

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 10

SPRING 2020

ISSUE 2

THE MUSTANG SPIRIT OF THE WEST: HOW TAKING A MORE COOPERATIVE APPROACH WILL SAVE OUR MUSTANGS

Katrina Duran

Abstract

This Note examines the systematic mismanagement of wild horses and burros on America's public lands and proposes a cooperative solution to these problems. America's wild horses and burros have faced a long history of abuse which led to their protection under the Wild Free-Roaming Horses and Burros Act of 1971 (WHBA). However, between trying to work within the structure of an almost-50-year-old statute and a tight federal budget, the Bureau of Land Management (BLM) has not been able to find a proper balance between a thriving horse population and an overcrowded one. This Note proposes possible solutions to this problem. Cooperative federalism, voluntary intergovernmental agreements, or even proactive state legislation are all viable options that would allow the wild horses and burros to thrive on America's public lands. In this instance, cooperative federalism seeks to set strict guidelines for states to meet in order for state governments to take over the care of these animals. Intergovernmental agreements would allow non-federal governments to take over the "smaller" tasks related to wild horses and burros in order to allow the Federal Government to focus on the task of long-term management and care of horses and burros in off-site holding facilities. Finally, proactive state legislating allows state governments to assume the care and control of horses and burros and it allows states to make the rules and suit them to their own state needs and resources.

| | | |
|------|--|-----|
| I. | Introduction | 242 |
| A. | The History of American Mustangs and Burros | 244 |
| 1. | Pre-1971: From Pests to Protected (1920-1970) | 244 |
| 2. | The Wild Horses and Burros Act and the First Attacks to the WHBA (1971-1977) | 246 |
| 3. | Amending the WHBA (1978-1982) | 248 |
| 4. | Post-1978 Legislation and Litigation (1983-2008) | 249 |
| B. | Wild Horses and Burros Currently (2009-Present) | 252 |
| II. | By broadening the BLM's interpretation of the WHBA, the Federal Government will be able to collaboratively work with non-federal governments to achieve a more balanced public land. | 254 |
| A. | Issues with the Current Framework | 254 |
| B. | Cooperative Agreements and Regulations | 256 |
| C. | Cooperative Federalism | 257 |
| 1. | What is Cooperative Federalism? | 257 |
| 2. | Is the WHBA Being Used to Its Full Collaborative Capacity? | 258 |
| 3. | Is it the Best Option to Use in the Present Case? | 259 |
| D. | Moving Forward | 260 |
| III. | Conclusion | 262 |

I. Introduction

The 2002 animated film, *Spirit: Stallion of the Cimarron*, depicts the life of a Kiger Mustang,¹ named Spirit, who was born in the 19th century American West. Spirit experiences a life of adventure, danger, abuse, and eventually freedom. Spirit's life reflects the lives of American wild horses and is further reflective of the dangers these horses faced before Congress passed the Wild Free-Roaming Horses and Burros Act of 1971 (WHBA). However, the Bureau of Land Management (BLM) continues to leave wild horses and burros in danger as they face overpopulation in Herd Management Areas.² These animals must also endure indefinite periods of time in holding facilities if they are deemed to be an "excess" horse or burro. The BLM faces a number of challenges when caring for our

¹ Kiger Mustangs are a subset of wild horses that are native to southeastern Oregon. The BLM currently manages two herds of Kiger Mustangs in Oregon under the Wild Horses and Burros Act of 1971. *History of the Kiger Mustang*, KIGER MESTEÑO ASSOC., <https://web.archive.org/web/20150308133016/http://www.kigermustangs.org/reg/modules.php?name=Content&pa=showpage&pid=12/> (last visited Aug. 29, 2019).

² Herd Management Areas are public lands under the supervision of the BLM managed for the conservation of wild horses and burros. However, these lands are not managed for the exclusive purpose of these wild horses and burros. The BLM studies the Herd Management Areas to ensure that the range remains at an Appropriate Management Level (AML), meaning that the populations of burros and mustangs are in balance with "the ecological capacity of public lands" by applying "principles of rangeland management and wildlife biology through a NEPA review process." *BLM Idaho Wild Horse and Burro Management Areas*, U.S. DEP'T OF THE INTERIOR, <https://data.doi.gov/dataset/blm-idaho-wild-horse-and-burro-herd-management-areas-polygon> (last visited Aug. 29, 2019).

nation's wild horses and burros. Among these challenges are budget constraints, maintaining a healthy population while avoiding overpopulation, and the rigid, antiquated regulation in the WHBA.³ A new approach is desperately needed.

Unfortunately, past efforts to substantially amend the WHBA have failed. The statute has remained the same since 2005, and while the BLM has decreased its budget in past years, wild horse and burro herds on public lands continue to grow.

Though the WHBA is a "cooperative" statute that intended the BLM to work with individual state agencies, the effect of the poorly designed statute is that the BLM often works independently and inefficiently. The WHBA allows the Secretary of the Interior (the agency under which the BLM falls) to "issue such regulations as he deems necessary for the furtherance of the purposes of this Act."⁴ However, instead of working with state agencies more cooperatively, the BLM currently allocates \$49.812 million and 61% of their expenditures on off-range holding costs.⁵ The other \$31.372 million in their budget is allocated between gathers and removals, adoptions, and "other activities" such as monitoring the horses and burros.⁶ By working more cooperatively with states and state wildlife agencies, the BLM could reduce these costs and provide better management alternatives for these "integral part[s] of the natural system of the [nation's] public lands."⁷

If the BLM takes a cooperative approach, the agency can reduce costs and better protect these "living symbols of the historic and pioneer spirit of the West."⁸ The BLM could begin "contracting" with state and local agencies to take over everyday care of the wild horses and burros (including keeping data and managing contraception). This would free up the BLM resources by allowing non-federal agencies to provide more care for the wild animals that they may have better knowledge of. However, total non-federal control is not the goal. By allowing the federal government to maintain their "final say" status, the BLM could create baselines of care that states and tribal nations would exceed if they have the resources to do so. By taking a cooperative federalism approach to the care of our nation's wild horses and burros, the Federal Government could solve

³ *Program Data*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data/> (last visited Aug. 29, 2019); BUREAU OF LAND MGMT., *REPORT TO CONGRESS: MANAGEMENT OPTIONS FOR A SUSTAINABLE WILD HORSE AND BURRO PROGRAM* 4 (2018), https://www.blm.gov/sites/blm.gov/files/wildhorse_2018ReporttoCongress.pdf.

⁴ 16 U.S.C.A. §1336 (2019).

⁵ *FY 2018 Wild Horse and Burro Program*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data/> (last visited Aug. 29, 2019).

⁶ *Id.*

⁷ 16 U.S.C.A §1331 (2019).

⁸ *Id.*

many problems that these animals face, while bettering their lives and maintaining a “thriving natural ecological balance” of federal public lands.⁹

A. The History of American Mustangs and Burros

In the 1500s, domesticated horses and burros arrived in the Americas from Europe.¹⁰ Over time, some of these animals escaped or were released from their owners, leading to feral horses and burros that adapted to American western ranges.¹¹ As time went on, the need for land in western states grew, which pushed wild horses and burros out of their expansive grazing lands and into the nation’s remaining public lands, sometimes wandering onto private property.¹² The western bands of wild horses and burros became a problem in the eyes of ranchers and farmers who were competing for grazing areas with these animals.

It is important to note that horses and burros are different from other grazing mammals, such as cattle. Cattle prefer to stay in one grazing area and pull grass out by the roots.¹³ Conversely, horses move between different terrains to graze, using trails repeatedly over time.¹⁴ Horses also have flexible lips that allow them to trim plants rather than pull them out by the root.¹⁵

1. Pre-1971: From Pests to Protected (1920-1970)

In the early 1920s, American ranchers and landowners saw wild horses and burros as pests that overgrazed their land, taking grazing space from their own livestock. Landowners wanted their land to be undisturbed and wanted something done about the horses and burros that wound up on their property. This left horses and burros open to being shot and sold to processing plants to be made into fertilizer, glue, and dog food.¹⁶

Then in the 1930s, Congress implemented the Taylor Grazing Act of 1934 (TGA) in an effort to manage livestock grazing on public lands and prevent “injury” to the public lands via overgrazing and soil degradation.¹⁷ The TGA established the Division of Grazing, later changed to United States Grazing Service, which granted ranchers individual grazing allotments and set fees for

⁹ 16 U.S.C.A. §1333(a) (2019).

¹⁰ Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 505 (1985).

¹¹ *Id.*

¹² *Id.* at 506.

¹³ *Wild Horses vs. Cattle: The Ecosystem Effect Debate, Land Damage*, OHIO WESLEYAN UNIV., <https://sites.google.com/a/owu.edu/overgrazing/the-match-up-horses-vs-cattle/land-damage/> (last visited Aug. 29, 2019).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ LISA DINES, *THE AMERICAN MUSTANG GUIDEBOOK: HISTORY, BEHAVIOR, AND STATE-BY-STATE DIRECTIONS ON WHERE TO BEST VIEW AMERICA’S WILD HORSES* (Willow Creek Press 2001).

¹⁷ Taylor Grazing Act of 1934, ch. 865, 73 Pub. L. No. 482, 48 Stat. 1269.

grazing.¹⁸ The fees that the Grazing Service established for horse grazing were twice as expensive as those for cattle grazing, and as a result, ranchers started cutting unbranded horses loose rather than paying fees for them.¹⁹ Because ranchers sought to avoid higher fees, the Grazing Service had to hire employees specifically to remove released horses from public lands.²⁰

By 1946, the General Land Office (GLO) and Grazing Service combined to form the BLM within the Department of the Interior (DOI).²¹ The BLM gained control of the wild horses, stopped directly removing the feral horses, and provided hunting permits to control herd sizes and to “meet the demand for pet foods and commercial use of horses.”²² As a result of BLM’s management practices, animal welfare and horse advocates lobbied for passage of federal laws to protect wild horses and burros.²³

Lobbyists’ efforts resulted in the 1959 Hunting Wild Horses and Burros on Public Lands Act (also known as the Wild Horse Annie Act),²⁴ which banned hunting feral horses from motorized vehicles or aircraft.²⁵ However, the Wild Horse Annie Act did not protect herds from being completely eliminated, and all animals remained subject to individual states’ estray laws.²⁶

In 1970, the National Environmental Policy Act (NEPA) was enacted to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment.”²⁷ NEPA provided federal agencies new procedural requirements. An agency must define their need to act, assess the environmental effects of multiple options, and receive public comment prior to any final decision.²⁸ NEPA also ensures that agencies weigh the “relationship between local short-term uses of [the]

¹⁸ 43 U.S.C.A. § 315 (2019).

¹⁹ The fees for livestock grazing were a nickel per animal per month, whereas horse grazing fees were a dime an animal per month. It was the belief that the horses grazed on the range harder than other livestock that resulted in an increased grazing fee. HAROLD “BUD” SHERRETS, *IMPACT OF WILD HORSES ON RANGELAND MANAGEMENT* 1 (1984).

²⁰ *Id.*

²¹ *National History*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/history/timeline/> (last visited Apr. 20, 2019).

²² SHERRETS, *supra* note 19, at 1.

²³ *Id.*

²⁴ “Wild Horse Annie” was a woman by the name of Velma B. Johnston who lived in Reno, Nevada. In 1950, Thelma came across a truckload of horses that were captured in a roundup that she described as being mutilated. She noted that they were on their way to a slaughterhouse for commercial purposes, which was at its peak in the 1950s. The treatment of wild horses shocked Thelma into working toward legislation to protect our Nation’s wild horses and burros. Velma B. Johnston (Wild Horse Annie), *The Fight to Save A Memory*, 50 TEX. L. REV. 1055 (1972).

²⁵ *Id.*

²⁶ An “estrays” is an “animal wandering at large whose ownership is unknown, but the term has also been defined as an animal who wanders or strays upon another’s property even if the animal’s owner is known.” 3B C.J.S. Animals § 248.

²⁷ 42 U.S.C.A. § 4321 (2019).

²⁸ 42 U.S.C.S. § 4332(C) (2019).

environment and the maintenance and enhancement of long-term productivity.”²⁹ Under NEPA, agencies must provide a “fully justified” explanation of why they are taking a particular action, called an Environmental Assessment (EA). NEPA is relevant to the WHBA because any time the BLM wants to initiate a removal through a gather, the BLM has to produce an EA.³⁰ Ultimately, NEPA serves as a “roadmap” for the BLM because any action the agency wants to take must comply with the mandates of the statute.³¹

2. The Wild Horses and Burros Act and the First Attacks to the WHBA (1971-1977)

In 1971, Congress enacted the WHBA to protect “the living symbols of the historic and pioneer spirit of the West,” from “capture, branding, harassment, or death.”³² Congress saw the horses as “an integral part of the natural system of the public lands” and a contributor of “the diversity of life forms within the Nation . . . [enriching] the lives of the American people.”³³ The WHBA gave management and protection duties to the BLM and the United States Forest Service (USFS), with the ultimate duty to protect to the feral horses and burros belonging to the Secretary of the Interior.³⁴

Congress claimed that the main policy objective of the WHBA was that “wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; . . . they are to be considered in the area where presently found, as an integral part of the system of the public lands.”³⁵ Moreover, Congress placed responsibilities on the Secretary to “achieve and maintain a thriving ecological balance on the public lands” while “all management activities shall be at the minimum feasible level.”³⁶ The balance that the Secretary was supposed to find included permission to “destroy” the wild horses and burros when necessary, in the most humane way possible.³⁷ Congress also went so far as to mandate that “no wild free-roaming horse or burro shall be ordered to be destroyed because of overpopulation unless in the judgment of the Secretary such action is the only practical way to remove excess animals.”³⁸ The WHBA even criminalized actions that would interfere with the wild horses and burros in any way, giving WHBA enforcers “designated by the Secretary” power to arrest, without warrants, anyone caught violating the Act.³⁹ However, power still remained with the Secretary to choose to destroy wild horses and burros if they

²⁹ *Id.* § 4332(C)(iv).

³⁰ NEPA, WILD HORSE EDUC., <https://www.wildhorseeducation.org/nepa/> (last visited Aug. 29, 2019).

³¹ *Id.*

³² 16 U.S.C.A. § 1331 (2019).

³³ *Id.*

³⁴ 16 U.S.C.A. § 1333 (2019).

³⁵ 16 U.S.C.A. § 1331.

³⁶ 16 U.S.C.A. § 1333(a).

³⁷ *Id.* § 1333(b)(1).

³⁸ Wild Free-Roaming Horses and Burros Act of 1971, Pub. L. No. 92-195, 85 Stat. 649.

³⁹ *Id.* at 651.

viewed herd areas as being over-populated or if they were not “maintaining a thriving ecological balance” in those areas.⁴⁰

After the Act became law, the New Mexico Livestock Board rounded up 19 free-roaming burros on federal land, testing the validity of the WHBA.⁴¹ The New Mexico Livestock Board claimed that the Federal Government lacked the power to control the wild burros, and they filed for declaratory judgment in *Kleppe v. New Mexico*.⁴² Ultimately, the Supreme Court held that “absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.”⁴³ The Court further stated that Congress could overrule the state law under the Supremacy Clause and found the WHBA constitutional.⁴⁴ Under *Kleppe*:

[T]he Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the Wild Free-[R]oaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.⁴⁵

The same year the *Kleppe* opinion was released, Congress amended the WHBA through the Federal Land Policy and Management Act of 1976. Congress gave the Secretary of the Interior the power to “use or contract for the use of helicopters or, for the purpose of transporting captured animals, motor vehicles” approving methods that previous legislation sought to eliminate.⁴⁶ On its face, this began to appear close to a cooperative statute, with the Secretary having the power to contract the BLM’s responsibilities to other entities. However, these methods were only to be used “after a public hearing and under the direct supervision of the Secretary or of a duly authorized official.”⁴⁷ This piece of legislation faced backlash from horse and burro advocate groups that worried for the safety of the wild animals and their reactions to motor vehicle roundups.

⁴⁰ *Id.* at 649.

⁴¹ *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

⁴² The New Mexico Livestock Board “rounded up and removed 19 unbranded and unclaimed burros pursuant to the New Mexico Estray Law. Each burro was seized on the public lands of the United States.” *Kleppe*, 426 U.S. at 533-34.

⁴³ The Property Clause confers upon Congress the power to “dispose of, and make rules and regulations as to, territory and other property belonging to the United States.” *Id.* at 543.

⁴⁴ *Kleppe*, 426 U.S. 529.

⁴⁵ *Id.* at 543.

⁴⁶ 43 U.S.C.S. § 1736(a).

⁴⁷ Federal Land Policy and Management Act of 1976, sec. 404, Pub. L. No. 94-579, 90 Stat. 2743.

3. Amending the WHBA (1978-1982)

In 1978, Congress passed the Public Rangelands Improvement Act (PRIA), amending the WHBA.⁴⁸ The PRIA requires the BLM continue the policy “of protecting wild free-roaming horses and burros from capture, branding, harassment, and death,” while at the same time facilitating “the humane adoption and disposal of excess wild free-roaming horses and burros which . . . pose a threat to their own habitat . . . and other rangeland values.”⁴⁹ However, PRIA also amended the WHBA to mandate that the Secretary of the Interior, through the BLM, “shall maintain a current inventory” of the wild horses and burros on their rangelands.⁵⁰ It also mandated that the purpose of the inventory would be to keep track of herd populations in order to determine “where an overpopulation exists and whether action should be taken to remove excess animals . . . and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals.”⁵¹ The BLM maintains herd numbers to this day, and continues to follow the steps laid out in the PRIA and the WHBA to determine where overpopulation exists.⁵²

Congress also codified a policy under the PRIA that the BLM took nationwide in 1976: its “Adopt-A-Horse” program.⁵³ Under this policy, if the Secretary of the Interior determined that a demand for horse and burro adoption existed “by qualified individuals, and for which he [the Secretary of the Interior] determines he can assure humane treatment and care,” horses and burros could be adopted by members of the public.⁵⁴ However, due to fear of large-scale buyers taking advantage of this program for commercial purposes (leading to horses being slaughtered), Congress ensured that “not more than four animals may be adopted per year by any individual.”⁵⁵ These policies are still codified in the statute as it stands today, but there are opportunities for certain fit individuals or groups to adopt more than four horses within a year if they seek special permission from the Secretary and the BLM.⁵⁶

Congress also allowed the BLM’s Adopt-A-Horse program to take further steps: “when the Secretary determines that such individual has provided humane

⁴⁸ Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803.

⁴⁹ *Id.* (It appears that Congress wanted to define “rangeland values” as a phrase meaning other wildlife and animals that provide value to rangelands, which are the public lands under the care and management of BLM.)

⁵⁰ *Id.* at 1808.

⁵¹ *Id.*

⁵² *Program Data*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data> (last visited May 15, 2020).

⁵³ Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803, 1809. The Adopt-A-Horse Program serves as a method for the BLM to reduce off-site holding expenses and long-term care expenses associated with gathers and removals of wild horses and burros. This enables the BLM to continue towards their mission of maintaining an ecological balance on United States public lands.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

conditions, treatment and care for such animal or animals for a period of one year, the Secretary is authorized . . . to grant title” to the adopter.⁵⁷ This means that horses and burros adopted out of this program would no longer be protected under WHBA, and would be the sole property of the adopter.

4. Post-1978 Legislation and Litigation (1983-2008)

After the implementation of the PRIA, individuals and groups brought an onslaught of litigation directed at the BLM and the WHBA concerning the constitutionality of the Act. Specifically, the litigation raised questions about whether the WHBA created the possibility of Fifth Amendment takings. Ultimately, these cases brought forth additional due diligence requirements on the BLM regarding adoptions of horses and burros.

One such case was *United States v. Johnson*, where Johnson was found to have captured and sold wild horses, a criminal offense.⁵⁸ Here, the court found that the language of the statute was not “constitutionally overbroad” or too vague as to be discriminatorily enforced.⁵⁹ The same year that the *Johnson* opinion was released, the BLM director at the time issued a moratorium on the destruction of excess adoptable horses, signaling a rise in more humane policies.⁶⁰ This policy remains in effect within the BLM today, signaling that this government agency truly wants to protect these wild animals.⁶¹

After *Johnson*, *Mountain States Legal Foundation v. Hodel* held that wild horses and burros were not instrumentalities of the Federal Government in so much as they could not be found guilty of “taking” private ranchers’ grass or water when they wandered onto their land.⁶² The Mountain States Legal Foundation claimed that the BLM and the Secretary of the Interior “disregarded its repeated requests to remove wild horses from its lands . . . and that the wild horses grazing on its lands have eroded the topsoil and consumed vast quantities of forage and water” when they sought relief under the Fifth Amendment for the damage done to their land.⁶³ The court ultimately found that “the Wild Free-Roaming Horses and Burros Act is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife,” holding that no taking occurred and that the federal government does not owe damages to private landowners when wild horses damage their lands.⁶⁴ However, Section 1334 of the WHBA maintains that the Secretary (or his agents) “shall

⁵⁷ *Id.* at 1810.

⁵⁸ *United States v. Johnson*, 685 F.2d 337, 338 (9th Cir. 1982).

⁵⁹ *Id.* at 339-40.

⁶⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES (2008).

⁶¹ Wild Free-Roaming Horses and Burros Act of 1971, Pub. L. No. 92-195, 85 Stat. 649.

⁶² *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1431 (10th Cir. 1986).

⁶³ *Id.* at 1425.

⁶⁴ *Id.* at 1428.

arrange to have the animals removed” from private lands when a private landowner contacts appropriate individuals.⁶⁵

Courts further protected wild horses and burros in *Animal Protection Institute, Inc. v. Hodel*.⁶⁶ The BLM admitted to knowing “prior to the placement of wild horses, that wild horses adopted . . . would, after passage of title, be put to commercial use” and that some had been “sold for commercial purposes.”⁶⁷ The BLM contended that it “interprets the statute and applicable regulations as not requiring inquiry into any disposition or use of horses after title passes.”⁶⁸ The court completely rejected the BLM’s reasoning for allowing animals to go to large-scale commercial buyers.⁶⁹ It held that Section 1333(c)

is designed to ensure that the BLM will have a reasonable time (one year) to satisfy itself that the prospective adopter will treat the animals in a humane manner and not exploit them. If during that period, the BLM becomes aware . . . that the only purpose for the adoption is to enable the adopter to exploit the animals for a commercial purpose, the transfer of title should not occur.⁷⁰

The court further held that the Secretary of the Interior cannot delegate his responsibility to destroy the animals “in a humane manner” to others.⁷¹ The court acknowledged that the Secretary has an affirmative duty to protect the horses it puts up for adoption and can (and should) refuse to transfer title when he knows horses or burros are being exploited.⁷² After *Hodel*, the BLM decided to scale back and ultimately eliminate its large-scale adoption process.⁷³

Then the early 1990s brought about a wave of legislation that, if passed, would have had major ramifications on the BLM’s wild horse management. These bills were proposing to take wild horse and burro management out of the hands of the BLM and put it into the hands of other federal government entities, which may not have had the wild horses’ and burros’ best interests at heart.⁷⁴

In 1991, the California Desert Protection Act of 1991 was introduced to “designate certain lands in the California desert as wilderness.”⁷⁵ However, the language of the bill “directs the Secretary of the Navy to: . . . be responsible for,

⁶⁵ 16 U.S.C. § 1334 (2018) (emphasis added).

⁶⁶ *Animal Prot. Inst. of Am., Inc. v. Hodel*, 671 F. Supp. 695, 697 (D. Nev. 1987).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 698.

⁷³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM (1990) (That is not to say that small scale adoptions have been eliminated, horses and burros are still adopted through the BLM’s “Adopt-A-Horse” program).

⁷⁴ California Military Lands Withdrawal and Overflights Act of 1993, H.R. 880, 103d Cong. (Cal. 1993).

⁷⁵ California Desert Protection Act of 1991, H.R. 2929, 102d Cong., 1st Sess.

and take appropriate action with respect to, the management of wild horses and burros on such lands.”⁷⁶ This would have effectively removed BLM management and protection and placed it in the hands of the Secretary of the Navy for herds of wild horses and burros in the China Lake area of California.⁷⁷ However, the bill died in the Senate before management and control of the protected animals was handed over to the Secretary of the Navy.⁷⁸

In 1993, the California Military Lands Withdrawal and Overflights Act was introduced to the House of Representatives.⁷⁹ The bill would have authorized “the Secretary of the Interior to assign management responsibility for the China Lake area to the Secretary of the Navy, who shall submit specified reports and manage the wild horses and burros on such lands.”⁸⁰ This bill also failed to make it past the House.⁸¹ This bill was very similar to the California Desert Protection Act of 1991 and would have had the same result for protected horses and burros if the bill passed.

In 1999, the Wild Horse and Burro Preservation and Management Act of 1999 was introduced in the House.⁸² The purpose of the bill was “to amend the [WHBA] to provide for delegation to States of the powers and duties under the Act regarding management of wild free-roaming horses and burros.”⁸³ This bill would have effectively handed over total control to states without any sort of BLM or congressional oversight regarding the care and maintenance of wild horses and burros. This bill also died in the House.⁸⁴

Finally, in 2004, a piece of legislation involving the WHBA was passed. However, it was in the 3,000-page omnibus Consolidated Appropriations Act of 2005.⁸⁵ This omnibus amended the WHBA to require the BLM to sell excess animals that were 10 years old and older, or animals that had been put up for adoption three or more times, “without limitation.”⁸⁶ The bill was enacted without seemingly anyone knowing or understanding what this meant for protected horses and burros. The ramifications of this Act were immediately recognized, however, and Congress scrambled to fix its mistake.⁸⁷ Under the Consolidated Appropriations Act of 2005, the BLM would have been able to drastically reduce

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ California Military Lands Withdrawal and Overflights Act of 1993, H.R. 880, 103rd Cong., 1st Sess.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Wild Horse and Burro Preservation and Management Act of 1999, 106 H.R. 2874, 106th Cong., 1st Sess.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809.

⁸⁶ *Id.* at § 3071.

⁸⁷ The “Rahall Amendment” is what Congress used to attempt to undo what was included in the omnibus.

the amount of horses and burros in their care, but without safety limitations to protect the wild horses and burros from being slaughtered for commercial purposes.⁸⁸

In 2005, the “Rahall Amendment” was Congress’ attempt at undoing the damage done by the 2004 amendment.⁸⁹ The “Rahall Amendment” prevented any appropriated funds from being used to facilitate the sale or slaughter of wild horses and burros.⁹⁰ This amendment continues to appear in current appropriation acts.⁹¹

B. Wild Horses and Burros Currently (2009-Present)

2009 brought about new potential legislation in regard to the WHBA when the Restore Our American Mustangs Act was introduced to the House.⁹² The bill increased acreage available for wild horses and burros protected by the WHBA, developed more sanctuaries, and forbade the killing of healthy animals.⁹³ This was unprecedented, as the WHBA specifically limits the amount of land allotted to these animals. The bill died in the Senate.⁹⁴

More potential legislation included two bills introduced a month apart in 2015 that would have amended the WHBA “to provide for State and tribal management and protection of wild free-roaming horses and burros,” eliminating the BLM’s management and protection of the animals.⁹⁵ The first bill was brought in the Senate where it died.⁹⁶ The second bill was introduced in the House where it also died.⁹⁷ These bills mimicked the bills proposed in the early 1990s, where there would be no BLM or congressional oversight to protect the best interests of the wild horses and burros.⁹⁸

That same year, Congress passed the Consolidated Appropriations Act of 2016.⁹⁹ The Act still contained the Rahall Amendment protecting “the destruction of healthy, unadopted, wild horses and burros in the care of the BLM . . . or, the sale of wild horses and burros that results in their destruction for processing into commercial products.”¹⁰⁰ However, this appropriations act allowed the Secretary of the Interior to “enter into multiyear cooperative agreements and contracts with

⁸⁸ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809.

⁸⁹ To Restore the Prohibition on the Commercial Sale and Slaughter of Wild Free-Roaming Horses and Burros, H.R. 249, 110th Cong. (2007).

⁹⁰ *Id.*

⁹¹ Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 129 Stat. 2242.

⁹² Restore Our American Mustangs Act, H.R. 1018, 111th Cong.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Wild Horse Oversight Act of 1845, H.R. 3172, 114th Cong.

⁹⁶ *Id.*

⁹⁷ H.R. 3172.

⁹⁸ California Military Lands Withdrawal and Overflights Act of 1993, H.R. 880, 103rd Cong. (Cal. 1993).

⁹⁹ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242.

¹⁰⁰ *Id.* § 2528.

nonprofits and other entities for the long-term care and maintenance of excess of wild horses and burros on private land.”¹⁰¹

After this, a bill was introduced in the Senate for the Department of the Interior, Environment, and related agencies as an Appropriations Act for 2017.¹⁰² While it still contained the Rahall Amendment and language from past appropriations acts, this bill would have permitted the “Interior to transfer excess wild horses or burros . . . to other federal, state, and local agencies for use as work animals.”¹⁰³ This meant that instead of letting the wild horses and burros in their care remain in corrals or in pastures, the animals would become work horses through certain programs to be implemented by “other federal, state, and local agencies.”¹⁰⁴ The bill died in the House, and Congress still blocks the unlimited sale of wild horses and burros and limits the use of euthanasia.¹⁰⁵

In 2018, the BLM submitted their required yearly Report to Congress where they laid plans to achieve Appropriate Management Levels (AML) for the horses and burros on public lands.¹⁰⁶ The Report contained four options. The first option would have BLM achieve national AML within eight years by using all “legal authorities contained in the Act (especially sale without limitation and euthanasia of unadopted or unsold animals).”¹⁰⁷ The second option would have BLM achieve AML within 10 years through “contraceptive fertility control treatments” while attempting to secure lower cost pasture-based holding facilities for excess horses and burros.¹⁰⁸ The third option BLM presented would achieve national AML within 6 years by using “an aggressive removal operation in conjunction with sterilization of 3,000 mares and stallions gathered annually, who would be later returned to the range.”¹⁰⁹ The final option BLM gave Congress would be the longest option, where AML would be achieved by 2030, but it would include adoption incentives of up to \$1,000 to adopters and it would use a “sterilize and return” technique in conjunction with plans to eventually “reduce the need for permanent sterilization and [increase] the use of contraceptives in the future.”¹¹⁰

While the options are more focused on reducing costs over time, they are not focused on finding partnering non-federal government agencies to help offset

¹⁰¹ *Id.* § 2549.

¹⁰² Department of the Interior, Environment, and Related Agencies Appropriations Act of 2017, S. Res. 3068, 114th Cong.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ BUREAU OF LAND MGMT., REPORT TO CONGRESS: MANAGEMENT OPTIONS FOR A SUSTAINABLE WILD HORSE AND BURRO PROGRAM (2018), https://www.blm.gov/sites/blm.gov/files/wild_horse_2018ReporttoCongress.pdf/.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Aggressive removals are seen as dangerous by horse and burro advocates due to the high likelihood of horses reacting out of fear and injuring themselves. *Id.*

¹¹⁰ *Id.* at 3.

some costs. The BLM's 2018 Report does not focus on potential steps the Bureau could take to reduce their expenses by working collaboratively with states and other non-federal agencies in order to achieve their stated goals.

II. By broadening the BLM's interpretation of the WHBA, the Federal Government will be able to collaboratively work with non-federal governments to achieve a more balanced public land.

After almost 100 years, the Federal Government is still failing to adequately protect and care for our nation's wild horses and burros. Overpopulation, budget constraints, underlying tension between private actors (consisting both of animal advocacy groups and ranching groups), and the Secretary of the Interior restrict the BLM's potential to protect these wild horses and burros.¹¹¹ By analyzing the current framework of the WHBA and the problems and tensions that have resulted from it, this Note will pinpoint the statute's biggest weaknesses and how the BLM can work within the current framework to better care for our Nation's horses and burros. The first section of this analysis will identify issues with the current framework of the WHBA. The second section will identify the approach of cooperative federalism and discuss whether it is the best approach for reform. The final section of this analysis will discuss and identify solutions that the BLM could adopt in order to successfully "achieve a thriving natural ecological balance on the public lands."¹¹²

This Note posits that the appropriate course of action is to take a more collaborative approach, one involving cooperative federalism in order for state governments to work closely with the Federal Government to achieve a better balance on public lands. "Cooperative federalism offers . . . a vision of independent governments working together to implement federal policy."¹¹³ By working around tensions between states and the Federal Government and taking a collaborative step forward, the future of America's mustangs and burros will be much brighter than it is now.

A. Issues with the Current Framework

The current framework for the WHBA establishes that the horses and burros protected by this Act are "under the jurisdiction of the Secretary [of the Interior] for the purpose of management and protection."¹¹⁴ Under the Act, the Secretary "shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving ecological balance on the public

¹¹¹ *Id.*

¹¹² 16 U.S.C. § 1333(a) (2018).

¹¹³ Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813, 815 (1998).

¹¹⁴ 16 U.S.C. § 1333(a).

lands.”¹¹⁵ However, the BLM currently faces much difficulty maintaining that “balance.”¹¹⁶

One of the tasks of BLM, and the Secretary of the Interior, is to keep a current inventory of wild horses and burros.¹¹⁷ The purpose of this inventory is to make determinations as to whether and where an overpopulation exists and,

whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).¹¹⁸

Another task of the Secretary is to “order old, sick, or lame animals to be destroyed in the most humane manner possible.”¹¹⁹ The Secretary also runs the Adopt-A-Horse program, where the public is able to adopt a previously wild horse or burro to be their own private animal.¹²⁰

The current framework of the WHBA also controls how horses and burros are to be treated when they wander onto privately owned land, where “the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed.”¹²¹ The WHBA does not prevent individuals from allowing free roaming horses and burros to stay; however, it does place an increased responsibility on the private landowner that allows wild horses and burros to remain on their land.¹²² In addition, they must keep the Secretary up to date on the approximate number of horses on their property.¹²³ The Act also places criminal consequences on individuals who “willfully remove . . . a wild free-roaming horse or burro from the public lands,” or “maliciously cause the death or harassment of any wild free-roaming horse or burro,” or “willfully violate a regulation issued pursuant to this Act.”¹²⁴

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Wild Free-Roaming Horses and Burros Act of 1971, Pub. L. No. 92-195, 85 Stat. 649.

¹¹⁸ § 1333 (b)(1).

¹¹⁹ § 1333 (b)(2)(A).

¹²⁰ § 1333 (b)(2)(B).

¹²¹ 16 U.S.C. § 1334 (2018).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 16 U.S.C.A. § 1338(a)(1), (3), (6) (2019).

B. Cooperative Agreements and Regulations

The Act does have a section of particular interest and importance: Section 1336, ‘cooperative agreements; regulations.’¹²⁵ This Section authorizes the Secretary to “enter into cooperative agreements with other landowners and with the State and local governmental agencies,” and the Secretary “may issue such regulations as he deems necessary for the furtherance of the purposes of this Act.”¹²⁶ However, the USFS and BLM are still managing and protecting the Nation’s wild horses and burros. That is not to say that States and Tribes do not want to take over their care.

In 2016, the State of Arizona took steps to ensure that a band of horses known as the Salt River Horses would be protected from harassment, injury, or death.¹²⁷ Section F of Arizona Revised Statute § 3-1491 provides that “this state may enter into an agreement pursuant to § 11-952 with the United States Forest Service to implement this article or to address any issue relating to the Salt River horse herd.”¹²⁸ Arizona even provided room for the state to “enter into an agreement with a private entity to address any issue relating to the Salt River horse herd.”¹²⁹ Arizona clearly wanted to take over management responsibilities for the Salt River band of horses, and subsequently the State Government legislated it as such.

Looking back through the history of the WHBA’s past proposed legislation, there have been bills proposed for states to take over total control of the wild horses and burros on their lands.¹³⁰ The litigation between the BLM, non-profits, tribal governments, and states indicates that there is tension between what states, those living in states, and what the BLM all think are best for these animals. This tension continues to plague the BLM, yet the Secretary of the Interior has not used the power that the statute has granted the position in order to enter into more in depth “cooperative agreements.”¹³¹ However, these “cooperative agreements” could be the saving grace of the BLM. The statute itself gives the Secretary the power to decide which “regulations . . . he deems necessary for the furtherance of the purposes of this Act.”¹³² Meaning that, should the Secretary decide that in order to further the regulations of the WHBA there could be a more collaborative approach, then the Secretary could take steps with states and smaller governments to achieve herd management goals. Though this “cooperative agreement” aspect of the WHBA exists, it only extends so far. The Secretary can only manage within the “purpose of this Act” and cannot “relocate

¹²⁵ 16 U.S.C. § 1336 (2018).

¹²⁶ *Id.*

¹²⁷ ARIZ. REV. STAT. ANN. § 3-1491(A) (2017).

¹²⁸ § 3-1491(E).

¹²⁹ § 3-1491(F).

¹³⁰ Wild Horse and Burro Preservation and Management Act of 1999, H.R. 2874, 106th Cong.

¹³¹ 16 U.S.C.A. § 1336 (2019).

¹³² *Id.*

wild free-roaming horses or burros to areas of the public lands where they do not presently exist.”¹³³

C. Cooperative Federalism

Cooperative Federalism is not a brand-new approach. Scholarly articles have written that it is something governments have been participating in for years.¹³⁴ Different articles define the concept differently. However, statutory law is becoming increasingly more cooperative, especially in regard to administrative agencies seeking to cooperate with state and local governments.¹³⁵ The WHBA is cooperative on its face, and this section will lay out what that means and what steps the BLM and the Secretary could take to better the wild horses and burros program.

1. What is Cooperative Federalism?

Cooperative federalism has been described as “circumstances where ‘state and federal actors . . . take responsibility for separate but interlocking components of a unified regulatory program.”¹³⁶ Cooperative federalism has also been defined as being “shared government responsibilities for regulating private activity,”¹³⁷ and “circumstances where ‘states take primary responsibility for implementing federal standards, while retaining freedom to supply their own, more stringent standards.”¹³⁸ It also happens when “nonfederal governments help implement federal policy in a variety of ways: by submitting implementation plans to federal agencies, by promulgating regulations, and by bringing administrative actions to enforce federal statutes.”¹³⁹ Cooperative federalism has been related to voluntary intergovernmental agreements, in which the Federal Government “purchase[s] rather than conscript[s] nonfederal governments’ regulatory services.”¹⁴⁰ It is observed as being a voluntary relationship between the federal and nonfederal governments where, “the federal government should not confiscate the property or conscript the services of nonfederal governments. Rather, the federal

¹³³ 16 U.S.C.A. § 1339 (2019).

¹³⁴ Christopher B. Power et al, *Cooperative Federalism and Environmental Laws: Coping with Two Masters*, 36 ENERGY & MIN. L. FOUND, § 6.02 (2015).

¹³⁵ ARIZ. REV. STAT. ANN. § 3-1491(A) (2017).

¹³⁶ Power et al., *supra* note 134 (quoting ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 92 (2011)).

¹³⁷ *Id.* (citing GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 3:14 (1992)).

¹³⁸ *Id.* (citing Adam Babich, *Our Federalism, Our Hazardous Waste, Our Good Fortune*, 54 MD. L. REV. 1516, 1532-33 (1995)).

¹³⁹ Hills, *supra* note 113, at 815.

¹⁴⁰ *Id.* at 817.

government should purchase such services through a voluntary intergovernmental agreement.”¹⁴¹

In summation, cooperative federalism is an approach that the Federal Government and non-federal governments can take in order to achieve government objectives through a collaborative approach. In the present case, the BLM does not appear to be operating the Wild Horse and Burro Program under any of the above definitions of cooperative federalism. The WHBA is cooperative on its face allowing the Secretary to use his discretion to cooperate with state wildlife agencies when making decisions. However, there is room for the WHBA to be more fully cooperative by allocating some discretionary authority to states, tribal nations, and non-federal government entities.

2. Is the WHBA Being Used to Its Full Collaborative Capacity?

Under the WHBA as it currently stands, there is capacity for the BLM and the Secretary to take a cooperative approach with non-federal governments and potentially with private actors. Under Section 1333 of the Act, the Secretary has a specific duty to “[consult] with the wildlife agency of the State,” if the Secretary were to propose new rangelands.¹⁴² In determining if “appropriate management levels should be achieved by removal or destruction of excess animals,” the Secretary “shall consult with the United States Fish and Wildlife Service, wildlife agencies of the State or States wherein wild free-roaming horses and burros are located.”¹⁴³ The WHBA also describes the Secretary’s powers in regards to research studies on the mustangs or burros and in regards to the transportation of the animals after round-ups with room for collaboration.¹⁴⁴ Clearly, the WHBA is meant to be treated as a cooperative statute where the Secretary is able to effectively consult and work with non-federal governments and agencies.

In the same light, Sections 1334 and 1336 are both special provisions in regard to cooperative federalism within the WHBA. Both sections are incredibly cooperative on their face. Section 1334 allows private actors to “[maintain] wild free-roaming horses and burros on [their] private lands . . . if he does so in a manner that protects them from harassment, and if the animals were not willfully removed or enticed from the public lands.”¹⁴⁵ Meaning that Section 1336 authorizes the Secretary “to enter into agreements with other landowners and with the State and local governmental agencies and may issue such regulations as he deems necessary for the furtherance of the purposes of this Act.”¹⁴⁶ However, none of these cooperative aspects are being used to their full capacity.

To the BLM’s credit, the Secretary does as much cooperative work as possible through partnerships with federal prisons and other government

¹⁴¹ *Id.*

¹⁴² 16 U.S.C.A. § 1333(a) (2019).

¹⁴³ § 1333(b)(1).

¹⁴⁴ § 1333(b)(3); 16 U.S.C.A. § 1338(a) (2019).

¹⁴⁵ 16 U.S.C.A. § 1334 (2019).

¹⁴⁶ 16 U.S.C.A. § 1336 (2019).

agencies,¹⁴⁷ but if the Act were to be interpreted more broadly within the BLM there would be vast improvements that could be made. This solution could take away some tension between states and the Federal Government, because the states and other non-federal governments would be able to care for the animals within their boundaries and get some say in how the horses and burros are actually tended to. Initiatives, such as birth control, that certain range areas have wanted to apply would be more easily implemented, and there could be a positive domino effect that could expand into other rangelands.

One solution to more effectively cooperating between governments would be for the BLM to take a broader interpretation towards the WHBA. This solution would call for the Secretary to use the powers given to him in Section 1336 and decide to create regulations that establish minimum federal guidelines that states and non-federal government entities would need to follow in order to take over control of the wild horses and burros that reside on public lands within their adjacent territories. Both options would create a more stable long-term solution for the BLM's problem with overpopulation and under-appropriation.

3. Is it the Best Option to Use in the Present Case?

In the case at hand, states and non-federal governments have the potential to take over the care and protection of wild horses and burros within their boundaries with some caveats. One caveat would be where the Federal Government maintains strict guidelines for care as a baseline, while other government entities are allowed to take over the animal's care if they are able to meet the baseline goals. There would be nothing stopping states and Tribes from providing better care or expanding rangelands for horses that come under their care, only a baseline minimum that they must meet in order to maintain their intergovernmental agreements.

The expectation would be that states and non-federal governments may be better equipped to care for and protect the horses and burros residing on public lands within their boundaries. Should certain states and non-federal governments not be properly equipped or be unable to maintain basic care guidelines, the responsibility would revert back to the BLM who would be in a better position to care for the horses and burros.

This solution could take away some tension between states and the Federal Government, because the states and non-federal governments would be able to care for the animals within their boundaries and get some say in how the horses and burros are actually cared for. Initiatives, such as birth control, that certain range areas have wanted to implement would be more easily adopted, and there

¹⁴⁷ BLM currently works with six federal prisons by allowing prisoners to train wild horses that will eventually be adopted; the idea behind this program is that the horses that have been trained will be more adoptable. BLM also cooperates with the United States Border Patrol to supply trained horses to Border Patrol Agents.

could be a positive domino effect that could expand into other rangelands. Allowing states and non-federal governments to have the option to take over the care of the horses and burros on their land might allow more experimentation on birth control methods to be done, which could ultimately have a very positive effect on both the wild horse and burro population and the ecological balance of the public rangelands where these horses and burros live. Further experimentation on less dangerous round-up methods¹⁴⁸ could be studied as well, leading to a healthier horse and burro population overall. These possible experiments are being stopped or heavily slowed down because the BLM and Federal Government still oversee day-to-day care of wild horses and burros under this Act.¹⁴⁹

D. Moving Forward

Should the BLM and the Secretary of the Interior choose to expand their definitions of the cooperative clauses of the WHBA, it would give non-federal government agencies the opportunity to create agreements with the Federal Government to care for these wild horses and burros. Non-federal government agencies could create agreements with the Federal Government to handle smaller issues like gathers and removals, adoptions, and monitoring activities. These have been referred to as smaller issues because together they make up only 37% of the BLM's expenditures.¹⁵⁰ The other 61% that is accounted for in the BLM's budget is for off-range holding costs. Though these take the majority of the budget, it is unlikely that states and other non-federal governments will want to contract with the government to take over the off-range holding costs of these animals due to the expenses associated with long-term care. However, the "smaller" activities could be easier to handle and more appealing to states and non-federal government agencies. Activities associated with monitoring may be appealing to states and their wildlife agencies because of their proximity and knowledge of the land within their state. Handling adoptions of wild horses and burros would also be appealing to state governments because of their ability to be able to better watch out for potential harmful adopters within their state.¹⁵¹ States and non-federal governments, with universities, would be better able to innovate in regard to monitoring and research if non-federal agencies were able to handle the wild horses and burros within their territories as well. Allowing states to take over the

¹⁴⁸ Current round-up methods oftentimes result in trauma and sometimes death to the horses and burros being "rounded up." Brulliard, Karin, *The battle over wild horses*, WASH. POST (Sept. 18, 2019) <https://www.washingtonpost.com/science/2019/09/18/wild-horses-have-long-kicked-up-controversy-now-foes-say-they-have-solution/?arc404=true>.

¹⁴⁹ Animal Welfare Inst., *BLM Drops Wild Horse Sterilization Experiments, Plans to Return Some Horses & Burros to the Range*, YUBANET (Feb. 19, 2019) <https://yubanet.com/enviro/blm-drops-wild-horse-sterilization-experiments-plans-to-return-some-horses-burros-to-the-range/>.

¹⁵⁰ *Program Data*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data/> (last visited Aug. 29, 2019) (the other 2% of the BLM's Wild Horses and Burros budget is not accounted for on their website).

¹⁵¹ Harmful adopters are adopters that want to adopt wild horses and burros in order to sell them or send them to slaughterhouses outside the United States (since horse slaughterhouses have been outlawed within the US).

care of the horses and burros may better situate the public lands that the horses graze on to maintain a more thriving ecological balance, which is the exact purpose of the WHBA.

Another alternative Congress could take is setting minimum guidelines that states, Tribes, or non-government agencies could choose to exceed with their own care guidelines and letting these non-federal government entities manage the daily oversight and care of these animals. This situation would not mean that the BLM would no longer manage any of the wild horses and burros that are protected by the Act, but this would allow the BLM to place more of a focus on horses and burros in places where state government and non-government agencies are unable to care for them. Some state government or other government bodies would be able to set more stringent care guidelines for wild horses and burros on their lands, while others would only be able to maintain the minimum guidelines.

However, this recommendation has some downfalls. There is a possibility that states and other non-federal governments would choose not to participate (which would result in the situation the BLM currently faces). States with little room in their budget for more wildlife care may have no interest in taking over the care of animals whose expenses can exceed over \$1,000 per year per animal.¹⁵² States and non-federal governments may also not be equipped with the game and fish agencies that others have in order to meet any minimum threshold requirements to participate in an oversight approach.

There is also the possibility that agencies would not be able to meet any minimum standards of care for the horses and burros. However, this could be solved if the BLM provides assistance to agencies wanting to handle care and management by acting as a resource to the non-federal agencies. By having outside non-federal agencies take over care and maintenance of these horses and burros there would be resulting openings in BLM's budget appropriations that could better focus on tackling the ever-present problem of maintaining a thriving ecological balance on the Nation's public lands. This would open up a more collaborative method with non-federal agencies where the latter could focus on wild horses and burros and the former could focus on the land and making sure minimum guidelines are being met.

Should the Federal Government approach the problem of maintaining an ecological balance through setting minimum guidelines for non-federal government agencies to use and then take over care of the wild horses and burros, there will be immediate drastic results. Surely, there will be initial problems to confront in individual programs. It may require more effort or budget from the BLM upfront to properly educate non-federal governments on proper management techniques and what minimum guidelines are expected. It could

¹⁵² *Adoption and Purchase Frequently Asked Questions*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/adoption-and-sales/adoption-faq/> (visited Aug. 30, 2019). The BLM provides estimates for how much animal care can cost through their adoption webpages.

easily be a multi-year cooperative project. But ultimately, the result would allow the BLM to take an oversight position with non-federal governments handling ground operations.

If the Federal Government is looking for a quicker approach, the answer might be starting voluntary intergovernmental agreements with non-federal governments in order to manage the care and maintenance of smaller tasks associated with upkeep of wild horses and burros. This could be used for some period of time, the ultimate goal being for states and non-federal governments to handle care where they can, with occasional assistance from the BLM. This allows states and non-federal governments to care for animals they are in close proximity to, especially when they may be much better equipped to manage how their grazing impacts Herd Management Areas and public lands. With the BLM's oversight, states and non-federal governments would be best suited to take over care in most areas. However, the BLM would still retain the power to take back any herds that are not being cared for under the minimum federal guidelines. Using this method protects wild horses and burros under anyone's management. By freeing up resources, the BLM will be able to focus on horses and burros that need the most attention and the rangelands that are the most damaged.

Finally, another option is for state governments to take matters into their own hands. If states begin to pass legislation that allows them to implement their own care plans and goals while the BLM provides assistance should states need it, the care of wild horses and burros could potentially drastically increase. However, there are significant downfalls to this method similar to other methods' downfalls. Like previous possible solutions, states could be ill-equipped to handle and care for the wild horses and burros on their land; if they pass legislation and are not able to afford management costs there is a large possibility that horses and burros would be in danger. There is also the chance that states could choose not to adopt legislation, or not be able to pass new laws surrounding this topic, which would leave the BLM in the same predicament it is currently in. However, this would be the best plan for a proactive state with enough room in its budget to properly care for its wild horses and burros.

If Arizona's surrounding states are able to pass and adopt similar laws there is the possibility that the BLM would not have to change any of its current methods, other than to adapt to moving into a position of assistance.

III. Conclusion

If the Bureau of Land Management and the Secretary of the Interior take a cooperative approach with the Wild Horses and Burros Act of 1971, they will be able to take a step forward in the future with more tools to better protect and care for our nation's wild horses and burros. Public lands will benefit no matter the approach the BLM takes, whether that is an approach of voluntary intergovernmental agreements, one of guidelines for non-federal government actors to follow, or even an approach where a proactive state passes its own legislation to take over management of its wild horses and burros. Working collaboratively with non-federal governments will further the purposes of the Act,

especially the purpose of “maintaining a thriving ecological balance” on America’s public lands in the West.

Though the BLM and the Secretary are constantly working to improve the lives of the wild horses and burros in their care, they are not proposing options to Congress that would alleviate some of the responsibility of the Federal Government. Should the BLM or the Secretary begin to utilize a broader interpretation of the Secretary’s role and responsibilities under the WHBA, the BLM will be able to take a far more collaborative approach with states and other non-federal governments. The best solution would be to allow the BLM to more frequently create agreements with non-federal governments and set minimum care guidelines so that those entities can help care for the animals they are closest in proximity to.