

***1047 RUNNING WILD: THE BUREAU OF LAND MANAGEMENT AND AMERICA'S WILD HORSES**

INTRODUCTION

America's wild horses have long served as a symbol of the West, of freedom, and of things that cannot be tamed or caged. However, the Secretary of the Department of the Interior ("Secretary"), through the Bureau of Land Management (BLM) is specifically charged with keeping the wild horse population under control¹--metaphorically, and often literally, caging the horses in. Recent population control techniques used by the BLM have caused an outcry from supporters of wild horses, although not for the first time. Claims against the BLM have included allegations of inhumane roundups of wild horses, restrictions on the wild horse herd size that interfere with breeding and herd diversity, as well as overestimations of the wild horse population and reproduction statistics.² The greatest concern of wild horse supporters is that the BLM is prioritizing the use of public lands for ranchers and attempting to reduce the wild horse population to numbers that resemble those in 1971 when Congress deemed that the wild horse population was "fast disappearing."³

I. THE WILD AND FREE-ROAMING HORSES AND BURROS ACT OF 1971

In the 1960s the American wild horse population had dwindled from a population in the millions to 17,000.⁴ Congress deemed that wild and free-roaming horses on public lands were "living symbols of the historic pioneer spirit of the West and as such are considered a national historic resource."⁵ Recognizing that the wild horse population was *1048 quickly disappearing and in need of protection, Congress enacted the Wild and Free-Roaming Horses and Burros Act of 1971 ("Act").⁶

The Act made it illegal for private persons to remove, kill, or harass wild horses.⁷ Depending on where the wild horses are located, the Secretary, through the BLM, and the Secretary of the Department of Agriculture, through the U.S. Forest Service, have the exclusive authority to regulate the population of wild horses and provide for the horses' protection on public lands.⁸ In 1978, the BLM was given the authority to manage the population of wild horses in overpopulated areas by killing the old, sick, or lame horses, placing other horses in adoption programs, and then killing those that remain in the most cost-effective and humane manner.⁹ The Secretary, through the BLM, may rely on a variety of material in determining whether or not an area is overpopulated, including current inventories of federal public lands, land-use plans, and court-ordered environmental impact statements.¹⁰ After 2004, an additional amendment was added that states that excess horses who are ten years old or older, or have been unsuccessfully offered for adoption three times, may be sold without limitation.¹¹

Additionally, the BLM is not allowed to relocate the wild horses to areas where they did not previously roam¹² The Act has yet to be successfully challenged for limiting the range of the wild horses to the land they occupied in 1971.¹³ This has caused

concern among wild horse supporters who say that the wild horses are being kept on land that is too scarce to support population growth, and ranchers who claim that the increase of wild horses in concentrated areas is depleting the availability of resources on the public lands for other purposes.¹⁴

The ultimate aim of the Act is to ensure thriving populations of wild horses and to foster ecological balance on the public lands.¹⁵ Removal is acceptable when appropriate studies show that there has been resource damage or that there is a serious threat of resource damage on the public lands.¹⁶ This has been supported by the Interior Board of Land Appeals (IBLA), which has remanded roundup proposals from the BLM on the basis that *1049 they do not meet the criteria for promoting that end.¹⁷ However, when challenging the BLM's actions on "quasi-scientific" grounds, such as population measurements or monitoring, IBLA will defer to the BLM,¹⁸ making many challenges difficult to sustain. Decisions by the BLM and other government agencies can only be set aside if they appear to be arbitrary or capricious; an abuse of discretion or otherwise not in accordance with the law; in excess of the agency's statutory jurisdiction or authority; or without observance of procedure required by law.¹⁹

II. ATTEMPTING TO REIGN IN THE AUTHORITY OF THE SECRETARY AND THE BLM

Shortly after the passage of the Act, litigation began between supporters of wild horses and the BLM regarding BLM and the Secretary's authority to remove wild horses and the management of the wild horse population; however, there has been little success in reducing the authority of the BLM. In *American Horse Protection Ass'n, Inc. v. Frizzell*, one of the first cases after the Act's passage, the court found that the BLM was not required to produce an Environmental Impact Statement regarding the roundup and removal of wild horses when the BLM had determined that environmental impact was "minimal."²⁰ The court also held that the Secretary had "wide discretion in protecting and managing wild horses."²¹

The first glimpse of success that supporters of wild horses had was in *American Horse Protection Ass'n, Inc. v. Watt*, when a federal court denied BLM's request to dissolve an injunction from 1976 that prohibited BLM's removal of wild horses from specific public lands in Idaho without the court's approval.²² The district court ruled that the BLM had failed to consider the possibility of limiting the number of grazing cattle in order to protect the land and had instead only focused on culling a herd of wild horses from 400 to 200.²³ Unfortunately, the case was remanded after a successful appeal by the BLM in the United States Court of Appeals for the District of Columbia. The Court of Appeals ruled that the purpose of the 1978 amendment to the Act was to reduce protections afforded to wild horses and to emphasize alternative uses for the natural resources that they consume.²⁴

In 2004 wild horse supporters were given another reason to argue for greater protection of wild horse populations. The Act was amended to allow wild horses over the age of ten or those that had been offered for adoption as least three times to be sold without *1050 limitation.²⁵ Former Montana Senator Conrad Burns, the sponsor of the amendment, stated that he believed most of the animals would be adopted and not sold for slaughter;²⁶ however, many proponents of wild horses fear that a trip to the slaughterhouse is exactly what these horses can expect.²⁷

Wild horse supporters finally found their first success in challenging and curtailing some of the BLM's authority in *Colorado Wild Horse & Burro Coalition Inc. v. Salazar*.²⁸ The BLM desired to remove all of the wild horses from the West Douglas Herd Area in Western Colorado because other activities in the area, specifically energy research, were causing the horses to move onto land they had not previously occupied.²⁹ The BLM had not made the determination that the wild horses in the West Douglas Herd Area were excess horses as determined by the Act prior to attempting to remove them.³⁰ The District Court held that the BLM's authority was limited to removing wild horses that met the requirements for being excess horse under the Act, and that the BLM's "management" of wild horses in private holding facilities did not meet the management standard Congress intended.³¹

Subsequent attempts to impose further limitations on the authority of the BLM and the Secretary have not been as successful. There have been minor successes such as *Habitat for Horses v. Salazar*, where the district court held that the observers of wild horses would suffer irreparable harm if the wild horses were completely removed from the North Piceance Herd Area in Colorado.³² Unfortunately, the district court tempered this win for wild horse supporters with the holding that the public interest in the removal of the horses outweighed the harm suffered by wild horse proponents.³³ Other courts have been less sympathetic to the argument that the supporters of the wild horses will suffer irreparable harm with the removal of horses,³⁴ contributing to the continued difficulties faced by supporters in reducing the authority of the BLM.

CONCLUSION

Wild horse supporters continue to find their attempts to constrain BLM authority, as delegated by the Secretary, blocked by the deference shown to the BLM's findings and the proponents' inability to show irreparable harm in the removal of the horses. Today there are more than 41,000 wild horses and burros in government holding facilities, at a cost to the *1051 government of more than \$36.9 million last year alone.³⁵ The wide amount of discretion and authority given to the BLM appears to have drastic consequences not only for the wild horses it is supposed to be protecting, but also for the country as a whole. Perhaps it is time to reconsider the BLM's practically unfettered authority and return some freedom to the wild horses.

Footnotes

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¹ 43 C.F.R. § 4700.0-5(b) (2011).

² See *In Def. of Animals v. Dep't of Interior*, 737 F. Supp. 2d 1125, 1131 (E.D. Cal. 2010).

³ *America's Mustangs: Put out to Pasture*, THE ECONOMIST (Sep. 24, 2011), available at <http://www.economist.com/node/21530154>.

⁴ Kristen H. Glover, *Managing Wild Horses on Public Lands: Congressional Action and Agency Response*, 79 N.C. L. Rev. 1108, 1108 (2001).

⁵ 16 U.S.C.A. § 1331 (2006).

⁶ Robert Iraola, *The Wild and Free-Roaming Horses and Burros Act of 1971*, 35 ENVTL. L. 1049, 1050 (2005).

⁷ 16 U.S.C.A. § 1338 (2006).

⁸ 16 U.S.C.A. § 1332(a) (2006).

⁹ 16 U.S.C.A. § 1333(b)(2) (2006).

¹⁰ *Id.*

¹¹ Iraola, *supra* note 6, at 1054.

¹² 16 U.S.C.A. § 1339 (2006).

¹³ 3 GEORGE CAMERON COGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 32:28 (2d ed. 2011).

14 *See Put out to Pasture: America's Mustangs, supra* note 3.

15 Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984).

16 Iraola, *supra* note 6, at 1056.

17 COGINS & GLICKSMAN, *supra* note 13, at § 32:28.

18 *Id.*

19 Habitat for Horses v. Salazar, 745 F. Supp. 2d 438, 449 (S.D.N.Y. 2010) (quoting Natural Res. Def. Council v. U.S. Dep't of Agric., 613 F.3d 76, 83 (2d Cir. 2010)).

20 American Horse Protection Ass'n v. Frizzell, 403 F. Supp. 1206 (D. Nev. 1975).

21 *Id.*

22 American Horse Protection Ass'n v. Watt, 694 F.2d 1310 (D.C. Cir. 1982).

23 *Id.*

24 *Id.*

25 Iraola, *supra* note 6, at 1054.

26 *America's Mustangs: Put out to Pasture, supra* note 3.

27 Iraola, *supra* note 6, at 1077.

28 Colo. Wild Horse and Burro Coal. v. Salazar, 639 F. Supp. 2d 87, 98 (D.D.C. 2009).

29 *Id.* at 89.

30 *Id.* at 98.

31 *Id.* at 95.

32 Habitat for Horses v. Salazar, 745 F. Supp. 2d 438 (S.D.N.Y. 2010).

33 *Id.*

34 *See, e.g., In Defense of Animals v. U.S. Dep't of Interior, 737 F. Supp. 2d 1125.*

35 *America's Mustangs: Put out to Pasture, supra note 3.*