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Managing Wild Horses on Public Lands: Congressional Action and Agency Response

Wild horses captivate the imagination and are invariably linked with visions of the American frontier, the ultimate wilderness. Once numbering two to five million,¹ the United States wild horse population declined to seventeen thousand by the 1960s.² Congress responded to the public's desire to protect these animals³ by unanimously passing the Wild Free-Roaming Horse and Burro Act of 1971 (the "Act").⁴ This seemingly benevolent legislation and the

1. LAWRENCE SCANLAN, *WILD ABOUT HORSES* 44 (1998) ("Travelers [in the early 1800s] reported seeing herds so massive that their movement across the horizon continued unabated from dawn to dusk."); see also BETSY A. CODY, *WILD HORSE AND BURRO MANAGEMENT* 1 (1993) (noting that an estimated two million horses inhabited the western range by 1900); WILD HORSE & FREEDOM ALLIANCE, *MANAGING FOR EXTINCTION: SHORTCOMINGS OF THE BUREAU OF LAND MANAGEMENT'S WILD HORSE AND BURRO PROGRAM* 5 (2000) [hereinafter *SHORTCOMINGS*] (estimating the number to be three million).

2. SCANLAN, *supra* note 1, at 45. Various reasons explain this drastic decline. In the 1930s, thirty million pounds of horseflesh were canned as chicken food. Wild Horse and Burro Freedom Alliance, *Creation of the BLM*, at <http://www.savewildhorses.org/blm.htm> (last visited Jan. 10, 2001) (on file with the North Carolina Law Review). Horses were also processed into fertilizer and shot by ranchers who wanted to eliminate grazing competition. SCANLAN, *supra* note 1, at 44. During this period, the federal government described wild horses as "worthless" and devised a plan to permanently remove them from the West. SCANLAN, *supra* note 1, at 47-48 (noting a 1919 removal plan that resulted from the lobbying efforts of ranchers seeking more room to graze profitable sheep and cattle); RICHARD SYMANSKI, *WILD HORSES AND SACRED COWS* 4 (1985) (noting that the Bureau of Land Management "encouraged catching wild horses" and quoting the first agency director as desiring "the removal of wild horses from public lands").

3. Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 507 (1985) (noting that the legislation was a result of "a nationwide letter writing campaign, organized by various horse protection groups, humane societies, and thousands of school children"). The campaign to protect the wild horse began in 1950 when Velma Johnson, known as "Wild Horse Annie," witnessed the maltreatment of a group of wild horses headed for the slaughterhouse and began the fight to prevent such abuse. See SCANLAN, *supra* note 1, at 46-51. During the next decade, public outcry escalated when Congress failed to enact comprehensive protective legislation. Bureau of Land Management, *History of Wild Horses*, at <http://www.wildhorseandburro.blm.gov/historywhb.html> (last modified June 21, 2000) (on file with the North Carolina Law Review) [hereinafter *History of Wild Horses*]; see also SYMANSKI, *supra* note 2, at 9 ("By the late 1960s, the celebrated horse cause had become truly national.").

4. Wild Free-Roaming Horse and Burro Act of 1971, Pub. L. No. 92-195, 85 Stat. 649 (codified as amended at 16 U.S.C. §§ 1331-1340 (1994)) (establishing a policy to protect wild horses on public lands); Pitt, *supra* note 3, at 507-08 (noting that the bill unanimously

Bureau of Land Management's (BLM)⁵ implementation of the Act have led to more than forty suits in the federal district courts.⁶ This Recent Development examines the management of wild horses on public lands since the Act became effective in 1971, outlines the challenges facing the BLM in managing these wild animals, and argues that removing domestic cattle from a portion of the BLM lands and reevaluating the usefulness of the adopt-a-horse program are necessary first steps in protecting the wild horse population and achieving the purposes set forth in the Act.

The BLM manages a larger area of land than any other federal agency—264 million acres, or about one-eighth of the United States.⁷ The mission of the BLM is “to sustain the health, diversity and productivity of the public lands for the use and enjoyment of present and future generations.”⁸ The 1971 Act expanded the BLM's jurisdiction over land to include jurisdiction over wild horses.⁹ Congress declared that wild horses “are living symbols of the historic

passed both houses of Congress).

5. The Act applies to both the United States Forest Service and the BLM. See 16 U.S.C. § 1332(a) (1994). This Recent Development will address the BLM exclusively because ninety-five percent of wild horses and burros on public lands inhabit lands administered by the BLM. CODY, *supra* note 1, at 2. The focus will be on wild horses, rather than burros, because wild horses live in family groups or bands while burros are generally solitary creatures that inhabit more marginal areas. See Wild Horse and Burro Freedom Alliance, *Wild Horse and Burro Behavior*, at <http://www.savewildhorses.org/behavior.htm> (last visited Jan. 10, 2001) (on file with the North Carolina Law Review). The ratio of wild horses to burros on federal lands is eight to one. CODY, *supra* note 1, at 2. Furthermore, the BLM can more easily provide for the adoption of burros, which are in “constant demand.” See Jim Robbins, *On the Run*, CHI. TRIB., Mar. 1, 1987, § 10 (Magazine), at 10 (noting that burros “look like little donkeys and are novel and cute”).

6. Tom Pogacnik, Bureau of Land Management, *Wild Horses and Burros on Public Lands*, at <http://biology.usgs.gov/s+t/frame/x182.htm> (last visited Jan. 21, 2001) (on file with the North Carolina Law Review); see, e.g., *Am. Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1315–16 (D.C. Cir. 1982) (holding that even though the BLM did not fully comply with an injunction requiring court approval to remove wild horses, a change in the governing statute may supersede the court's discretion); *Eddleman v. United States*, 729 F. Supp. 81, 82–83 (D. Mont. 1989) (denying the plaintiffs relief, for lack of subject matter jurisdiction, from the federal government's refusal to allow the plaintiffs to adopt wild horses that the plaintiffs had cared for and fed); *Am. Horse Prot. Ass'n v. Andrus*, 460 F. Supp. 880, 888 (D. Nev. 1978) (declining to enjoin the U.S. Department of the Interior from removing wild horses from Nevada ranges but requiring a veterinarian's certificate for animals to be destroyed).

7. Bureau of Land Management, *BLM Facts*, at <http://www.blm.gov/nhp/facts/index.htm> (last visited Jan. 10, 2001) (on file with the North Carolina Law Review).

8. *Id.*

9. 16 U.S.C. § 1333(a) (1994) (establishing the Secretary of the Interior's authority over wild horses in connection with the Act).

and pioneer spirit of the West . . . and . . . are fast disappearing from the American scene" and established a policy to protect the horses "from capture, branding and harassment, or death."¹⁰ Furthermore, Congress expressed that wild horses were to be considered "an integral part of the natural system of the public lands."¹¹ After this legislation passed, public sentiment quieted,¹² and the BLM began the task of implementing the congressional mandate.¹³

The Act directs the agency to maintain "all management activities . . . at the minimum feasible level."¹⁴ During the first years of wild horse management, the population of wild horses increased dramatically as a result of the hands-off management procedures mandated by the Act.¹⁵ In response, Congress amended the legislation in 1978 to establish a balanced management regime.¹⁶ The amendments directed the BLM to keep an updated count of the wild horse population to enable the agency to determine when overpopulation exists, to establish appropriate management levels¹⁷ of wild horses, and to decide when to remove or destroy excess animals to achieve this optimal level.¹⁸ To help with this task, the

10. 16 U.S.C. § 1331 (1994).

11. *Id.*

12. See Pitt, *supra* note 3, at 508.

13. The Supreme Court upheld the Act against a constitutional challenge, finding that congressional regulation and protection of wildlife on public lands is constitutional under the Property Clause, section 3, clause 2 of Article 4 of the U.S. Constitution. *Kleppe v. New Mexico*, 426 U.S. 529, 545-46 (1976).

14. 16 U.S.C. § 1333(a) (1994). The Act further directs the agency "to protect the natural ecological balance of all wildlife species which inhabit such lands." *Id.*

15. See Pitt, *supra* note 3, at 517-18 (noting the "soaring" population of wild horses by 1974 and the BLM's estimate of population growth rate to be between eighteen and thirty percent each year). The 1971 Act originally mandated that "[n]o 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 from the area." Wild Free-Roaming Horse and Burro Act of 1971 § 3(c), Pub. L. No. 92-195, 85 Stat. 649, 650, *amended by* Public Rangelands Improvement Act of 1978 § 14, Pub. L. No. 95-514, 92 Stat. 1803, 1808-10 (codified at 16 U.S.C. §§ 1332(f), 1333(b)-(d) (1994)).

16. Public Rangelands Improvement Act of 1978 § 14, Pub. L. No. 95-514, 92 Stat. 1803, 1808-10 (codified at 16 U.S.C. §§ 1332(f), 1333(b)-(d)).

17. The appropriate management level is based on the number of animals that a particular area can support. 16 U.S.C. § 1333(b)(1) (1994).

18. See § 1333(b)(1)-(2). Subsection (b)(2) establishes a hierarchy of removal procedures. First, old, sick, or lame animals are destroyed, then healthy animals are removed for adoption, and, finally, healthy animals not wanted for adoption are destroyed. § 1333(b)(2); see also CODY, *supra* note 1, at 4 (noting that horses in excess of the appropriate management level are removed). A BLM regulation authorizing field officers to decide when excess animals must be removed was upheld as the most effective means of implementing the goal of "immediate" removal. *Blake v. Babbitt*, 837 F. Supp. 458, 459 (D.D.C. 1993) (upholding 43 C.F.R. § 4770.3(c)). The Act specifically authorizes

BLM established 209 "herd management areas" in ten states where wild horses are managed and maintained.¹⁹

One of the most controversial aspects of the BLM's management is the round-up, removal, and adoption process codified in the Act and detailed in agency regulations.²⁰ Since 1973, the "adopt-a-horse" program has been the primary method of placing excess wild horses removed from the range.²¹ Under the Act, healthy excess animals removed from public lands may be adopted by "qualified individuals" who "can assure humane treatment and care" for the animals.²² For a fee of at least \$125 per wild horse,²³ a qualified individual may adopt up to four horses at a time.²⁴ Once the individual has cared for the

the BLM to issue necessary rules and regulations. 16 U.S.C. § 1336 (1994); *see also* 43 C.F.R. §§ 4700–4770 (1999) (listing regulations issued by the agency under the Act's grant of authority).

19. *See* 43 C.F.R. § 4710.3-1 (1999) ("In delineating each herd management area, the authorized officer shall consider the appropriate management level for the herd, the habitat requirements of the animals, [and] the relationships with other uses."). Herd management areas have been established in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming. Bureau of Land Management, *Removal Data by State*, at <http://www.wildhorseandburro.blm.gov/99stats.htm> (last modified Feb. 18, 2000) (on file with the North Carolina Law Review). The majority of these horses inhabit Nevada. *See* CODY, *supra* note 1, at 3.

20. *See* 16 U.S.C. § 1333 (1994); 43 C.F.R. §§ 4720–4750 (1999).

21. CODY, *supra* note 1, at 2 ("If adoption demand is insufficient, the remaining healthy animals are to be destroyed. However, the BLM . . . [has] not exercised this right since January 1982 and [has] been expressly prohibited from doing so by Congress (as a rider on annual appropriations) since 1988."); *see also* Peter Kendell, *Horse Adoption Muted by Slaughter Report*, CHI. TRIB., Jan. 21, 1997, § 1, at 1 ("Since [1971], the federal government has had only one method for controlling the population of the herds: capturing thousands of horses and trucking them around the country to be adopted by the public.").

22. 16 U.S.C. § 1333(b)(2)(B). The BLM's recent policy allowing horses to be adopted through Internet auctions has raised questions regarding the agency's ability to determine whether adopters are in fact qualified. Telephone Interview with Andrea Lococo, Rocky Mountain Coordinator, The Fund for Animals Inc. (Sept. 7, 2000); *see also* *Click of the Mouse Might Harness A Wild Horse or Burro at Auction*, WASH. POST, July 4, 2000, at A17 (describing the new adoption method). Animals currently up for adoption can be viewed at Bureau of Land Management, *Wild Horse and Burro Internet Adoption*, at <http://www.adoptahorse.blm.gov> (last visited Jan. 10, 2001) (on file with the North Carolina Law Review).

23. 43 C.F.R. § 4750.4-2(b) (1999). At both public and Internet auctions, the bidding starts at \$125, but a horse ultimately could sell for a higher price. In 1984, the BLM developed a fee waiver system to encourage adoptions; however, this program contributed to the commercial exploitation of animals and ended in 1988. *See* CODY, *supra* note 1, at 2–3.

24. This limiting provision was added to the Act by the 1978 Amendments in an effort to thwart abuses in the program. *See* Public Rangelands Improvement Act of 1978 § 14(a), Pub. L. No. 95-514, 92 Stat. 1803, 1810 (codified at 16 U.S.C. § 1333(c) (1994)). This protection could be circumvented by adopting animals in the names of friends or relatives, a process known as power-of-attorney adoption. *See infra* notes 37–40 and

horses for one year, title may be transferred to that private party and the horses are no longer under the jurisdiction of the BLM.²⁵ Since the program was first implemented, private individuals have adopted over 175,000 wild horses and burros.²⁶

From the beginning, ranchers were hostile to the program.²⁷ The BLM unofficially sanctioned private roundups and overlooked the inhumane treatment of the animals.²⁸ In the 1980s, concerns regarding overpopulation resulted in increased horse removal.²⁹ Thousands of animals awaited adoption in crowded BLM corrals,³⁰ where conditions were less than optimal.³¹

accompanying text.

25. 16 U.S.C. § 1333(d)(1) (1994).

26. *History of Wild Horses*, *supra* note 3. By 1987, wild horses had been adopted in every state except Hawaii. BUREAU OF LAND MGMT. & FOREST SERV. 7 TH REPORT TO CONGRESS, ADMINISTRATION OF THE WILD FREE-ROAMING HORSE AND BURRO ACT 7 fig.3 (1988).

27. Even when the population of wild horses reached 17,000, ranchers viewed wild horses as competing with their cattle for the resources of the public lands and sought to destroy them. *See* SCANLAN, *supra* note 1, at 44–45. In the years leading up to the Act's passage, "[c]attle ranchers and sheep farmers complained that wild-horse herds ate their hay and competed with their livestock for precious water and grasslands, that stallions trampled fence lines and stole their mares." *Id.* at 47. Ranchers did not support the Act because it prohibited "commercial processing of those wild horses exceeding range capacity." Pitt, *supra* note 3, at 507.

28. In one case, ranchers rounded up wild horses on federal lands after notifying BLM officials. *Am. Horse Prot. Ass'n v. U.S. Dep't of Interior*, 551 F.2d 432, 434–35 (D.C. Cir. 1977). The horses were trapped overnight while the ranchers discussed controlling them by closing their nostrils with hog rings. *Id.* at 435; *see also* SCANLAN, *supra* note 1, at 49–50 (explaining that hog rings prevent horses from breathing fully, reducing their speed). During the night, four horses died by falling over a cliff, and three horses' hooves became stuck in the rocks. The surviving horses were sent to Nebraska "to be slaughtered for dog food." 551 F.2d at 435.

29. *See* CODY, *supra* note 1, at 3.

30. *See id.* at 2 (noting that almost 10,000 animals were in corrals by 1985). The BLM attempted to facilitate adoptions by using prisoners to introduce the animals to humans. *See* SCANLAN, *supra* note 1, at 53 ("Sometimes the task of gentling adopted mustangs falls to people who perhaps have yet to learn the wisdom of patience and trust—inmates in penitentiaries."). For an examination of prisoners' efforts to tame the horses, *see* Tad Bartimus, *Everybody Wins—The Horses, The Inmates and the Taxpayers*, L.A. TIMES, Aug. 30, 1987, at A2; *see also* Associated Press, *Rehabilitating Horses and Prisoners*, N.Y. TIMES, Aug. 26, 1987, at B4 (documenting the "unqualified praise from everybody involved" in the Colorado Wild Horse-Inmate Program). The overcrowding of corrals continues today on a smaller scale. *See* SHORTCOMINGS, *supra* note 1, at 15 (noting that hundreds of horses are in holding facilities waiting to be adopted).

31. Overcrowding is stressful for wild horses and allows disease to spread among them. SHORTCOMINGS, *supra* note 1, at 15; *see also* Paul Hammel, *Federal Probe Planned in Wild Horse Deaths*, OMAHA WORLD-HERALD, Nov. 12, 1997, at 21, LEXIS, News Library, Omaha World Herald File (discussing the disease-related deaths of 24 horses during one month at a BLM facility holding 5,000 horses).

An early lawsuit, *Animal Protection Institution of America v. Hodel*,³² challenged the administration of the adopt-a-horse program, claiming that the BLM transferred title to individuals who the BLM knew would exploit the animals for commercial purposes.³³ On appeal, the Ninth Circuit focused on congressional intent and rejected the government's contention that the Act allows the transfer of title even if the BLM knows that the transferee intends to exploit the animals commercially.³⁴ The court stated that when the BLM ignores adopters' intent, it "undercuts Congress' desire to insure humane treatment for wild horses and burros"³⁵ and "renders the adoption process a farce; the one-year requirement of humane treatment and care serves no purpose if, on the day the one-year period expires, the adopter can proceed to the slaughterhouse with his horses or burros."³⁶

Despite this early attempt to prohibit the adoption program from being used as a vehicle to circumvent the Act's protection, abuses continued. In 1992, The Fund for Animals notified the BLM that a western farming operation intended to exploit commercially hundreds of horses obtained through the adoption program.³⁷ The BLM seized the animals, and the farm was not allowed to obtain title.³⁸ The farming operation sued the BLM, asserting that the agency had breached a contract between the parties.³⁹ The case illustrates that the four horse limitation is ineffective to curtail abuses: The farm held power of attorney for 150 adopters and was attempting to adopt 600 horses when the BLM seized the animals.⁴⁰ The court refused to dismiss the case because a valid agreement between the parties existed; however, it noted that adopting horses for commercial

32. 671 F. Supp. 695 (D. Nev. 1987), *aff'd*, 860 F.2d 920 (9th Cir. 1988).

33. *Animal Prot. Inst. of Am. v. Hodel*, 860 F.2d 920, 923 n.3 (9th Cir. 1988) ("Commercial exploitation encompasses the use of animals as bucking horses in rodeos and the slaughter of animals for processing into pet food.").

34. *Id.* at 925-26.

35. *Id.* at 927.

36. *Id.*

37. E-mail from Andrea Lococo, Rocky Mountain Coordinator, The Fund for Animals Inc., to Kristen Glover (Sept. 7, 2000, 14:28:47 EST) (on file with the North Carolina Law Review); *see also* *Haberman v. United States*, 26 Cl. Ct. 1405, 1408-09 (1992) (stating that the BLM confiscated the horses after receiving a telegram from The Fund for Animals that the farm intended to slaughter the horses).

38. E-mail from Andrea Lococo, *supra* note 37.

39. *Haberman*, 26 Cl. Ct. at 1407.

40. *Id.* at 1407-08; *see also supra* note 24 and accompanying text (discussing the four horse limit).

purposes would constitute a breach of the agreement between the parties and violate the Act.⁴¹

Perhaps the sharpest criticism of the adoption program came in 1997, after newspaper articles revealed the contents of a memo detailing extensive abuse in the adoption program produced by the Department of Justice after a four-year investigation.⁴² The memo stated that while agency employees "freely admit that everyone 'knows' as a general proposition that most of the horses adopted out go to slaughter eventually, the agency tries to avoid finding out that this will happen in any given adoption."⁴³ Furthermore, a subsequent investigation conducted by the Associated Press found that more than 200 BLM employees themselves had adopted more than 600 wild horses and that ninety percent of horses rounded up by the agency eventually were slaughtered.⁴⁴ The BLM later disputed the Associated Press findings, asserting that far fewer horses were slaughtered and that few employees were profiting.⁴⁵ Nonetheless, the BLM announced that it would implement changes to the adoption program, including closer monitoring of potential adopters, to reduce the abuses alleged by the Associated Press.⁴⁶

41. *Id.* at 1416.

42. See, e.g., Editorial, *Adopt-a-Horse Slaughter*, S.F. CHRON., Feb. 7, 1997, at A26; Doug McInnis, *Most Adopted Wild Horses Being Led to Slaughter: Federal Report Finds 'Don't Ask, Don't Tell' Policy*, HOUS. CHRON., Jan. 29, 1997, at A8, LEXIS, News Library, The Houston Chronicle File.

43. McInnis, *supra* note 42.

44. *Id.* ("[S]ome of the employees could not account for the whereabouts of the horses, while others acknowledged sending them to slaughter.") One BLM employee "couldn't account for 90-odd horses placed with relatives, friends and co-workers." *Subsidized Slaughter: Horse-Adoption Program Merits Inquiry*, STAR TRIB. (Minneapolis, Minn.), Feb. 1, 1997, at 18A [hereinafter *Subsidized Slaughter*]. The same investigation revealed that 32,774 horses remained untitled after adoption by private individuals. See Associated Press, *U.S. Agency Loses Track of Wild Horses, Burros Adopted Under Protection Law*, CHI. TRIB., Jan. 29, 1997, at N4. Selling a horse for slaughter can be a profitable enterprise, as one horse can sell for as much as \$700. See *Subsidized Slaughter*, *supra*. This profitability is reduced when the adopter obtains title before slaughtering the animal because, according to the director of the adoption program, caring for the horse over the one-year adoption probationary period can cost between \$500 and \$1000. See Guy Gugliotta, *Chasing Down Wild Accusations*, WASH. POST, Feb. 25, 1997, at A15. The government spends an average of \$1500 in adoption-related costs for each horse that is later adopted for a fee of \$125. See *Subsidized Slaughter*, *supra*.

45. See Associated Press, *U.S. Disputes Accounts of Horse Killing*, CHI. TRIB., Feb. 21, 1997, § 1, at 8; Nancy J. Smeltzer, *Horses, Burros Available for Adoption: Bureau Officer Rebuts Report of Program Being Mismanaged*, COLUMBUS DISPATCH, Feb. 7, 1997, at 6C, LEXIS, News Library, The Columbus Dispatch File.

46. See *New Rules Aim to Keep Animals From Slaughter*, MILWAUKEE J. SENTINEL, Apr. 24, 1997, at 5A. At an adoption held shortly after the Associated Press reported the investigation results, a federal official stated that "[i]f you are here so you can take these

In October 1997, after the investigation results were reported, the BLM, the Animal Protection Institute, and The Fund for Animals executed a settlement agreement to resolve a lawsuit seeking to modify the injunction granted in *Hodel*.⁴⁷ Requiring the BLM to adopt tougher standards for transferring title, the settlement agreement sought to prevent the slaughter of wild horses by individuals soon after receiving title to the animals.⁴⁸ Under the agreement, an individual adopting a wild horse must sign an affidavit stating, "I have no intent to sell this wild horse or burro for slaughter or bucking stock, or for processing into commercial products."⁴⁹ Furthermore, the BLM agreed to negotiate memoranda of understanding with slaughterhouses requiring them to retain paperwork on BLM-branded horses for one year and to notify the BLM of any untitled horses received.⁵⁰ Finally, the BLM agreed to eliminate power-of-attorney adoptions.⁵¹

Recently, the BLM reported that wild horses were still being sent to slaughterhouses, although the numbers were significantly less than the numbers reported in the 1997 Associated Press investigation tally. From March 1998 to September 1999, 571 titled wild horses were slaughtered,⁵² more than 180 of which were killed within the first three months of title transfer.⁵³ The Fund for Animals filed a motion in the federal district court of Nevada on August 21, 2000, to obtain

animals to slaughter, we don't want you here. These animals didn't ask to be caught. They don't deserve that. This program was designed to protect animals from that fate." Peter Kendall, *Horse Adoption Muted by Slaughter Report*, CHI. TRIB., Jan. 21, 1997, § 1, at 1.

47. Settlement Agreement, Animal Prot. Inst. of Am. v. Babbitt (D. Nev. filed Oct. 15, 1997) (No. CV-N-85-365-HDM) (on file with the North Carolina Law Review).

48. E-mail from Andrea Lococo, *supra* note 37.

49. Settlement Agreement at 2, *Animal Prot. Inst. of Am.* (No. CV-N-85-365-HDM).

50. *Id.* at 3. The BLM would thus know when horses were sent to slaughter during the one-year probationary period in which title remained in the BLM. Significantly, the BLM did not require slaughterhouses to report horses received after the one-year period expired.

51. *Id.* at 4. This provision should alleviate the power of attorney loophole in the four horse limit. For an illustration of how the four horse limitation can be circumvented by using a power of attorney, see *supra* notes 37-40 and accompanying text (discussing *Haberman v. United States*, 26 Cl. Ct. 1405 (1992)).

52. E-mail from Andrea Lococo, *supra* note 37; see also Matt Kelley, *Wild Horse Slaughter Revealed by the Bureau of Land Management*, CHI. TRIB., Nov. 8, 1999, Evening Update, at 2 (noting that an October 1999 internal BLM report found that "571 former wild horses were slaughtered at four U.S. plants between March 1998 and Sept. 22 [1999]").

53. See *SHORTCOMINGS*, *supra* note 1, at 17; Kelley, *supra* note 52; John Ritter, *Debate on Horse Roundups Running Wild*, USA TODAY, Sept. 12, 2000, at 8A.

compliance with or to alter the terms of the 1997 settlement.⁵⁴ The Fund for Animals alleged that the BLM had neither investigated nor recommended for prosecution any adopter for violating the affidavit,⁵⁵ and the affidavits had not been signed as required under the 1997 settlement agreement.⁵⁶ According to The Fund for Animals, applications for title frequently did not even contain the required affidavit.⁵⁷

On November 29, 2000, District Judge Howard D. McKibben denied The Fund for Animals' motion to enforce the settlement agreement.⁵⁸ Upon the judge's request, the BLM assured the court that all field offices used forms containing the required language and that all old forms were discarded as of August 1999.⁵⁹ The BLM further asserted that the agency reviews adoption records for "suspicious activity" before passing title to potential adopters.⁶⁰ Despite the BLM's assurances, Judge McKibben suggested that the BLM could require prospective adopters to provide information about prior adoptions and whether any of those animals were

54. Plaintiff The Fund for Animals' Motion to Enforce the Parties' October 1997 Settlement Agreement and Memorandum in Support at 2-3, *Animal Prot. Inst. of Am. v. Babbitt* (D. Nev. filed Aug. 21, 2000) (No. CV-N-85-365-HDM) (on file with the North Carolina Law Review). The 1997 settlement agreement provides that its terms may be modified for good cause either by consent of the parties or by filing an action in court. Settlement Agreement at 5, *Animal Prot. Inst. of Am.* (No. CV-N-85-365-HDM).

55. See Motion to Enforce Settlement Agreement at 4-5, *Animal Prot. Inst. of Am.* (No. CV-N-85-365-HDM); see also Ritter, *supra* note 53 ("The agency's position is that once an adopter takes title, the horse is private property and outside the government's reach."). The Act's criminal provisions require a fine of up to \$2000 and/or imprisonment for up to one year for violating enumerated provisions of the Act or any regulation issued under the Act. 16 U.S.C. § 1338 (1994). The Associated Press investigation revealed that only three people were convicted under the Act from 1985 to 1995. See Associated Press, *Convictions in Wild Horse Abuse Cases Are Disputed*, CHI. TRIB., Aug. 7, 1997, at N16.

Importantly, however, the BLM does not determine when to prosecute individuals for violating the Act, and "[m]any prosecutors regard the law as ambiguous and open to interpretation on violations." *Id.* Furthermore, the program chief has characterized many of the cases as difficult to prove. *Id.* A BLM spokesperson recently asserted that the agency "investigated two cases involving the alleged sale of untitled wild horses to slaughterhouses in [1998-1999]." Ritter, *supra* note 53.

56. Motion to Enforce Settlement Agreement at 2, *Animal Prot. Inst. of Am.* (No. CV-N-85-365-HDM).

57. *Id.* at 4-5.

58. Transcript of Plaintiff Motion (#201) and Defendants' Cross-Motion at 35, *Animal Prot. Inst. of Am. v. Babbitt* (D. Nev. Nov. 29, 2000) (No. CV-N-85-365-HDM) (on file with the North Carolina Law Review).

59. *Id.* at 12. Judge McKibben later stated, "There's little question in my mind that the BLM did not do a good job of getting everybody in compliance on these attestation forms. So, if you want a specific order out of this court, I would give you one on that." *Id.* at 21.

60. *Id.* at 13.

slaughtered,⁶¹ commenting that the BLM might have devised this solution on its own if the agency truly sought to improve the adoption program.⁶² The judge recommended that the BLM “look[] for ways to try to close any of the holes that exist out there, instead of arguing that you’ve done everything right, which you clearly haven’t.”⁶³ Ultimately, however, Judge McKibben failed to find substantial violations by the BLM.⁶⁴

Examining the thirty-year history of the BLM’s implementation of the Act reveals the difficulty involved in managing the animals under the current regime. Management decisions involving wild horses must consider population density and related ecosystem characteristics, as well as competing public land use by domestic cattle. Ecologists recognize that land has a limited carrying capacity; that is, land cannot support an infinite number of animals.⁶⁵ Because wild horses are largely without natural predators in their current habitats,⁶⁶ the risk of overpopulation increases.⁶⁷

The BLM’s adoption of appropriate management levels and regulatory procedures to remove excess wild horses indicates that population density does factor into management decisions.⁶⁸ The

61. *Id.* at 14. The judge suggested that this information be provided “under the pains and penalties of purgery [sic]” and indicated that such a system would result in “a pretty good case for a prosecutor.” *Id.* at 14–15.

62. *Id.* at 19.

63. *Id.* at 22–23.

64. *Id.* at 27–28. The judge emphasized that “if everybody was absolutely zealous in pursuing these matters, . . . probably . . . the numbers . . . would be reduced down to almost zero, if people actually found out that they were facing substantial fines, penalties, and a possible felony.” *Id.* at 34–35.

65. See Pitt, *supra* note 3, at 508 (“Carrying capacity commonly is defined as the maximum number of healthy animals that can be maintained by habitat on a given unit of land.”).

66. See Pitt, *supra* note 3, at 509 (citing the wolf as the wild horse’s only serious natural predator).

67. See Michael Sangiacomo, *The Beasts Who Come in From the Cold: West’s Wild Burros, Horses Up for Auction*, PLAIN DEALER (Cleveland, Ohio), July 30, 2000, at 2B, LEXIS, News Library, The Plain Dealer File (noting that excessive numbers of animals can result in starvation). The solution to overpopulation problems in wild horses might be found in birth control; the BLM is developing a contraceptive that would prevent conception for up to three years. Gugliotta, *supra* note 44. To effectively manage the population growth rate with contraception, seventy percent of reproductively active female horses must be prevented from reproducing. JOHN E. GROSS, EFFECTS OF CONTRACEPTION AND REMOVAL TREATMENTS ON PRYOR MOUNTAIN WILD HORSE POPULATION DEMOGRAPHICS AND GENETICS (Nat’l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 34, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review).

68. See *supra* notes 17–19 and accompanying text.

BLM currently estimates the wild horse population at 46,000 and the sustainable population at 27,000.⁶⁹ In theory, restricting the sheer number of animals inhabiting a particular area might be an effective management tool.⁷⁰ Herds do not recognize herding or park boundaries, however. Thus, determining carrying capacity based on such fictionalized spatial distributions of land is questionable.⁷¹

Another factor that the BLM should consider when determining a particular area's carrying capacity is the genetic viability of the herd itself.⁷² Genetic viability in wild horses has been the focus of several

69. Ritter, *supra* note 53. The population of wild horses has changed little over the past decade; in 1987 the population was estimated to be 44,800. Penelope McMillan, *Wild Horse Killing Plan Stirs Protest*, L.A. TIMES, May 13, 1987, at B1. Some wild horse advocates dispute the BLM's determination that overpopulation problems exist. Andrea Lococo of The Fund for Animals asserts that the appropriate management levels established by the BLM are simply too low and that the horses are not in fact overpopulated. Telephone Interview with Andrea Lococo, *supra* note 22. The population determinations made by the BLM have been the subject of increasing debate; furthermore, the growth rates of wild horses in general and specific herds in particular cannot be estimated without further research. See CODY, *supra* note 1, at 4 (discussing the need for additional study); Pitt, *supra* note 3, at 520 (discussing the debate regarding the BLM's inventory numbers); Animal Rights Law Project, *The Protection of Wild Horses Under the Wild & Free Roaming Horses and Burros Act*, at <http://www.animal-law.org/wildhorses/wildhrse.htm> (last visited Sept. 3, 2000) (on file with the North Carolina Law Review) (stating that a 1993 count of the Nevada wild horse population by the Public Lands Resource Council found the BLM's population estimates to be "inflated"); see also FRANCIS J. SINGER & RONALD OSBORNE, DEVELOPMENT AND ASSESSMENT OF TOOLS THAT MANAGERS COULD USE TO MONITOR WILD HORSE POPULATIONS (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 32, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review) (suggesting a new method of identifying and numbering wild horse herds). Additionally, the population of wild horses at the time of the 1971 Act was 17,000, see Robbins, *supra* note 5, at 10, a population just 20,000 less than the BLM's projected maximum population. Stated differently, the BLM's maximum allowable population is a mere 20,000 horses more than the horse population that triggered congressional protection thirty years ago.

70. See Pitt, *supra* note 3, at 518 (noting that the primary management tool available to ranger managers is "restricting the numbers of animals using the range") (quoting William M. Reavley, *Wild Horse Board Suggests Sweeping Changes*, 39 CONSERVATION NEWS 12, 14 (1974)).

71. The Fund for Animals contends that the artificial management areas established by the BLM fail to provide for horses' needs, forcing the horses to migrate into other areas to gain access to forage and water resources, and ultimately questions the usefulness of the appropriate management numbers established by the agency. Telephone Interview with Andrea Lococo, *supra* note 22; see also STEPHEN H. JENKINS, DENSITY DEPENDENCE IN POPULATION DYNAMICS OF FERAL HORSES (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 26, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review) (concluding that "unmanaged populations of wild horses might eventually stabilize at their ecological carrying capacities").

72. See E. GUS COTHRAN, GENETIC VARIATION IN HORSE POPULATIONS (Nat'l

studies in recent years, highlighting the need to integrate genetic information into the agency's management decisions.⁷³ One recent study of population dynamics in wild horse herds concluded that "populations managed with a target size of fewer than 500 horses were at some risk of losing more than 90% of selective neutral genetic variation over a long period of 200 years."⁷⁴ This need to consider genetic viability of horse herds produces additional conflicts for horse managers.⁷⁵

The BLM's management schemes and control mechanisms should account for the impact of these large herds on the ecosystems

Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 27, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review) (noting that "wild equid populations managed by the BLM are kept at population sizes that are small enough for the loss of genetic variation" and arguing that "[b]ecause a loss of genetic variability can lead to a reduction in fertility or viability of individuals in a population, it is critical that genetic considerations be included in management plans"); see also LINDA COATES-MARKLE, SUMMARY RECOMMENDATIONS—BLM WILD HORSE AND BURRO POPULATION VIABILITY FORUM, APRIL 21, 1999 (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 35, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (recommending that the BLM consider genetic viability in administering the program); GROSS, *supra* note 67 ("Because the management objective for many horse populations is small (< 150 horses), there are also concerns about the long-term genetic viability of these small populations."); BARRY NOON ET AL., POPULATION VIABILITY ANALYSIS—GENERAL PRINCIPLES AND APPLICATIONS (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 30, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review) ("Population viability analysis is a valuable and sometimes indispensable tool in understanding the role of species in ecosystem process.").

73. See COTHRAN, *supra* note 72; GROSS, *supra* note 67; JENKINS, *supra* note 71; OLIVER A. RYDER, GENETIC MANAGEMENT OF SMALL POPULATIONS: THE SPECIAL CASE OF FERAL HORSES (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 28, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review); D.P. SPONENBERG, DECIDING WHICH FERAL HORSE POPULATIONS QUALIFY AS A GENETIC RESOURCE (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 25, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review).

74. FRANCIS J. SINGER & LINDA ZEIGENFUSS, GENETIC EFFECTIVE POPULATION SIZE IN THE PRYOR MOUNTAIN WILD HORSE HERD: IMPLICATIONS FOR CONSERVATION GENETICS AND VIABILITY GOALS IN WILD HORSES (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes No. 29, 2000), <http://www.blm.gov/nstc/resourcenotes/resnotes.html> (on file with the North Carolina Law Review). Citing a study conducted by Dr. Gus Cothran, the Wild Horse and Burro Freedom Alliance asserts that the minimum herd number necessary to preserve genetic viability is 150. See SHORTCOMINGS, *supra* note 1, at 19. Only twenty-five percent of herd areas contain more than 150 animals. *Id.* The genetic value of wild horses supports their preservation. See SCANLAN, *supra* note 1, at 54.

75. GROSS, *supra* note 67 ("Managers are thus faced with conflicting needs to minimize population size to control habitat damage or forage use, and to maximize population size to preserve genetic variation.").

that they inhabit.⁷⁶ The BLM must protect the range from deterioration due to overgrazing to preserve the public land and to allow shared use of the resource by domestic cattle and wild animals.⁷⁷ Because maintaining biodiversity and preserving the land's natural processes are essential to ecosystem management,⁷⁸ wild horse management on public lands should be examined in the context of other uses—particularly the grazing of private cattle.

BLM lands have been used to graze private cattle since the agency was created.⁷⁹ For every wild horse on BLM lands, one hundred cattle currently graze.⁸⁰ The enormous cattle presence on public lands might be justified as necessary to support meat consumption in the United States, a country that consumes more beef than any other.⁸¹ The cattle grazing on public lands, however, account for less than three percent of beef consumed in the United States.⁸² Nevertheless, ranchers do not welcome the wild horse

76. See Robert H. Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control*, 4 BUFF. ENVTL. L.J. 45, 104 (1996) (defining ecosystem management as “looking at the environment on an ecosystem level with the goals of sustainability, biodiversity and ecosystem health.”).

77. See 16 U.S.C. § 1333(a) (1994) (“The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.”); 43 C.F.R. § 4700.0-6(a) (2000) (“Wild horses and burros shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat.”); Pitt, *supra* note 3, at 514 (describing the fragile range ecosystem); Ritter, *supra* note 53 (describing the impact of horses on rangeland).

78. Peter Morrisette, *Is There Room for Free-Roaming Bison in Greater Yellowstone?*, 27 ECOLOGY L.Q. 467, 479 (2000).

79. See SHORTCOMINGS, *supra* note 1, at 6 (noting that ranching on public lands began in 1905 and that the BLM was formed in 1946). The Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315–315r (1994)), established the system of grazing currently in place on public lands. The Grazing Act directs the BLM to establish grazing districts, § 315(a), authorizes the BLM to issue grazing permits, § 315(b), and establishes an “affirmative duty to protect grazing privileges.” Pub. Lands Council v. United States DOI Sec’y, 929 F. Supp. 1436, 1441 (D. Wyo. 1996), *amended by* 167 F.3d 1287 (10th Cir. 1999), *aff’d*, 529 U.S. 728 (2000). While the BLM must protect livestock grazing, the Grazing Act establishes that a grazing permit does not create a “right, title, interest or estate.” § 315(b). The Supreme Court has held that the Secretary of the Interior is “free reasonably to determine just how, and the extent to which, ‘grazing privileges’ shall be safeguarded, in light of the [Grazing] Act’s basic purposes.” Pub. Lands Council v. Babbitt, 529 U.S. 728, 742 (2000).

80. CODY, *supra* note 1, at 5; *see also* SHORTCOMINGS, *supra* note 1, at 8 (noting that the ratio is at least one to fifty).

81. See JEREMY RIFKIN, *BEYOND BEEF: THE RISE AND FALL OF THE CATTLE CULTURE* 154 (1992) (noting that Americans consume twenty-three percent of the beef produced worldwide). America’s affection for beef is difficult to overstate; every twenty-four hours, 100,000 cows are slaughtered in the United States. *Id.* at 154.

82. See SHORTCOMINGS, *supra* note 1, at 13; *see also* Smith, *supra* note 76, at 80 (“Even if every public land rancher went out of business because s/he could not afford to

presence on BLM range lands,⁸³ arguing that horses eat more forage than cattle because they are more active animals.⁸⁴ Horses and cattle prefer the same types of grasses and the same land slope, and they sometimes compete for scarce water resources.⁸⁵ Ranchers further argue that due to a less efficient digestive system, a wild horse equal in weight to a cow must consume a greater amount of food.⁸⁶ Thus, ranchers believe that the BLM's horse management activities are necessary to prevent range deterioration.

To support this view, however, the removal of wild horses must be causally connected to range land improvement—removal must be shown to abate range deterioration. To date, this connection has not been established. Some observers have questioned the ability of the BLM to identify range deterioration caused by wild horses as opposed to privately-owned, domestic livestock.⁸⁷ According to a General Accounting Office study, most horse removals have not

practice ecologically sound and sustainable livestock grazing, the beef market would not be damaged.”). Furthermore, allowing private cattle to graze public lands is not a profitable enterprise, but rather a costly subsidy. See SHORTCOMINGS, *supra* note 1, at 13.

83. SHORTCOMINGS, *supra* note 1, at 10; see also Wild Horse & Burro Freedom Alliance, *Public Lands Are Born*, at <http://www.savewildhorses.org/public.htm> (last visited Jan. 11, 2001) (on file with the North Carolina Law Review) [hereinafter *Public Lands Are Born*] (“As late as 1929, nearly 100,000 horses were shot on the Crow Reservation to make way for more cattle grazing.”). Ranchers believe that an additional cow can be added for every wild horse removed from the range. Smith, *supra* note 76, at 70. Rancher supporters lament the emotionalism accompanying wild horse advocacy and assert that ranchers have been “lost in the shuffle.” Pitt, *supra* note 3, at 513 (“Drowned in a deluge of public outrage over the treatment of captive wild horses, the legitimate concerns of the western rancher have been belittled and swept aside.”).

84. See Pitt, *supra* note 3, at 510 (noting that wild horses spend “approximately seventy-five percent of their daylight hours foraging”). Cattle supporters also assert that wild horse populations have a negative impact on riparian areas. Pitt, *supra* note 3, at 510–13. The adversity towards wild horses is often further justified by asserting that public lands should be managed to protect native species and that wild horses are not native. See generally SCANLAN, *supra* note 1, at 45 (discussing wild horses’ ancestral links to Spanish horses). It is important to recognize, however, that domestic cattle are not native.

85. See CODY, *supra* note 1, at 4; see also Pitt, *supra* note 3, at 510–11 (noting that cattle and horses sustain themselves on the same species of sedges and grasses and that horses use the same range as cattle).

86. Pitt, *supra* note 3, at 510.

87. Pitt, *supra* note 3, at 5 (“Documentation of range damage caused by wild horses and burros is limited.”); see also Smith, *supra* note 76, at 58–61 (discussing environmental effects of cattle grazing on rangeland). A former BLM chief officer of the adoption program admitted his uncertainty that “a horse does any particular habitat damage greater than a cow.” Timothy Aepfel, *US Wants to Lift Ban on Killing Wild Horses*, CHRISTIAN SCI. MONITOR, June 15, 1987, at 5. Regardless of the source, range deterioration is a widespread condition of western lands and an important management consideration. See Smith, *supra* note 76, at 59 (noting that a United Nations report estimates that eighty-five percent of the western range is deteriorating).

resulted in improved rangeland condition.⁸⁸ Furthermore, the lack of quality water and land resources compounds the issue because the low quality resource conditions can support fewer animals.⁸⁹ These facts suggest that a full understanding of appropriate horse management in the context of the larger public range ecosystem requires a comprehensive inquiry into the relationship between horses and range conditions where cattle are not present.

While removing cattle entirely from BLM lands might not be a practical or necessary solution, a compromise might be possible. The BLM should act to remove cattle entirely from the state of Nevada, where most wild horses are found.⁹⁰ Currently, 530,000 private cattle graze on Nevada public lands.⁹¹ Removal of cattle would allow careful monitoring and scientific evaluation of key issues, including population growth rates and impact on range conditions that could prove useful in settings where cattle and horses share the range. The agency's own regulations accompanying the Act allow for such action, stating that "[i]f necessary to provide habitat for wild horses . . . [the BLM] may close appropriate areas of the public lands to grazing use by all or a particular kind of livestock."⁹² In herd management areas in other states, the BLM should evaluate the proportion of cattle to horses, determining whether reducing the number of cattle on the range would allow more horses to remain on public lands and reduce the numbers of horses in holding facilities awaiting adoption.⁹³ The

88. See CODY, *supra* note 1, at 5.

89. See *Public Lands Are Born*, *supra* note 83 (noting that the most productive lands were kept by private individuals and that the public lands were formed out of "leftover land"). Ranchers prefer to graze on this "leftover land" nonetheless, because they pay very little to use it and are not responsible for preserving the land. See Smith, *supra* note 76, at 67-70 (discussing the activities undertaken by the federal government to support cattle grazing and the financial aspects of private grazing on public lands).

90. According to the latest estimates, Nevada has 23,214 of the 46,000 wild horses on BLM lands. See Ritter, *supra* note 53. Other states that have particularly large viable populations of wild horses are Oregon and Wyoming. See SHORTCOMINGS, *supra* note 1, at 19.

91. Animal Rights Law Project, *supra* note 69. Two hundred twenty-five thousand sheep also graze public lands in Nevada. *Id.*

92. 43 C.F.R. § 4710.5(a) (1999) ("If necessary to provide habitat for wild horses . . . the authorized officer may close appropriate areas of the public lands to grazing use by all or a particular kind of livestock."); see also 43 § 4710.5(c) (1999) (authorizing either temporary or permanent exclusion of livestock).

93. This suggestion is supported by recent accounts describing the lack of interested adopters for captured horses. See Ritter, *supra* note 53. This action could also be cost effective, considering the cost of rounding up animals, transporting them, and caring for them at holding facilities. In 1987, the BLM estimates that horses in holding facilities cost taxpayers \$9.3 million per year, or around \$25,000 per day. *The Nation*, L.A. TIMES, Apr. 28, 1987, at 2.

BLM regulations provide that herd management areas may be designated as being "managed principally, but not necessarily exclusively, for wild horse or burro herds."⁹⁴

Ranchers currently grazing cattle on federal lands in Nevada might argue that removing their cattle from Nevada would be inequitable.⁹⁵ The BLM could offer to subsidize ranchers forced to move their cattle to private grazing lands so that the ranchers' grazing fees do not change. Due to the absence of cattle in Nevada, the BLM would not be required to spray Nevada land with pesticides to encourage growth of grasses, could drastically reduce its predator control program in Nevada, could reduce administrative costs associated with grazing permits, and could avoid paying for removal and adoption of wild horses in Nevada.⁹⁶ These savings would allow the agency to directly subsidize ranchers' private livestock grazing to compensate for the termination of their federal grazing permits. Furthermore, many of these ranchers might not be geographically limited to Nevada; three percent of ranchers control fifty percent of federal grazing permits, indicating that one cattle owner or entity could have cattle grazing in several states.⁹⁷

The BLM should also drastically reduce and reform the highly controversial adoption program.⁹⁸ The demand for wild horses for adoption has decreased,⁹⁹ and the number of horses in holding

94. 43 § C.F.R. 4710.3-2 (1999).

95. Interestingly, however, a similar separation of horses and cattle was advocated by a cattle rancher, who suggested that horse preserves on a combination of federal and private lands could be a solution to the problem of management. "Then you could remove all the other horses from the west on much of our grazing lands." *Range Issues and Problems With the Wild Horse and Burro Act and Its Implementation: Field Hearing Before the Subcomm. on Nat'l Parks and Public Lands of the Comm. on Res.*, 105th Cong. 14 (1998) (Sup. Docs. No. Y4.R31/3:105-105) [hereinafter *Wild Horse and Burro Act Hearings*] (statement of Sen. Dean Rouds, Chairman, Sen. Natural Res. Comm., Nev. Leg.).

96. See Smith, *supra* note 76, at 68-69 (discussing the actions taken by the BLM to support cattle grazing). Furthermore, the agency should raise grazing fees on all BLM lands. In the early 1990s, grazing fees were \$1.81 per month for each cow while the grazing fees charged by private landowners were between \$6.40 and \$9.50 per month. RIFKIN, *supra* note 81, at 106.

97. See Smith, *supra* note 76, at 80; see also *supra* note 93 (discussing the costs of administering the program).

98. See *supra* notes 21-26 and accompanying text (describing the program).

99. See SHORTCOMINGS, *supra* note 1, at 15-16 (discussing the limited demand for horses and the resulting problem of horses held for extended periods in BLM facilities). The Department of Justice found that "everyone involved in the program [knows] that there is a very limited market for adopted horses On the other hand, thousands of horses a year, far more than could be taken care of by legitimate adoptions, have to be moved off the range." Doug McInnis, *Report Acknowledges Wild Horses are Being*

facilities has thus increased.¹⁰⁰ Needed improvements to the program advocated by wild horse enthusiasts¹⁰¹ would likely prove expensive and time consuming. The BLM views funding for the current Wild Horse Program as inadequate,¹⁰² and Congress now appears to recognize the management difficulties faced by the BLM in implementing the program. For example, one Congressman observed that “[w]e have given them laws and mandates to live by that are often contradictory, and generally they try to do the best they can to make sense of the whole mess.”¹⁰³

A solution for the adoption program should account for the potential impact on genetic viability of herds and the impact of round-up procedures. The adoption program places healthy horses with individuals, while older or unhealthy animals are returned to the range, raising concerns that the agency could be harming the wild population.¹⁰⁴ Furthermore, the BLM should caution individuals to adopt wild horses only after careful consideration,¹⁰⁵ because these

Slaughtered, N.Y. TIMES, Jan. 29, 1997, at A12 (quoting a 1996 internal Justice Department memorandum); see also Pitt, *supra* note 3, at 528 (noting that potential adopters might be dissuaded because of concerns about taming the wild animals).

100. See Martha Mendez, *These ‘Protected’ Horses are Destined for the Menu*, CHI. TRIB., Jan. 14, 1997, Evening Update, at 8 (“They dash and snort from corner to corner, clustering together. Humans spook them. Wind spooks them. They spook each other.”).

101. See SHORTCOMINGS, *supra* note 1, at 16 (advocating longer monitoring of adoptions, a comprehensive cross-referencing system that records individuals who have slaughtered animals in the past, and promotion of the adoption program).

102. A BLM spokesman, James Boylan, said of the current program, “It’s impossible for us to follow up on everything because we don’t have the manpower to do it.” See Gerry Lanosga, *Horse Adoption Program Kicking Up a Cloud: Critics Contend Animals Often Purchased for Slaughter*, INDIANAPOLIS STAR, Apr. 18, 1997, at D1. Describing the agency’s reaction to the slaughtering of wild horses, a BLM official stated, “We discourage it and we make sure that the animal is cared for that first year, but once the year is up, we can only hope.” Sangiacomo, *supra* note 67. In 2000, the program was funded at around \$20 million. SHORTCOMINGS, *supra* note 1, at 18; see also Pitt, *supra* note 3, at 522–23 (discussing the evolution of funding for the program). Despite these budgetary difficulties, the BLM appears committed to protecting wild horses. Tom Pogacnik, the director of the adoption program, has said that “[the horses are] a wonderful part of America, and we’re here to protect them.” *A Horror For Horses*, CHI. TRIB., Feb. 4, 1997, § 7, at 3.

103. *Wild Horse and Burro Act Hearings*, *supra* note 95, at 2 (statement of Rep. James Hansen, Utah).

104. See Pitt, *supra* note 3, at 529 (“The Adopt-A-Horse program, by selecting only the best looking and most fit horses, may very well be genetically selecting for a less viable wild horse population.”). But see GROSS, *supra* note 67 (concluding that the most effective means of controlling population and reducing loss of genetic diversity is to delay the first reproduction).

105. An owner of four wild horses obtained through the adoption program stated that “[t]hey can be tamed, but it’s like taming a deer. A lot of people don’t know what they are getting into.” Kendall, *supra* note 46; see also Craig Timberg, *Adopt-A-Wild-Horse*

horses differ dramatically from their domestic counterparts genetically¹⁰⁶ and behaviorally.¹⁰⁷ Moreover, the round-ups necessary to remove the animals from public lands are commonly accomplished by helicopters and can be traumatizing for the animals.¹⁰⁸ The fact that older animals considered unadoptable are returned to the range after this experience, with the possibility of repeat round-up and release procedures, appears to violate the Act's prohibition on harassing the animals.¹⁰⁹

The problem of managing wild horses on public lands defies an easy solution. These living symbols of the Wild West are valuable as sources of genetic diversity and as cultural icons, yet their status as part of the ecosystem of the western United States continues to be

Program is Saddled with Controversy: Killing of Animals, Federal Subsidies Attract Criticism, SUN (Baltimore, Md.), Sept. 21, 1997, at 1B (quoting an adoption observer as stating, "I think it's a fine thing . . . because it gets a lot of homes for these horses that otherwise wouldn't have homes.").

106. See SCANLAN, *supra* note 1, at 54 ("Studies have determined that wild horses are more genetically diverse than any other breed of horse."); see also SPONENBERG, *supra* note 73 (noting that the natural selection of wild horses has shaped the herds' genetic composition and that this process cannot be repeated if the horses become extinct).

107. See SCANLAN, *supra* note 1, at 52 ("It was instantly and instinctively clear to me that [the captured wild horse] was no dog. The focus, the stare, the wariness, said so. Here, now, was no pack horse."); *id.* at 54 (discussing the wild horse's abilities as a trail horse); Kendall, *supra* note 46 (noting that wild horse enthusiasts characterize the animals as "smarter, more loyal and heartier than any domestic breed").

108. A reporter from the Associated Press described a round-up as follows:

Clattering hooves. Whinnies of mares to their colts. Snorts and grunts. The helicopter roaring through the draw behind them. After 10 miles of running, the horses slow. Their heads sag. . . . The herd nears the Judas horse—the horse trained to entice them into captivity. Prompted by a slap, the Judas horse bolts into the open gates of the trap, leading the herd. A hidden wrangler pulls a latch and the gate slams shut. . . . The horses turn toward the gate and spin around, hunting for an opening. Their eyes roll back in their heads. A stallion bares its teeth and chomps on another stallion's neck. A foal leans tight against a mare. . . . The wranglers prod the horses into a trailer with 'hot shots'—electric prods—and frighten them with 'wild rags'—stock whips with noisy plastic bags tied on the end. Frightened by the closeness, the horses scramble and smack against the cold metal siding. Then they jump at the noise they are making.

Within a half-hour, the trailer clatters off to an adoption center.

Mendez, *supra* note 100. Others have expressed concerns that the round-ups are destroying family units that should be left on the range. *Wild Horse and Burro Act Hearings*, *supra* note 95, at 16 (statement of Assemb. John Carpenter, Nevada Assemb.) ("We need to leave the best families out there, the ones that are able to make the best living, the ones that look the best, we need to leave them.").

109. See 16 U.S.C. § 1331 (1994) (announcing a policy to protect wild horses from "capture, branding, harassment, or death"). Once an *accurate* carrying capacity has been determined, the excess animals should be destroyed in the field using the most humane methods available in order to prevent both the deterioration of the range and the suffering of the animals by starvation.

precarious. Congress has expressed an intention to protect these animals, and domestic cattle should not be considered a priority over wild horses in all areas of the public lands. The adoption program, long the object of criticism, should be dramatically reformed. Although the majority of Americans will never watch a herd of wild horses graze in an open field, the presence of these creatures on public lands satisfies a need to connect with something uniquely American; that need demands reassurance that these animals are not in danger: “[t]he sight of wild horses on land that is more or less theirs is an illusion, but one that fosters hope.”¹¹⁰

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110. SCANLAN, *supra* note 1, at 57.