the remaining herds have been issued non-genetically viable AMLs that prevent self-sustaining populations and will result in inbreeding and eventual expatriation.

The BLM has recently affirmed a decision to zero out the West Douglas Herd Management Area in Colorado based on an established AML of 60 wild horses being a non self-sustaining and genetically unviable population.

Though this “affirmation” is not based on the best available science in equine genetics, which has asserted that a minimum population of 150-200 wild horses is necessary to preserve long-term viability, based on this most recently affirmed standard by the BLM, 72 Herd Management Areas or 36% of the remaining federally managed HMAs have AMLs issued for populations of 60 or less wild horses or burros in their HMAs.

Based solely on this criterion, all of these populations and HMAs will now be subjected to complete elimination, which is justified due to established AMLs that BLM has affirmed are known to cause irreparable damage to wild populations, AMLs that they themselves have established.

What makes this especially egregious is that the majority of these AMLs were not established due to the “productive capacity of the habitat”. They were established due to BLMs and USFS inequitable distribution of resources and their confusion regarding their legal mandates and/or refusal to issue enough resource allocations for wild horse and burro use within the management areas to support self sustaining populations - this is a direct result of the absurd definition of “Range” being applied towards their duties, administrations and management actions regarding wild horse and burro populations and their “federally protected habitat”.

Examples that clearly illustrate management actions are failing to provide resources for self-sustaining populations despite their availability include:

Moriah Herd Management Area

The Moriah HMA currently spans 43,375 total acres with an established AML not to exceed 29 wild horses. Acreage was reported in 2004 as totaling 55,050 acres indicating a loss of habitat of 11,675 acres. The maximum forage allocations issued for wild horse use within the HMA is not to exceed 348 AUMs while livestock grazing allotments within the HMA have been issued 4,546 AUMs.

Jakes Wash Herd Management Area

Jakes Wash HMA spans 153,622 public acres with an established AML not to exceed 21 wild horses. The maximum forage allocations issued for wild horse use within the HMA is not to exceed 252 AUMs while livestock operations affecting the HMA have been issued 15,725 AUMs. Wild horses have been given less than 2% of the available forage in the area.

Highland Peak Herd Management Area

Highland Peak HMA spans 137,975 public acres with an established AML not to exceed 33 wild horses. The maximum forage allocations issued for wild horse use within the HMA is not to exceed 396 AUMs while approved livestock allocations affecting the Highland Peak HMA total 8,985 AUMs.

Jackson Mountain Herd Management Area

The Jackson Mountain HMA spans 283,699 acres with an established AML not to exceed 217 wild horses. The maximum forage allocations issued for wild horse use within the HMA is not to exceed 2,604 AUMs while approved livestock allocations affecting the Jackson Mountain HMA total 32,744 AUMs.

Lincoln County Elk Management Plan

In 1999, the Lincoln County Elk Management Plan was implemented under a “categorical exclusion” by BLM that intends to manage for an elk population objective that will out number wild horse populations by a ratio of at least 3-1. The Elk Management Plan overlaps 14 Herd Management Areas, which span approximately 2.6 million acres with a maximum allowable wild horse population not to exceed 644 wild horses.

In November 2003, twelve of these HMAs determined new wild horse “Appropriate Management Levels” (AML) in a mass AML decision approved by BLM titled, *“Notice of Wild Horse Management Decision and Finding of No Significant Impact (FONSI) for the Establishment of Appropriate Management Levels for Twelve Wild Horse Herd Management Areas within the Ely District”* This decision was issued together with the environmental assessment of the HMAs (EA-NV-040-03-036).

Records from 1998 show a combined AML of 884 wild horses for the same fourteen HMAs, indicating a total loss of 240 wild horses no longer allowed in the Elk Management Area. The new AMLs were not established because of the productive capacity of their habitat, or the lack of it, but because the BLM Ely District failed to issue enough forage allocations to sustain them, preferring instead to distribute resources in an inequitable manner to livestock and revenue generating big game species instead.

As of 2005, the Ely District issued 535,592 total Active Animal Unit Months (AUMs) for livestock grazing, including both cattle and sheep. The newly established AMLs for the wild horse population of these fourteen HMAs have been issued a forage allocation of only 7,728 AUMs while the former AMLs allowed 10,608 AUMs, a loss of 2,880 AUMs. No evidence could be found that livestock allocations were reduced, only wild horses were reduced to support the introduced elk populations and future management objectives.

The Interior Board of Land Appeals has stated that it will support wild horse and burro removal decisions issued by the BLM or USFS based solely on the fact that wild populations have exceeded the established “appropriate management levels”.

Yet IBLA does not require current monitoring data of rangeland health to verify if those AMLs are still appropriate, they do not require BLM or USFS to report current resource distribution of other multiple-use applications, they do not require population estimates of big game species or livestock distributions that may have changed since the AMLs were first established, they do not require that BLM or USFS provide evidence that wild horse and burro management plans, resource allocations and established AMLs are comparable to other land use authorizations, and they do not require any independent analysis or verification of BLMs or USFSs assertions on rangeland health.

While the “burden of proof” falls on the appellant, the appellant has no power or authority to demand that this information be supplied in order to gauge the accuracy of the general assertions put forth in documents that BLM and USFS write, which in turn grants them the unchecked authority to “manage wild horses and burros to extinction”, as is being witnessed on a National scale.

If the IBLA will uphold wild horse and burro removals with no other evidence than wild populations have exceeded previously established AMLs, what criteria does IBLA use to determine if those AMLs are legally compliant with the spirit and intent of The Wild Free-Roaming Horse and Burro Act of 1971; to preserve and protect them and their habitat in self-sustaining viable populations because they contribute to the diversity of life forms within the Nation and for the enjoyment of future generations?

A prior decision by IBLA determined that wild populations must be managed at an “optimum number”; Optimal towards what end? Optimal for whom?

Based on available statistics and data, it does not appear that the “appropriate and approved” populations are optimal in any sense of the word to the remaining wild horse and burro populations, towards their future preservation and sustainability or towards the intent and purpose of why the Wild Free-Roaming Horse and Burro Act was passed into public law.

The American people were made a promise as set forth in public law, that wild horses and burros would be preserved and protected within our Nation and this law was passed without a single dissenting vote and with unprecedented and overwhelming support from the American people.

It is not appropriate for BLM and USFS to circumvent Congressional intent, public laws and the will of the citizenry by deeming the “appropriate” use of public resources is through creating management plans that deny the spirit and intent of the law and necessary requirements to protect and preserve these wild horse and burro populations in their federally protected habitats.

It is submitted to the Court that these agencies have been able to do so by the application of an absurd and unreasonable definition currently being applied to the meaning of “Range” that has yielded absurd and meaningless results that are contrary and antithetical to the intent of The Wild Free-Roaming Horse and Burro Act of 1971 (PL 92-195), which was clearly established for the principle purpose of protecting and preserving America’s wild horses and burros for the enjoyment of the American people and future generations.

Furthermore, public lands were to be managed to support multiple uses of resources for the benefit of the American people, *for all of the American people*, not just for the exclusive use of a few individuals who have an economic interest and gain garnered through the utilization of these resources.

The BLM provides the public a copy of the Federal Land Policy and Management Act of 1976 with the inclusion of historical overview that led up to its passage titled, “*A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*” authored by Eleanor R. Schwartz, Chief, Office of Legislation and Regulatory Management, Bureau of Land Management, Department of the Interior.

This overview cited that recreation was the subject of the first piece of public land legislation that might be considered a predecessor of FLPMA through a bill introduced and passed in 1970 known as S.3389. This bill acknowledged the embodiment of some of the recommendations made by the Public Land Law Review Commission in their report issued prior to its passage that identified needs of the public lands and shortcomings of public lands management.

As cited in the Commissions report, one of the principle considerations that needed to be addressed was, “*Lack of public access has locked up millions of public land for the private use of but a few, and many outstanding hunting, fishing, and other recreational opportunities are not available.*”

It is obvious from the passage of the Wild Free-Roaming Horse and Burro Act that it was of the opinion of a great majority of the American public, which was also supported by Congress, that wild free-roaming horses and burros on public lands were a fundamental pleasure, that they were enjoyed for their wild free-roaming natures, that they contributed to the diversity of life forms within the Nation, that their aesthetic, historic and cultural values to the American people were of a paramount significance since they are the only two species to ever have a federal law established solely for their preservation and protection, and their presence and the public viewing of this additional wildlife added to the recreational value of the public lands experiences.