

A National Injustice: The Federal Government's Systematic Removal and Eradication of an American Icon

Bruce Wagman & Lisa McCurdy***

Brutal captures and deaths of American wild horses are occurring on the range. This is not a fictional western gone bad but federal policy. The government tries to justify this cruelty with junk science and is sheltered in its actions by procedural barriers and judicial deference. For nearly four decades, federal contractors have been capturing wild horses and burros across the western United States under the guise of “management” pursuant to the Wild Free-Roaming Horses and Burros Act.¹ The horses are often chased down by helicopters, sometimes for miles through rough terrain in the heat of summer, lassoed, and forced to the ground and then into trailers.

Wild horses live and move in very tight-knit families consisting of mothers, father and young. Captures disrupt natural social structures, with individuals sent off to an unknown fate based on the justification that the land on which they live cannot sustain their presence. In a battle for the limited resources found on America's public lands, wild horses are losing out to more “lucrative” uses of the range, such as long-term livestock grazing and oil and gas leases. While the government would have the public believe that a “humane” solution has been found to balance

Copyright © 2011 by Bruce Wagman and Lisa McCurdy.

* Bruce Wagman is a partner in the San Francisco office of Schiff Hardin LLP. His practice focuses on animal law litigation, consultation, legislation, and education. He has litigated multiple state and federal cases involving a wide range of animal law issues, including animal hoarding, cruelty, entertainment, biomedical research, farmed animals, animal injury, attacks, ownership, veterinary malpractice, and pet custody. He is a co-author of the first casebook used in law schools on the subject—*Animal Law: Cases and Materials*—now in its fourth edition. He has been teaching the Animal Law course at Berkeley Law and other law schools since 1996.

** Lisa McCurdy is an associate in the litigation department of Greenberg Traurig, LLP, in Los Angeles, focusing on commercial and real estate litigation and animal protection law. Her work in the field of animal protection law includes litigation to protect animals against hoarding, veterinary malpractice, and cruelty in research and farming, as well as litigation regarding animal ownership and custody.

1. This law will be referred to in this Article as the “Wild Horses Act” or simply “the Act.” Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2006).

competing interests, and that displaced animals are merely relocated to a new home, the treatment of the wild horses is an abdication of the government's fiduciary responsibility to an American icon and fosters animal cruelty as part of an ongoing agency program.

The Bureau of Land Management (BLM) is the primary federal agency in charge of wild horse management.² A complex and tortuous federal statutory and regulatory scheme insulates and protects the majority of agency decisions in the area.³ A large body of case law exists regarding the removal of wild horses from public lands. Individuals and organizations interested in viewing, admiring and preserving the natural state of the horses bring claims under the Administrative Procedure Act (APA), the Wild Horses Act, the National Environmental Policy Act (NEPA), and the Information Quality Act. The challengers allege that the agencies are violating federal law by making eradication decisions based on incomplete and inaccurate data and without adequate consideration of wild horses as a vital part of public lands. In addition to courtroom challenges to agency actions, an equally active set of advocates is working to try and motivate legislative action to force changes in the statutory template upon which BLM operates its program.

It would take a thick book to even attempt to completely discuss and describe the internecine set of laws, regulations, policies, and guidelines that govern the wild horse issue. This Article briefly sets out the legal framework governing wild horse management, the key elements behind the government's decisions, and the challenges facing those who oppose the roundups.

Although not directly addressed in the challenges brought, the subtext of these lawsuits is two-fold. First, advocates believe that wild horse homelands are being systematically converted to other purposes without sufficient analysis as required by the statutory framework. Second, as a visceral and somewhat emotional matter, it is the cruelty inherent in the roundups and the dissolution of thousands of horse families that drives much of the opposition.

THE WILD FREE-ROAMING HORSES AND BURROS ACT: THE RULES ON THE RANGE

At the beginning of the last century, an estimated two million wild horses inhabited the American West.⁴ By 1971, that number was thought

2. While the U.S. Forest Service and other agencies may occasionally play a role in decisions regarding the fate of wild horses, the BLM is responsible for the vast majority of the impact on the wild horses. For ease of reading, this Article will use "BLM" to refer to any involved federal agency.

3. See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM (Aug. 1990).

4. *Id.* at 8.

to have dwindled to approximately 9500.⁵ In the competition for public rangeland, the horse populations lost out to grazing and oil-and-gas interests. Congress responded with statutory protection, declaring that “wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West” and they “contribute to the diversity of life forms within the Nation and enrich the lives of the American people.”⁶ Accordingly, Congress ordered that “wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death.”⁷

Between 1971 and 1978, the wild horse population across the western states rebounded significantly. In response, the Act was amended in 1978 to authorize the BLM to limit the wild horse population to levels that the rangelands can sustain, based on considerations of the multiple uses of the lands.⁸ The 1978 amendments “cut back on the protection the Act affords wild horses,” and allowed the BLM to shift its focus to other potential effects the horses may cause and resources they may use.⁹ The amendments triggered a reversal of the effect of the Wild Horses Act, so that the law passed to protect wild horse populations became a tool for their near eradication.

Still, the BLM is required to maintain horse populations with the least interference possible.¹⁰ Despite the lofty language of the law, across the West thousands of horses are rounded up each year in what the government has coined “gathers.” The word “gather”—suggesting some gentle process—is a euphemism for the brutality of the roundups. As with most legalized cruelty, the roundups take place largely outside the eye of the general public—because those eyes would likely be crying if they saw what was happening to the “living symbols” of America. The government’s program is devastating to the animals and to those who value their place in American society.

The BLM is tasked with protecting the wild horses, the rangelands, and the ranchers that have a stake in utilizing the horses’ home ranges.¹¹ Perhaps not surprisingly, these interests are often in conflict. While BLM

5. *Id.* at 8, 10.

6. 16 U.S.C. § 1331.

7. *Id.*

8. Under 16 U.S.C. § 1332(f), the BLM is authorized to remove “excess” horses, defined as those which “*must* be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” 16 U.S.C. § 1332(f) (emphasis added).

9. *Am. Horse Prot. Ass’n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982).

10. *Id.*; 43 C.F.R. § 4710.4 (2010) (requiring that management of the horses “shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans”).

11. *See Blake v. Babbitt*, 837 F. Supp. 458, 459 (D.D.C. 1993) (noting that the 1978 amendment struck “a new balance between ‘protecting wild horses and competing interests in the resources of the public range’”) (citing *Am. Horse Prot. Ass’n v. Watt*, 695 F.2d 1314, 1316 (11th Cir. 1983)).

is required to consider the various potential uses of the land, and while most uses for open public lands are more profitable than providing a home for wild horses, potential monetary return per square acre is not a statutorily-approved factor in decisions about the removal of wild horses.¹² Rather the protection of the horses is supposed to be a constant; the inquiry is whether the number of horses is so large that the population has exceeded the carrying capacity of the land, considering the multiple use doctrine. The government can only remove the horses if current reliable data shows that horse populations are “excess.”¹³ Even then the BLM is required to use the least invasive maintenance techniques possible.¹⁴

THE WILD HORSES ACT IN PRACTICE

Under the Act, the BLM must keep the wild herds at what it decides are “appropriate management levels” (AMLs). In determining these levels, the BLM must “consider[] [wild horses] in the area where presently found, as an integral part of the natural system of the public lands.”¹⁵ The controversy over America’s wild horses is a result of the diametrically opposed opinions about BLM’s statutory duties and priorities with respect to the wild horses. At its heart, the battle involves a choice over which interests are ascendant—those of the horses or of the other uses.

Wherever horses live on public lands, the local field office of the BLM is in charge of wild horse management.¹⁶ Each BLM office has “significant discretion to determine their own methods of computing the [AML] for the herds they manage.”¹⁷ At the beginning of each federal fiscal year, the BLM issues a “gather schedule” which identifies the agency’s intention for the following year. Specific herds and field offices are designated to have potential roundups. While the schedule is subject to change, and regularly does so, this publication gives interested citizens a general idea about planned captures.

Only under limited circumstances can the BLM actually remove horses from their designated herd area. While certain requirements are

12. The multiple uses that must be considered include “competing interests of cattle, wild horses, other wildlife, and protecting the ranges from deterioration and erosion,” and “other resource values,” but have never included financial considerations. *Am. Horse Prot. Ass’n*, 694 F.2d at 1319 n.41; *Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 22 (D.C. Cir. 2006) (citing 43 C.F.R. 4700.0-6(b) (2010)).

13. See *Blake*, 837 F. Supp. at 459.

14. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1333(a) (2006).

15. *Id.* at § 1331.

16. See *Fund for Animals*, 460 F.3d at 16; *Blake*, 837 F. Supp. at 459 (“The Wild Horse Act was enacted in 1971, and it ‘extended federal protection to wild horses and empowered BLM to manage horses roaming public ranges as a part of the Agency’s management of the public lands.’”) (quoting *Am. Horse Prot. Ass’n v. Watt*, 694 F.2d 1310, 1311 (D.C. Cir. 1982)).

17. *Id.*

unclear and highly disputed, the agency must follow a multistep process to address wild horse populations. First, the BLM must obtain reliable information about the herd, environment and range conditions. From that evaluation they establish the AML, the appropriate number of horses for the land at issue.¹⁸ The AML is used to determine if “an overpopulation exists.”¹⁹ Next, “excess” animals must be identified.²⁰ After meeting these steps, the agency can, and supposedly must, take “immediate” action to return to the AML.²¹ “[O]ld, sick, or lame animals [can] be destroyed in the most humane manner possible.”²² Other “excess” horses can then be “humanely captured and removed” for adoption, and those who are not adopted are placed in long-term holding corrals or can be “destroyed in the most humane and cost efficient manner possible.”²³ “Three strikes” horses, who have been offered for adoption three times with no takers, and old horses can also be sold.²⁴

THE STATUTORY WEB

While the overriding direction of BLM actions pertaining to wild horses comes from the Wild Horses Act, NEPA also plays an integral role in every roundup. Under NEPA, any major federal action that significantly affects the quality of the human environment requires preparation of an environmental impact statement (EIS).²⁵ Implementing regulations require any government agency considering a proposed action that falls within NEPA to first determine if the action is one that will normally require preparation of an EIS.²⁶ Agencies are tasked with ensuring that they utilize “high quality” information and making environmental information “available to public officials and citizens before decisions are made and before actions are taken.”²⁷ The agency can avoid issuing an EIS by issuing a finding of no significant impact only if the agency took a “hard look” at the problem and found the potential environmental impact to be insignificant.²⁸ The BLM has taken advantage of the statutory structure by assessing individual gathers separately, permitting the agency to issue a finding of no significant impact and avoid conducting an EIS.²⁹ NEPA’s implementing regulations also require the

18. The particular area in each case is also defined by the BLM in related land use plans.

19. 16 U.S.C. § 1333(b)(2).

20. *Id.*

21. *Id.* As a practical matter, the BLM regularly delays removal of wild horses for some time after an excess determination has been made.

22. *Id.* § 1333(b)(2)(a).

23. *Id.* § 1333(b)(2)(c).

24. *See id.* § 1333(e).

25. 42 U.S.C. § 4332(c) (2010).

26. *See* 40 C.F.R. § 1501.4(a) (2010).

27. 40 C.F.R. § 1500.1(b) (2010).

28. *See* *Sierra Club v. Kimbell*, 623 F.3d 549, 559 (8th Cir. 2010).

29. *See, e.g., Am. Horse Prot. Ass’n*, 694 F.2d 1310; *Fund for Animals*, 460 F.3d 13.

BLM to consider the cumulative impact of its actions.³⁰ However, there is no documented instance of the BLM assessing the cumulative impact of multiple gathers.

The BLM has largely insulated itself from the meaningful review NEPA is intended to provide in other ways. The agency justifies its gathers with minimal data, which often falls far short of establishing the need to remove wild horses. Moreover, decisions are frequently based on old data, not current data as required by law. Thus, while the BLM goes through the process of evaluating the environmental impacts of the roundups, its detractors assert that BLM's NEPA compliance is nothing more than lip service. An oft-repeated refrain is that the data the BLM provides is unhelpful and misleading, and that the decisions that arise from it are therefore equally faulty. Opponents assert that the data is also inadequate to meet the Information Quality Act of 2001³¹ and the BLM Information Quality Guidelines, which require that information be "presented in an accurate, clear, complete, and unbiased manner."³²

One area in which the BLM consistently relies on old data is in its determination of AMLs. The BLM's error in using old figures is then compounded when those calculations are applied to the periodic inventories that are made of wild horse populations in an area. BLM's reliance on outdated inventories is illustrated by the United States General Accounting Office's (GAO) 1990 review of the Wild Horse Program.³³ The GAO found that a 1987 herd management plan set the wild horse target population in six Nevada herd areas at the estimated 1974 levels.³⁴ There is little indication that the BLM has improved on the quality of data upon which it relies since that time.

BLM AND STATUTORY INTERPRETATION

Many doctrines commonly addressed in other animal and environmental law cases regularly arise in this area, although the special nature of the wild horse program must always be considered. Some of the typical issues include (1) standing of the plaintiffs under Article III, Section 4 of the Constitution; (2) agency discretion and deference;³⁵ (3) the high standard needed for relief when plaintiffs challenge agency

30. 40 C.F.R. § 1508.7 (2010).

31. See 44 U.S.C. § 3516 (2010).

32. BUREAU OF LAND MANAGEMENT, INFORMATION QUALITY GUIDELINES 4, available at http://www.blm.gov/pgdata/etc/medialib/blm/national/national_page.Par.7549.File.dat/guidelines.pdf.

33. See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM 3, 23 (Aug. 1990).

34. *Id.* at 23.

35. See, e.g., *Natural Res. Def. Council v. Chevron USA, Inc.*, 467 U.S. 837 (1984).

decisions;³⁶ (4) the heightened requirements for establishing a right to preliminary injunctive relief;³⁷ and (5) mootness. In this section we just touch on a few other issues that merit focus and that are more specific to an analysis of the Wild Horses Act litigation and what powers the BLM has in making its decisions.

The BLM has made many decisions over the past three decades that are highly questionable given the statutory framework. Perhaps one of the most drastic is its *seriatim* “zeroing out” of herd areas in which the BLM eliminates *all* horses from an area.³⁸ The agency purports to do that pursuant to its broad management authority, but “zeroing out” is in direct conflict with its mandate. The BLM is required to consider the horses in their herd areas “as an integral part of the natural system of the public lands.”³⁹ By removing all of the horses from the herd area the agency is categorically in conflict with this mandate. No agency interpretation of this plain language can justify how “considering” horses *in* a herd area can mean eliminating them. If horses are presumptively important (“integral”) to the land, clearly the intention of the agency itself was to keep at least some of them on the land.

Sometimes, zeroing out is the last step in what looks like a planned extirpation of horses in a Herd Area. The BLM often reasons that total elimination of horses in a Herd Area is necessary where there are not enough horses in the area to maintain a healthy gene pool. There may have at one point been an adequate amount of horses in the Herd Area, but serial roundups by the BLM have reduced the population size. Thus, the BLM can be the cause of the genetic deterioration which it later uses to justify capturing all the horses in that area.

In addition to the rationale for roundups, the methods and manner in which they are conducted also concern the general public. BLM’s own regulations state that the BLM must provide wild horses and burros with “humane care and treatment.”⁴⁰ The regulations further define “humane treatment” as “handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse or burro.”⁴¹ But BLM practices are seemingly inconsistent with these requirements. The images of helicopters chasing horses across miles of rough terrain leave many viewers with the sense that “unnecessary stress and suffering” is an inevitable result of the

36. In general agency decisions need to be “arbitrary and capricious” or in direct violation of the authorizing statutes in order to be successfully challenged under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

37. *See, e.g.,* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

38. A “herd area” is “the geographic area identified as having been used by a herd as its habitat in 1971.” 43 C.F.R. § 4700.0-5(d) (2010).

39. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 (2006).

40. 43 C.F.R. § 4700.0-2 (2010).

41. *Id.* § 4700.0-5(e).

process. In fact, some small percentage of horses die as a result of the roundups.⁴² For those animals that survive, the health impacts of the roundups are well documented.⁴³ Even worse, once the horses are moved into captivity, they suffer a new set of psychological and physiological changes, including confused social status, separation from lifelong herd mates, wasting away of muscle tissues, insulin resistance, and obesity.⁴⁴ Although there has never been a successful challenge to the BLM's capture methods, given the litany of negative consequences, it is difficult to see how the practices satisfy the regulatory requirement of humane treatment.

THE ROAD AHEAD

The present treatment of wild horses in America is distressing. According to the BLM, as of February 2010 there were roughly equal numbers of wild horses and burros in captivity and wild on public lands.⁴⁵ Wild horses and burros are recognized as living symbols of America's history. However, their existence is threatened by competition to use public lands for more lucrative purposes. While those who hope to protect this American icon can technically challenge BLM actions under the APA, the judicial route is an uphill battle due to broad agency discretion, the short time frame to mount most actions, and the lack of accurate and complete data. As a result, public awareness is a key component to bringing an end to this unlawful government practice.

As required by statute, the BLM regularly seeks public comment on its proposed gathers. Public pressure, in Congress and the courts, may eventually persuade the BLM to at least temporarily halt planned gathers. Undoubtedly, public commentary and demand led the BLM earlier this year to request that the National Academy of Sciences / National Research Council make an independent technical review of the Wild Horse and Burro Program.⁴⁶ That review is intended to determine if the BLM is using the best science and information available in managing

42. This occurs either during the chase and capture, or from diseases later contracted in long-term holding.

43. See, e.g., BRUCE NOCK, *WILD HORSES: THE STRESS OF CAPTIVITY* (2010) (providing non-exhaustive list of the impact on the animals includes miscarriages, intestinal compaction, and development of colic, which is often fatal).

44. See generally *id.*

45. BLM states that there were "approximately 38,400 wild horses and burros (about 33,700 horses and 4,700 burros) . . . roaming on BLM-managed rangelands in 10 Western states" as of February 2010. At the same time, BLM claims there were 40,600 captured horses and burros in short and long-term holding facilities. See *Wild Horse and Burro Quick Facts*, BUREAU LAND MGMT. (Feb. 2, 2011), http://www.blm.gov/wo/st/en/prog/wild_horse_and_burro/wh_b_information_center/Fact_Sheet.html.

46. See, e.g., Press Release, Bureau of Land Management, BLM Proposes National Academy of Sciences Study (Aug. 27, 2010), available at http://www.blm.gov/wo/st/en/info/newsroom/2010/august/NR_8_27_2010.html.

wild horses and burros on western rangelands. The study was set to begin on January 1, 2011, but unless it recommends significant changes *and* the BLM follows those recommendations, no change will result. For now, the BLM acts with almost unfettered authority in deciding the fate of the equine symbol of our freedom.

It is doubtful that the planned study will lead to any significant change in the treatment of the wild horses, and it will have no binding effect on the BLM. Nevertheless, it may stimulate further support for legislation that shifts the power base held by BLM over decisions about the wild horses. Continued and increased societal support and action—through litigation, efforts at legislation, and public campaigns—are the only hope the horses have. Unless horse advocates continue to challenge the status quo, the horses could end up right where they were before the Wild Horses Act was adopted in 1971—on the brink of disappearing.