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STRAYING WILD HORSES AND THE RANGE LANDOWNER: THE SEARCH FOR PEACEFUL COEXISTENCE

Alfred W. Buckley*

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I. INTRODUCTION

In 1971 Congress passed Public Law 92-195, the Wild Free-Roaming Horses and Burros Act,¹ to preserve a vanishing symbol of American pioneer heritage.² Before this statute was enacted, wild horses and burros³ were in danger of extinction.⁴ Today the success of the Act has prompted much controversy as to whether wild horses overpopulate the public rangelands⁵ in the Western United States.⁶ Private landowners adjacent to federal regions often complain that wild horses "stray" onto their parcels and consume their forage and water.⁷ While owners have the right to use and enjoy their property free from incursions,⁸ Congress intended protection of a living emblem of the Nation's spirit to be of paramount importance.⁹

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1. 16 U.S.C. §§ 1331-40 (1976 & Supp. V 1981) [hereinafter cited as "the Act" or "the Wild Horses Act."]. The Supreme Court has unanimously upheld the Act as an appropriate exercise of congressional power under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). For careful examination of this decision, see Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381 (1981); Note, *Constitutional Law—Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife*, 12 LAND & WATER L.REV. 181 (1977); Note, *Wild Horses and Burros Act Preempts State Authority*, 17 NAT. RESOURCES J. 337 (1977); Comment, *Constitutionality of the Free Roaming Wild Horses and Burros Act: The Ecosystem and the Property Clause in Kleppe v. New Mexico*, 7 ENV'T L. 137 (1976); *Free-Roaming Horses Act Valid Under Property Clause*, 62 A.B.A.J. 1030 (1976).

Congress is presently considering legislation that would amend the Act's management, adoption and criminal provisions. S.457, 98th Cong., 1st Sess., 129 CONG. REC. S1068-70 (daily ed. Feb. 3, 1983). See *infra* notes 17, 23, 26, 29 & 77.

2. See 16 U.S.C. § 1331 (1976).

3. This article uses "horses" to denote both wild horses and wild burros, unless otherwise indicated.

4. See *infra* notes 14, 15, 19, 20 & accompanying text.

5. H.R. REP. NO. 1122, 95th Cong., 2d Sess. 21 (1978).

6. These states include Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. BUREAU OF LAND MANAGEMENT & FOREST SERVICE, THIRD REPORT TO CONGRESS, ADMINISTRATION OF THE WILD FREE-ROAMING HORSE AND BURRO ACT 8-9 (1980) [hereinafter cited as THIRD REPORT TO CONGRESS].

7. See *infra* note 49 & accompanying text.

8. See C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 171 (2d ed. 1971).

9. H. CONF. REP. NO. 681, 92d Cong., 1st Sess., reprinted in 1971 U.S. CODE CONG. & AD.

This article will examine the conflicting interrelationships between wild horses and private property holders. An analysis of the Wild Horses Act and the relevant case law will demonstrate that the prevailing method used to eliminate the "straying problem"—extensive governmental removal of horses from public and private lands—countermands the protective purposes of the Act and of related public lands statutes.¹⁰ So long as intensive culling remains the standard agency practices to relieve straying,¹¹ current mechanisms must be improved to reconcile removal and the Act's goals.¹² This article suggests various superior management systems and several innovative approaches to balance the needs of landowners and of wild horses.

II. HISTORICAL OVERVIEW

An estimated two million wild horses roamed the Western United States at the turn of the century.¹³ Populations were decimated as business interests hunted herds to sell to fertilizer and pet food companies.¹⁴ The slaughter reached such appalling proportions during the 1950's that wild horse extinction became a frightfully real possibility.¹⁵ To deter commercial destruction of the horses, Congress enacted the "Wild Horse Annie" Act¹⁶ in 1959. This statute prohibited the use of aircraft or motor vehicles in stalking wild horses.¹⁷ For a variety of reasons, this provision did not

NEWS 2159, 2160; H.R. REP. NO. 480, 92d Cong., 1st Sess. 4-5 (1971); S. REP. NO. 242, 92d Cong., 1st Sess., reprinted in 1971 U.S. CODE CONG. & AD. NEWS 2149, 2151.

10. See *infra* notes 53-57 & accompanying text.

11. See *infra* note 135.

12. Some of this article's proposed alternatives, such as adoption incentives and "peak stray roundups," could operate within the federal government's present "management-intensive" posture to reduce the need for massive interference with horse populations. See *infra* notes 78-86, 95-122, 135 & accompanying text. Other suggested solutions, such as cooperative agreements, fencing and designated ranges, would serve as alternatives to large-scale horse regulation. See *infra* notes 87-93, 109, 123-37 & accompanying text. The result of all the propositions should be to protect the animals from continuous human intervention while eliminating the straying problem, so long as the techniques function within the mandates of the Wild Horses Act.

13. H.R. REP. NO. 480, *supra* note 9, at 3; S. REP. NO. 242, *supra* note 9, at 2149.

14. S. REP. NO. 242, *supra* note 9, at 2149; S. REP. NO. 802, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2253, 2253-54. Airplanes and motor vehicles were the primary tools used to capture the horses. S. REP. NO. 802, *supra*, at 2254.

15. Johnston, *The Fight to Save a Memory*, 50 TEX. L. REV. 1055, 1055 (1972).

16. 18 U.S.C. § 47 (1976). The statute's popular title incorporated the nickname of the late Velma B. Johnston, founder of Wild Horse Organized Assistance (WHOA!), who successfully fought for the provision's passage. H. RYDEN, AMERICA'S LAST WILD HORSES 215-24, 281 (rev. ed. 1978).

17. 18 U.S.C. § 47 (1976). Violators may be subject to fines of up to \$500 and/or six months imprisonment. *Id.* § 47(a)-(b). In 1976 Congress amended the Wild Horses Act to permit the Secretaries of Interior and Agriculture to authorize the use of helicopters and motor vehicles in managing or in transporting the horses. 16 U.S.C. § 1338a (1976). Legislation pending before Congress would also allow "the head of any Executive Department or Agency administering Federal lands" to utilize helicopters and motor vehicles in wild horse regulation. S. 457, 98th Cong., 1st Sess. §

effectively protect the animals.¹⁸ During the 1960's the carnage continued unabated.¹⁹ Additional legislation was essential to preserve the horses.²⁰ After a deluge of public support,²¹ Congress passed the Wild Horses Act.

The Wild Horses Act declared that wild horses and burros were "living symbols of the historic and pioneer spirit of the West."²² Noting that horse populations were "fast disappearing from the American scene,"²³ Congress mandated that wild horses "be protected from capture, branding, harassment, or death."²⁴ To achieve these goals, the Act empowered the Secretaries of Interior and Agriculture²⁵ to protect and control wild horses through various management techniques²⁶ as an

9, 129 CONG. REC. S1068, S1070 (daily ed. Feb. 3, 1983). This would enable governmental officials other than the Secretaries of Interior and Agriculture (or their authorized agents) to cull wild horses *without* the Secretaries' approval, pursuant to "any laws pertaining to management of Federal lands." *Id.* This proposed amendment, if enacted, would directly contradict § 1333(b) of the Act which empowers *only* the Secretaries of Interior and Agriculture (or their authorized personnel) to remove "excess" horses from the public range. *See* 16 U.S.C. §§ 1333(b)(2), 1338(a) (1976 & Supp. V 1981). Of course, the Secretaries could authorize other Federal Departments to conduct roundups, but such agencies cannot cull the horses on their own initiative. *See id.* §§ 1333(a)-(b), 1338(a) (1976 & Supp. V 1981).

References throughout this article to the "Secretaries" will be to the Secretaries of Interior and Agriculture, unless otherwise noted.

18. Even though this statute eliminated the most convenient roundup techniques, hunting continued. H.R. REP. NO. 480, *supra* note 9, at 3. The Wild Horse Annie Act was to be enforced by local officials who were less than vigorous in its implementation. Johnston, *supra* note 15, at 1059. Man proceeded to encroach upon wild horse habitats by fencing watering holes and grazing areas and by diverting and depleting natural sources of water. *Id.* No centralized federal agency protected the horses from these dangers. H.R. REP. NO. 480, *supra* note 9, at 3-4.

19. S. REP. NO. 242, *supra* note 9, at 2150.

20. H.R. REP. NO. 480, *supra* note 9, at 3-4.

21. *See* H. RYDEN, *supra* note 16, at 279-84.

22. 16 U.S.C. § 1331 (1976).

23. *Id.* Congress is presently reviewing a resolution that would delete this language, substituting a federal policy that would sustain a "healthy [wild horse] population base" to be "managed under the principle of multiple use." S. 457, 98th Cong., 1st Sess. § 1, 129 CONG. REC. S1068, S1069 (daily ed. Feb. 3, 1983). Since 1971 the major controversy surrounding the Act has been whether the statutory protection has created horse overpopulation on the federal range. H.R. REP. NO. 1122, *supra* note 5, at 21.

24. 16 U.S.C. § 1331 (1976).

25. The Secretaries have delegated responsibility for the Act's enforcement to the Bureau of Land Management (BLM) and the Forest Service, respectively. 16 U.S.C. § 1332(a) (1976). The BLM primarily implements the Act, since 95 percent of wild horses roam on public lands within its jurisdiction. THIRD REPORT TO CONGRESS, *supra* note 6, at v.

26. The BLM's management has emphasized removal of "excess" horses from public lands. *See* 16 U.S.C. § 1333 (1976 & Supp. V 1981); *see infra* note 135. Once culled, the horses are most frequently placed in BLM holding facilities pending adoption by private citizens through the agency's national "Adopt-a-Horse" program, which began in the Spring of 1976. BUREAU OF LAND MANAGEMENT, FOUR-YEAR AUTHORIZATION REPORT TO THE CONGRESS FOR FISCAL YEARS 1982-1985, at 93 (1980) [hereinafter cited as BLM FOUR-YEAR AUTHORIZATION REPORT]. An individual or organization may adopt no more than four horses annually, subject to written authorization from the Secretaries that a greater number could be humanely maintained. 16 U.S.C. § 1333(b)(2)(B) (Supp. V

“integral part of the natural system of the public lands.”²⁷ Criminal sanctions, similar to those in the Wild Horse Annie Act,²⁸ were intended to insulate the animals from commercial degradation.²⁹

While the Act is designed to apply to the public lands, wild horses tend to roam within broad “home ranges” which could overlap with private property. Changes in a given area’s habitat may force herds to migrate

1981). After one year of humane care, the government may transfer title of the animals to the adopter. *Id.* § 1333(c). More than 35,000 horses and burros have been adopted as of September 1981. BUREAU OF LAND MANAGEMENT & FOREST SERVICE, FOURTH REPORT TO CONGRESS, ADMINISTRATION OF THE WILD FREE-ROAMING HORSE AND BURRO ACT 5 (1982) [hereinafter cited as FOURTH REPORT TO CONGRESS]. There were applications outstanding for 43,000 animals as of April, 1980. THIRD REPORT TO CONGRESS, *supra* note 6, at 13.

BLM horse regulation should maximize protection of the horses while balancing equine interests with other environmental amenities. Management must be at the “minimal feasible level,” using agency discretion to adjust the intensities of various land uses, including horses, to achieve a “thriving natural ecological balance.” See 16 U.S.C. §§ 1333(a)-(b) (1976 & Supp. V 1981). Pending legislation would change the management criteria by striking the “minimal feasible” language from § 1333(a) and by allowing “excess” wild horses to be rounded up and sold to commercial entities. S. 457, 98th Cong., 1st Sess. §§ 3(a), (b)(2)(C)-(D), 129 CONG. REC. S1068, S1069 (daily ed. Feb. 3, 1983). For further discussion of this proposal, see *infra* note 77 & accompanying text.

Another management method involves creation of specific wild horse ranges. 16 U.S.C. § 1333(a) (1976). For an analysis of such refuges, see *infra* notes 126-37 & accompanying text.

A definitive investigation of the management provisions is beyond the scope of this article. For a more extensive examination, see Buckley & Buckley, *The Appropriate Degree of Management Under the Wild Free-Roaming Horses and Burros Act*, 19 CAL. W.L. REV. 419 (1983): Note, *Good Intentions Gone “Stray”—the Wild, Free-Roaming Horse and Burro Act*, 16 LAND & WATER L. REV. 525 (1981).

27. 16 U.S.C. § 1331 (1976).

28. See *supra* note 17.

29. Penalties of up to \$2000 and/or one year imprisonment may be levied against any person convicted of unauthorized removal or conversion of wild horses, or against anyone guilty of killing, harassing, or selling wild horses or their remains for commercial processing. 16 U.S.C. § 1338(a) (1976). Persons authorized by the Secretaries to sell horse remains for commercial products, under one bill currently before Congress, would be insulated from these sanctions. S. 457, 98th Cong., 1st Sess. § 8(a), 129 CONG. REC. S1068, S1070 (daily ed. Feb. 3, 1983). If enacted, the legislation would also stiffen punishment for repeat offenders. *Id.*

A recent court decision upheld the constitutionality of the Act’s criminal provisions. *United States v. Johnson*, 685 F.2d 337 (9th Cir. 1982). Few cases have invoked the Act’s penalties. See, e.g., *United States v. Hughes*, 626 F.2d 619 (9th Cir. 1980); *United States v. Christiansen*, 504 F. Supp. 364 (D. Nev. 1980). Convictions are rare. See Bureau of Land Management, Fiscal Year 1981 Program Accomplishments, Wild Horse & Burro Report 2 (Nov. 1981) (newsletter) [hereinafter cited as Wild Horse & Burro Report] (1860 adopters and 3750 horses were inspected for possible violations of the Act in 1980, and of those prosecuted, there were no convictions). Occasionally state animal anti-cruelty statutes have been applied to persons who allowed their recently adopted horses to starve to death. *State v. Mitts*, 608 S.W.2d 131 (Mo. Ct. App. 1980); *State v. DeHart*, 42 Or. App. 837, 601 P.2d 917 (1979) (affirming *mem.* defendant’s conviction under state law for cruelty to animals), *rev’d on other grounds and reversal aff’d sub nom.*, 55 Or. App. 254, 637 P.2d 1311 (1981) (defendant denied due process of law because of inadequate legal counsel). If title had not yet passed from the BLM to the private custodian, as apparently was the situation in the above state cases, then the Act’s more stringent sanctions should have been applied in federal district court. See 16 U.S.C. § 1338(a)(6) (1976); 43 C.F.R. § 4760.2(c), (g), (1) (1981).

beyond their normal territorial boundaries.³⁰ Since much of the rangeland throughout the West is an unfenced, public-private "checkerboard,"³¹ wild horses might regularly stray onto privately owned property. How the Act responds to this difficulty is discussed in the following sections.

III. STRAYING WILD HORSES: STATUTORY PROVISIONS AND JUDICIAL INTERPRETATIONS

According to 16 U.S.C. § 1334:

[i]f wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by the agents of the Secretary.³²

This provision attempts to harmonize the landowner's rights to use and enjoy his private property³³ and the Act's protection of wild horses from human manipulation and destruction. While the constitutional basis for § 1334's regulation of conduct on private lands remains an open issue,³⁴ several persuasive theories suggest that Congress was empowered to extend federal control beyond public boundaries.³⁵

30. M. ZARN, T. HELLER & K. COLLINS, TECHNICAL NOTE, WILD, FREE-ROAMING HORSES—STATUS OF PRESENT KNOWLEDGE 32-33 (1977). Scientific studies have indicated that "home ranges" are relatively rigid and defined, subject to seasonal variations caused by higher population densities and insufficient food supplies. *Id.* at 33.

31. The "checkerboard" consists of intermingling public and private tracts. Coggins & Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099, 1104 (1976). This pattern of ownership is a byproduct of federal land grants to railroads constructing the transcontinental railroad. Note, *supra* note 26, at 534 n. 71.

32. 16 U.S.C. § 1334 (1976). Such removal should be done "within a reasonable time." *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 12 (D. Nev. Jan. 29, 1982), *enforcement stayed pending settlement*, No. 81-110 (D. Nev. July 7, 1982) (interim order).

33. See *supra* note 9 & accompanying text.

34. The Supreme Court has specifically declined to decide whether the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, "empowers Congress to protect animals on private lands." *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

35. An analysis of the constitutional authorities upon which § 1334 is based is beyond the scope of this article. Two commentators suggest that Congress' powers to regulate wild horses on public and private property may be found in the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and in Congress' "inherent power" to protect and preserve animals which are historic symbols of our national heritage. Coggins & Hensley, *supra* note 31, at 1130-35, 1139-43. This latter argument, while persuasive, has not been definitely determined by the courts. *Id.* at 1141. However, no judicial precedent appears to preclude its existence. *Id.* at 1142-43.

Another commentator offers an attractive theory to legitimize constitutionally § 1334's regulation of wild horses on private lands. This approach, suggested by analogy from the nuisance analysis utilized in *Camfield v. United States*, 167 U.S. 518 (1897), "weigh[s] the utility of the congressional policy for the use of federal lands" against "the degree of imposition on the owners of nonfederal property."

The legislative history did not evaluate § 1334 in terms of the straying problem.³⁶ Agency regulations³⁷ essentially echo the Act's phraseology.³⁸ Therefore, the language in question must be interpreted from the face of the provision and from judicial explanations.

A. *The Leading Case: Roaring Springs*

The foremost case defining the parameters of § 1334 is *Roaring Springs Associates v. Andrus*.³⁹ The plaintiff organization owned unfenced land in eastern Oregon. When wild horses roamed onto its parcels, the association asked federal agents from the Department of Interior to remove the trespassing animals. After the government refused, the plaintiff petitioned a United States Magistrate to issue a mandamus order.⁴⁰ The court ruled that the defendants owed the private landowner a "ministerial duty" under § 1334 to return the wild horses to the public range.⁴¹ The government's defenses of sovereign immunity,⁴² of incorpo-

Gaetke, *supra* note 1, at 398. Using the author's first consideration, the Act's legislative history indicated that federal protection of the horses was essential to prevent their extinction. H.R. REP. NO. 480, *supra* note 9, at 3-4; S. REP. NO. 242, *supra* note 9, at 2150. Applying the second element, § 1334 imposes minimal federal interference with uses of private property, since the provision provides landowners a convenient, inexpensive means of removing straying wild horses from their parcels. *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. 522, 525-26 (D. Or. 1978). According to this balancing analysis, this meagre intrusion, coupled with the compelling federal policy protecting wild horses from deprecation by man, would be a "needful" regulation "respecting the federal land," and thus would be an appropriate exercise of the Property Clause. *But cf.* Gaetke, *supra* note 1, at 398, 399-401 (concluding that the Act's ban of private roundups on all nonfederal lands is "unnecessarily broad" and might not be "needful" regulation 'respecting the federal lands' " under the Property Clause).

36. H. CONF. REP. NO. 681, *supra* note 9, at 2160; S. REP. NO. 242, *supra* note 9, at 2153. While committee reports were silent on the straying problem, several Congressmen mentioned this aspect of § 1334 in testimony at congressional hearings and in introducing various resolutions. *See, e.g., Protection of Wild Horses on Public Lands: Hearings on H.R. 795, H.R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 18 (1971) (statement of Gilbert Gude, U.S. Representative, Maryland) [hereinafter cited as *Protection Hearings*]; *Id.* at 27 (statement of Lester L. Wolff, U.S. Representative, New York); 117 CONG. REC. 5028, 5786 (1971) (statements of Sen. Jackson and Sen. Nelson, respectively).

37. 43 C.F.R. §§ 4700.0-1 to 4760.2 (1981).

38. *Id.* § 4750.3 (1981). The regulations still require removal only from private lands enclosed in a "legal fence" or unfenced property in a "no-fence" district, which is a region "where the private landowner is not required by State statute to fence the private land to protect it from trespass by domestic livestock." *Id.* The continued existence of this regulation is confusing, since the Act does not restrict § 1334's application in this way, and since the court in *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. 522 (D. Or. 1978), declared § 4750.3 invalid as contrary to the statutory mandates. *See infra* note 44 & accompanying text.

39. 471 F. Supp. 522 (D. Or. 1978). This case is briefly discussed in Note, *Wild Horses Off Private Lands*, 19 NAT. RESOURCES J. 721 (1979).

40. *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. at 524.

41. *Id.* at 526.

42. Defendants argued that insufficient funds were available to implement the Act's directives, requiring monies from the public treasury to be used to remove the straying horses. The doctrine of sovereign immunity would bar such a siphoning. *Id.* In rejecting this view, the court found that

rating state estray laws into the Act,⁴³ and of limiting the scope of § 1334⁴⁴ did not neutralize this mandatory requirement.

Undoubtedly the court was correct in stating that agency discretion is inappropriate when property owners request removal of strays.⁴⁵ Congress must have intended § 1334 to protect wild horses from private, unauthorized culling⁴⁶ by allowing landowners an inexpensive and expedient method of retrieving the horses.⁴⁷ Since the Act was primarily enacted to prevent the atrocities of private roundups,⁴⁸ it is unlikely that Congress would have permitted § 1334 to function at the whim of agency officials.

The "straying horses" problem has generated much of the litigation involving the Act.⁴⁹ Many of these decisions rely upon *Roaring Springs* or similar reasoning. However, the "ministerial duty" declared in *Roaring Springs* has been improperly extended beyond private property lines to intensify horse regulation on the public tracts.

B. *The Usurpation of § 1334: Excessive Horse Management*

In *Mountain States Legal Foundation v. Andrus*,⁵⁰ the federal

adequate revenue existed to cull the horses from the plaintiff's property. *Id.* at 526-27.

43. *Id.* at 524. The government reasoned that the Act permitted states to define "stray" in § 1334. As the court correctly noted, neither the Act nor the legislative history suggests that § 1334, or any of the Act's provisions, should be implemented differently among states. *Id.* at 524-25. The Supreme Court ruled that the Act would override conflicting state statutes under the Supremacy Clause, U.S. CONST. art. VI, cl. 2. *Kleppe v. New Mexico*, 426 U.S. 529, 543-45 (1976). This implies that the Act was intended to apply uniformly across state lines, regardless of varying local philosophies.

44. The BLM declared that its duty to retrieve horses extended only to private lands enclosed by a "legal fence" or unfenced in a so-called "no-fence district" as defined in 43 C.F.R. § 4750.3 (1978). *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. at 525. The court ruled this regulation *ultra vires* as inconsistent with the Act. *Id.* Section 1334 applies to all private landowners, not merely to fenced properties. 16 U.S.C. § 1334 (1976); *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 7 (D. Nev. Jan. 29, 1982), *enforcement stayed pending settlement*, No. 81-110 (D. Nev. July 7, 1982) (interim order); *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. at 525.

45. *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. at 526. The Act's language is clearly compulsory. See 16 U.S.C. § 1334 (1976). "Shall" is generally imperative in statutes. BLACK'S LAW DICTIONARY 1233 (rev. 5th ed. 1979).

46. The Act prohibits unauthorized private roundups under the criminal provisions. 16 U.S.C. § 1338(a) (1976).

47. See *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. at 525-26.

48. See *supra* notes 14-15, 19-20, 23-24, 29 & accompanying text.

49. See, e.g., *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110 (D. Nev. Jan. 29, 1982), *enforcement stayed pending settlement*, No. 81-110 (D. Nev. July 7, 1982) (interim order); *C-Punch Corp. v. Andrus*, No. 80-266 (D. Nev. July 29, 1981), *modified*, *C-Punch Corp. v. Watt*, No. 80-266 (D. Nev. Nov. 12, 1981) (striking portion of July 29, 1981 decree requiring BLM to remove 225 horses); *Fallini v. Andrus*, No. 79-233 (D. Nev. July 9, 1981) (dismissed for lack of subject matter jurisdiction), *complaint refiled sub nom. Fallini v. Watt*, No. 81-536, (D. Nev. Aug. 21, 1981); *Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. 20105 (ENVTL. L. INST.) (D. Wyo. 1981); *Roaring Springs Assoc. v. Andrus*, 471 F. Supp. 522 (D. Or. 1978).

50. 12 ENVTL. L. REP. 20105 (ENVTL. L. INST.) (D. Wyo. 1981), *amended*, *Mountain States Legal Found. v. Watt*, No. 79-275 (D. Wyo. Feb. 19, 1982).

district court of Wyoming utilized comparable factual circumstances—wild horses straying onto private parcels—to launch exorbitant regulation amounting to a blatant distortion of the purposes and requirements of § 1334, which was not even cited in either the original or amended opinions.⁵¹

One of the management considerations in § 1333 requires wild horse control to achieve and maintain a “thriving natural ecological balance” on the public lands.⁵² Congress desired this phrase to operate within two broader public rangeland statutes: the Federal Land Policy and Management Act of 1976⁵³ (FLPMA), and the Public Rangelands Improvement Act of 1978⁵⁴ (PRIA). FLPMA and PRIA serve to rejuvenate degenerating range conditions⁵⁵ through a comprehensive system of “multiple uses” and “sustained yield.”⁵⁶ Within such a unified structure, all public land policies should blend to produce ecological balance among all uses.⁵⁷

In *Mountain States* Judge Kerr endowed “thriving natural ecological

51. Surprisingly, the original opinion cited only one of the Act's provisions, § 1333(a). *Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. at 20105. In an amended order, the court cited generally to § 1332(f) and § 1333. *Mountain States Legal Found. v. Watt*, No. 79-275, at 2-3 (D. Wyo. Feb. 19, 1982).

52. 16 U.S.C. §§ 1333(a), (b)(2) (1976 & Supp. V 1981).

53. 43 U.S.C. §§ 1701-82 (1976 & Supp. V 1981).

54. Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified in scattered sections of 16 & 43 U.S.C.).

55. According to BLM research, 135 million of approximately 171 million acres of public lands produced below potential as of January 1975. U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS, PUBLIC RANGELANDS CONTINUE TO DETERIORATE 1, 5 (1977) [hereinafter cited as PUBLIC RANGELANDS CONTINUE TO DETERIORATE]; BUREAU OF LAND MANAGEMENT, RANGE CONDITION REPORT PREPARED FOR THE SENATE COMMITTEE ON APPROPRIATIONS II-12 (1975). A 1977 study traced most of this deteriorated state to poor livestock grazing management and the lack of land management plans for 107 million acres. PUBLIC RANGELANDS CONTINUE TO DETERIORATE, *supra*, at 1, 4-5.

56. FLPMA defines “multiple use” as:

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources. . . . [Multiple use includes] a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources. . . . and [includes] harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (1976). “Sustained yield” involves “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” *Id.* § 1702(h) (1976). For an exhaustive critique of multiple use and sustained yield standards, see Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of “Multiple Use, Sustained Yield” for Public Land Management*, 53 U. COLO. L. REV. 229 (1982).

57. For a detailed explanation of the interrelationships of FLPMA, PRIA and the Wild Horses Act, see Buckley & Buckley, *supra* note 26, at 433-39.

balance" with more regulatory overtones. The court interpreted § 1333(a) to command culling of all wild horses from "the checkerboard grazing lands" in the Rock Springs, Wyoming region, except for those horses that the plaintiffs voluntarily acceded to remain.⁵⁸

The court erroneously assumed that § 1333(a) of the Act compels the Bureau of Land Management (BLM) to round up wild horses from *both* public and private tracts whenever the animals stray onto the landowner's parcels. Section 1334 is designed to remedy *Mountain States'* factual situation,⁵⁹ but it applies only when wild horses stray *onto* private lands.⁶⁰

58. *Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. at 20105. In this case, wild horses had strayed and grazed on plaintiff's private lands. The BLM had conducted few roundups in the area between 1972 and 1976. According to BLM statistics, populations increased from 2364 to 6129 horses between 1972 and 1979. *Id.* Almost half of these horses had wandered onto plaintiff's property during the seven year period. *Id.* The court did not mention whether the number of livestock grazing the Rock Springs public lands had increased within this time frame. Judge Kerr assumed that rising numbers of horses constituted overpopulation *a fortiori*. The opinion neither cited any scientific evidence indicating that the horses exceeded the land's carrying capacity, nor demonstrated that the horses, rather than the livestock, primarily caused the range deterioration. *See id.* In order to determine which organisms exert the greatest pressures on a local ecosystem, one must compare the complex interrelationships of competing species. This includes analyzing scientific data of the various organisms' biologies, demographics, behavioral characteristics, nutritional requirements, habitat preferences, grazing impacts, seasons of use, and effects of competing for the land's available forage. COMMITTEE OF WILD AND FREE-ROAMING HORSES AND BURROS, NATIONAL RESEARCH COUNCIL, WILD AND FREE-ROAMING HORSES AND BURROS: CURRENT KNOWLEDGE AND RECOMMENDED RESEARCH, PHASE I FINAL REPORT 20, 107-08, 201-02 (1980) [hereinafter cited as PHASE I FINAL REPORT].

A subsequent order modifying the original decision demonstrates the court's continuing confusion in interpreting the Act's management requirements. In this amended opinion Judge Kerr erroneously concluded that all horses above the number agreed upon by the BLM and neighboring landowners were "excess" animals as defined in § 1332(f) of the Act and thus had to be removed from the region's checkerboard by the government. *Mountain States Legal Found. v. Watt*, No. 79-275, at 2-3 (D. Wyo. Feb. 19, 1982). Also, the court incorrectly suggested that "excess" could be defined as those horses exceeding the area's population levels "at the time the Act was passed [1971]." *Id.* at 3. The court offered another inaccurate definition of "excess" horses as the number specified by a site-specific environmental impact statement (EIS) prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-61 (1976 & Supp. V 1981). *Mountain States Legal Found. v. Watt*, No. 79-275, at 2 (D. Wyo. Feb. 19, 1982). None of these interpretations is supported by the language of the Act or agency regulations. Section 1332(f) defines "excess" horses as those animals that the Secretary has removed or which must be culled pursuant to the Act's management provisions "in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (Supp. V 1981). Agency regulations use the same definition. 43 C.F.R. § 4700.0-5(d) (1981). Nowhere does the Act suggest that "excess" be defined in terms of private agreements between the BLM and landowners or the 1971 populations. *See* 16 U.S.C. §§ 1331-40 (1976 & Supp. V 1981). EIS's are useful research tools under § 1333(b) to assist the BLM in assessing whether equine management is necessary, but they are not the sole or definitive device to establish horse overpopulation. *See id.* §§ 1333(a)-(b) (1976 & Supp. V 1981).

The *Mountain States* approach has been applied in comparable cases. *See, e.g., C-Punch Corp. v. Andrus*, No. 80-266 (D. Nev. July 29, 1981), *modified C-Punch Corp. v. Watt*, No. 80-266 (D. Nev. Nov. 12, 1981).

59. Perhaps the court failed to refer to § 1334 since it would not have supported the massive removal measures ordered by Judge Kerr.

Horses on the contiguous *public* portions of the checkerboard are not subject to the provision.⁶¹ Landowners could exploit this precedent and § 1334 to coerce the BLM into gathering wild horses from all public and private plots in an entire region to eliminate forage competition with livestock. However, the BLM's "ministerial duty" does not apply to public lands, even if private interests hold grazing permits and leases to use certain federal tracts.⁶² Leasing arrangements do not alter the *public* ownership of the range,⁶³ so wild horse management on federal sections should conform to the purposes pervasive throughout the Act, as well as to PRIA and FLPMA's "multiple use-sustained yield" concepts. The court improperly ordered removal of the horses from the public lands in the region.⁶⁴

Another court seemed to concur with this criticism of *Mountain States*. In *T Quarter Circle Ranches, Inc. v. Watt*,⁶⁵ the United States Magistrate's Report and Recommendation to the Nevada District Court noted that

[s]ection 1334 makes no distinction between the checkerboard lands and other lands. Certainly, the checkerboard lands are not uncommon in the West. . . . Presumably, Congress was aware of the problems with the checkerboard lands by at least 1978 . . . if not when the Wild Horses Act became law in 1971. Nevertheless,

60. 16 U.S.C. § 1334 (1976).

61. *Id.* Also, § 1333(a) is not intended to remedy the straying problem. Its purpose is to ensure that management functions at the "minimal feasible level" to maintain thriving ecological balance within FLPMA and PRIA. *See supra* notes 53-57 & accompanying text. Therefore, the court's reliance upon § 1333(a) to resolve a "§ 1334 problem" was misplaced.

62. Section 1334 mentions leased public lands not in the first sentence, in which the "ministerial duty" is specified, but in the latter portions of the provision discussing private maintenance of wild horses. 16 U.S.C. § 1334 (1976). Under this part of § 1334, a landowner is not prohibited from "maintaining [wild horses] on his private lands, or lands leased from the Government, if he does so in a manner that protects them from harassment, and if the animals were not willfully removed or enticed from the public lands." *Id.* If Congress had desired the mandatory removal requirement to apply to leased lands as well as to private tracts, then the first sentence of § 1334 would have incorporated the later references to leased property.

The Secretary of Interior issues such leases and permits pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (1976 & Supp. V 1981).

63. "[T]he creation of a grazing district or the issuance of a permit pursuant to the provisions of [Subchapter I of the Taylor Grazing Act] shall not create any right, title, interest, or estate in or to the [public] lands." 43 U.S.C. § 315b (1976). *See also* *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1005 (9th Cir. 1981).

64. Of course, the court validly ordered the BLM to gather the horses from the plaintiff's private property. Section 1334 compels such a result, *see supra* notes 32, 39-48 & accompanying text, although Judge Kerr did not justify the holding on those grounds. *See Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. at 20105, *as amended by* *Mountain States Legal Found. v. Watt*, No. 79-275, at 1-3 (D. Wyo. Feb. 19, 1982).

65. No. 81-110 (D. Nev. Jan. 29, 1982), *enforcement stayed pending settlement*, No. 81-110 (D. Nev. July 7, 1982) (interim order).

at the time Congress amended the Wild and Free-Roaming Horse Act in October of 1978, it made no amendment of Section 1334 to consider the problems of the checkerboard lands. Therefore, this matter is within the province of Congress and not the district court.⁶⁶

According to this interpretation, it would be inappropriate to apply § 1334 to public property within the checkerboard lands, absent congressional modification of the Act.

The *Mountain States* rationale essentially sought to bolster a local economic endeavor.⁶⁷ This by itself is not objectionable. Nevertheless, within the context of statutes aspiring to balance multiple uses and attain maximum productivity from all environmental amenities,⁶⁸ a decision which so obviously favors one particular value over another⁶⁹ reduces the goals of FLPMA, PRIA and the Wild Horses Act to mere "lip-service."⁷⁰

A financial analysis indicates that § 1334 can prove quite costly to the federal taxpayer. As one commentator has mentioned, free-roaming horses wandering onto unfenced private land may return the day after BLM has

66. *Id.* at 6. Somewhat inexplicably in the conclusion, the Magistrate contradicted this language. The Report observed that two previous Nevada cases "concerned checkerboard lands." *Id.* at 11-12 (citing *C-Punch Corp. v. Andrus*, No. 80-266 (D. Nev. July 29, 1981), and *American Horse Protection Ass'n v. Andrus*, 460 F. Supp. 880 (D. Nev. 1978), *vacated & remanded in part, aff'd in part*, 608 F.2d 811 (9th Cir. 1979), *appeal dismissed*, *American Horse Protection Ass'n v. Watt*, 679 F.2d 150 (9th Cir. 1982)). The Recommendation deferred to judicial precedent, commenting that both of these courts "found that the Act applies to checkerboard lands." *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 12. Another part of the opinion also suggested that § 1334 should function on adjacent public and private tracts. *Id.* at 10-11. However, the Magistrate stated earlier that such a determination was specifically beyond the courts' "province" and must be defined by Congress. *Id.* at 6. How this inconsistency is reconciled is unclear.

The Report, like *Mountain States*, confused § 1333's management objectives with § 1334's mandatory duty. *See id.* at 10-11. Wild horse regulation on public ranges was not designed to accommodate or implement the needs of single private uses. *See supra* notes 24, 26-27, 29, 52-57, 59-64 & accompanying text. When an individual landowner requires a remedy for horse trespass, he should turn to § 1334 without disrupting the BLM's broader management policies under § 1333.

67. The court emphasized that the increase in wild horses "created severe problems for ranchers in the Rock Springs area." *Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. at 20105. The tenor of the opinion stresses the need to cull the horses for the benefit of the ranching operations. *See id.*

68. *See supra* the discussion of PRIA and FLPMA in notes 52-57 & accompanying text.

69. The *Mountain States* court implied this partisanship. *See supra* note 67.

70. One commentator has conveyed a similarly restrictive approach to wildlife management in general. *See Schectman, The "Bambi Syndrome": How NEPA's Public Participation in Wildlife Management is Hurting the Environment*, 8 ENVTL. L. 611 (1978). This concept of wildlife regulation seems to advance the "least expensive" management most expedient toward a single goal which the advocate desires. The "cost" analysis is mostly economic and rarely aesthetic, so the preferred objective often coincides with the money-generating activity. The most salient problem with this analysis is its subjectivity. Rather than determining which land uses create environmental concerns, it manages a particular activity to justify a preconceived outcome. This subjugates the essential congressional intention of FLPMA, within which all federal public land regulation must operate. *See supra* notes 52-57 & accompanying text.

removed them.⁷¹ This could entail perpetual governmental roundups. However, the costs are amplified under the decision in *Mountain States*, which requires the BLM, at all taxpayers' expense, to cull wild horses from public areas upon neighboring private landowners' requests.⁷² The result is a significant federal subsidy of a particular landowner's temporary⁷³ use of public property. Section 1334 insists that the expenditure be made when horses stray onto private tracts, but there is no compelling reason why taxpayers should finance excessive interference with a national resource⁷⁴ to eliminate range competition for a few lessees.

Mountain States produced more than merely a subsidy for a particular range activity. It countermanded a central multiple use tenet found not only in the Act, but also in FLPMA and PRIA, that bestows upon wild horses "equal footing" with other public land uses in rangeland management.⁷⁵ *Mountain States* would award livestock a higher priority to graze the range. Under FLPMA and PRIA's multiple use doctrines, no single use possesses such a lofty status.⁷⁶

71. Note, *supra* note 26, at 534-35. Permanent removal of wild horses from a checkerboard region would be unwarranted. Section 1334 is structured to tackle individual straying episodes after they have occurred. *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 12-13. If the horses returned to private areas, the owner would again need to request governmental removal. *Id.*

72. In some instances, BLM revenues may be inadequate to undertake all desired roundups. *See, e.g.*, Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgement and Cross-Motion for Summary Judgment, at 3-5, *C-Punch Corp. v. Andrus*, No. 80-266 (D. Nev. July 29, 1981).

73. Under the Taylor Grazing Act, permits to graze the public lands may not be issued for periods greater than ten years, subject to discretionary renewal by the BLM. 43 U.S.C. § 315b (1976).

74. *See generally* 16 U.S.C. § 1331 (1976) (Congress' declaration that wild horses "contribute to the diversity of life forms within the Nation" and "enrich the lives of the American people.").

75. H.R. REP. NO. 480, *supra* note 9, at 5 (stating wild horses "should be considered as components of the public lands *coequal* with wildlife and domestic livestock.") (emphasis added); *American Horse Protection Ass'n v. Frizzell*, 403 F. Supp. 1206, 1220-21 (D. Nev. 1975); 43 C.F.R. § 4700.0-6(c) (1981) ("comparable" status); ENVIRONMENTAL LAW INSTITUTE, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 169-70 (1971) [hereinafter cited as *THE EVOLUTION OF NATIONAL WILDLIFE LAW*].

One commentator contended that the Act assigns horses a superior status in the public land management process:

[T]he Act did accord wild horses and burros a special status. Ducks, bears, coyotes, and most other species can be shot on federal lands and their carcasses sold, but all private killing, molestation, or sale of horses and burros is forbidden. The federal government can capture or kill the latter animals only in defined, exceptional circumstances. All official management activities are to be kept to the "minimum feasible level." Congress clearly intended these restrictions to change the usual way of treating wild horses and burros on the public domain. While the Act recognizes multiple use management, it injects new priorities into traditional administrative choice patterns. . . . There is no warrant in the Wild Horses Act or its legislative history for concluding that cattle or sheep have preference over wild horses in a conflict over forage. If anything, the Act reflects a contrary congressional intention.

Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, 1978 DUKE L.J. 753, 783-84 (footnotes omitted).

76. *See American Horse Protection Ass'n v. Frizzell*, 403 F. Supp. 1206, 1221 (D. Nev. 1975)

There are management approaches superior to *Mountain States* that blend private uses of public rangelands and protection of wild horses. The following sections propose and explain such techniques.

IV. MANAGEMENT RESPONSES TO THE STRAYING PROBLEM

The Wild Horses Act has existing mechanisms that could limit equine access to private lands and circumvent the need for perennial roundups and extensive regulation. These include (1) removing "excess" wild horses in overpopulated regions; (2) fencing to separate public and private tracts in areas horses frequently roam; and (3) establishing cooperative agreements between the government and landowners to allow wild horses to stray and to graze on private lands.⁷⁷

"Excess" horses, as determined by the BLM,⁷⁸ could be removed from public portions of the checkerboard regions in "peak stray areas."⁷⁹ Section 1333(a) mandates that such culling be at the "minimal feasible level,"⁸⁰ and § 1333(b) limits roundups to "excess" horses, within the overall framework of FLPMA and PRIA, to achieve thriving ecological balance for multiple environmental values.⁸¹ Consequently, roundups on public lands to eliminate horse trespass onto private parcels should only be pursued on a very restricted basis at locations experiencing continual straying. Under § 1333, "peak stray area roundups" can be distinguished from the judicial remedies in *Mountain States* and *C-Punch Corporation*

(examining regulations under the Classification and Multiple Use Act, Pub. L. No. 88-607, 78 Stat. 986 (1964) (authority terminated 1970)); THE EVOLUTION OF NATIONAL WILDLIFE LAW, *supra* note 75, at 172-73.

77. Legislation currently before Congress would create a fourth solution to straying. The bill would permit the BLM to sell culled horses to commercial interests. S. 457, 98th Cong., 1st Sess. § 3(b)(2)(C)-(D), 129 CONG. REC. S1068, S1069 (daily ed. Feb. 3, 1983). Applying the *Mountain States* rationale, horses removed from checkerboard lands could be sold. If enacted, this proposal would enable the federal government to pursue and facilitate the very commercial exploitation that the Act sought to eliminate in the private sector. The bill's provision appears to contradict the Act's central scheme to protect wild horses from intensive human interference. S. REP. NO. 242, *supra* note 9, at 2152; H.R. REP. NO. 480, *supra* note 9, at 4-5. H. CONF. REP. NO. 681, *supra* note 9, at 2159-60.

78. For the Act's and the BLM's definitions of "excess" horses, see *supra* note 58. To most accurately assess whether an "excess" number exists, the Secretary must maintain current inventories of wild horse populations in various regions, consult governmental wildlife agencies and independent horse and wildlife experts, and contract with non-governmental personnel, as recommended by the National Academy of Sciences, to conduct scientific studies. 16 U.S.C. § 1333(b)(1)-(3) (Supp. V 1981). The significance of these research requirements in wild horse management is discussed in Buckley & Buckley, *supra* note 26, at 439-41.

79. A "peak stray area" might include private territory upon which wild horses regularly or constantly trespass. For a suggestion as to how this term could be applied, see *infra* notes 84-86 & accompanying text.

80. 16 U.S.C. § 1333(a) (1976).

81. *Id.* § 1333(b) (Supp. V 1981). See *supra* notes 52-57 & accompanying text for a review of the roles of FLPMA and PRIA in horse regulation.

v. *Andrus*,⁸² since these courts prescribed much more massive regulation on public lands than the Act tolerates.⁸³

Some of the scientific studies authorized under § 1333(b)⁸⁴ should help clarify horse land-use patterns which will assist the BLM in isolating peak stray areas.⁸⁵ This research data should enable the BLM to determine more accurately horse populations and thus protect the animals from uninformed, overzealous management.⁸⁶

These scientific studies would also prove significant in the fencing of public and private lands. Fencing between all checkerboard segments could be prohibitively expensive.⁸⁷ This also would be unnecessary, since wild horses roam within their own limited "home ranges"⁸⁸ and would likely stray repeatedly across the same territory. Fencing peak stray areas, however, would be an effective trespass barrier and could be less costly than removal at some locations.⁸⁹

Another management method to resolve the straying problem is § 1336 of the Act, which provides that "[t]he Secretary is authorized to enter into cooperative agreements with other landowners and with the State and local governmental agencies"⁹⁰ to permit wild horses to roam and graze on private or state lands.⁹¹ The Act continues to fully protect the horses under

82. No. 80-266 (D. Nev. July 29, 1981), *modified*, *C-Punch Corp. v. Watt*, No. 80-266 (D. Nev. Nov. 12, 1981).

83. *See supra* notes 51-64, 67-74 & accompanying text. For example, Judge Kerr compelled an *indiscriminate* culling of *all* wild horses from an entire checkerboard region. *See Mountain States Legal Found. v. Andrus*, 12 ENVTL. L. REP. at 20105, *as amended* by Mountain States Legal Found. v. Watt, No. 79-275, at 2-3 (D. Wyo. Feb. 19, 1982). The Act, however, allows only "excess" horses to be gathered from public tracts. 16 U.S.C. § 1333(b) (Supp. V 1981).

84. *See id.* *See also supra* note 78.

85. Several of these studies investigate wild horse demography, habitat preference and use compared to cattle patterns, food consumption rates, nutritional requirements, social, genetic and population dynamics, and grazing and watershed impacts, as compared with cattle. PHASE I FINAL REPORT, *supra* note 58, at 70, 108, 164, 167, 169. The National Academy of Sciences Committee on Wild Horses outlined several projects to examine these factors. *Id.* at 108-29.

86. The BLM's inventories of wild horse populations have been criticized in the past. *Id.* at 190. *See also* American Horse Protection Ass'n v. Kleppe, 6 ENVTL. L. REP. 20802, 20803-04 (ENVTL. L. INST.) (D.D.C. 1976), *aff'd on rehearing*, No. 76-1455 (D.D.C. Nov. 19, 1981), *aff'd in part, rev'd in part and remanded*, American Horse Protection Ass'n v. Watt, 694 F.2d 1310 (D.C. Cir. 1982) (characterizing BLM estimates of horse numbers and reproductivity in the Challis, Idaho area as "meaningless," "speculative" and "unreliable").

87. Note, *supra* note 26, at 535.

88. *See supra* note 30 & accompanying text.

89. *See, e.g.*, American Horse Protection Ass'n v. Kleppe, No. 76-1455, at 5-6 (D.D.C. Nov. 19, 1981), *aff'd in part, rev'd in part and remanded*, American Horse Protection Ass'n v. Watt, 694 F.2d 1310 (D.C. Cir. 1982); Plaintiff's Memorandum in Opposition to Motion to Dissolve Injunction at 13, American Horse Protection Ass'n v. Kleppe, No. 76-1455 (D.D.C. Nov. 19, 1981).

90. 16 U.S.C. § 1336 (1976).

91. *See* 43 C.F.R. § 4710.3 (1981); 16 U.S.C. § 1334 (1976).

such agreements.⁹² The success of this provision would seem to depend upon the willingness of private property owners to consent to wild horses grazing their available forage. In times of economic hardship, this genial disposition might wane. Section 1336 could be more useful in reducing the straying conflict if landowners received additional incentives to pursue cooperative agreements.⁹³

Given the number of requests to remove straying wild horses,⁹⁴ the Act's current devices have not been used successfully to reconcile property owners and free-roaming herds. Imaginative answers need to augment the present framework.

V. INNOVATIVE SOLUTIONS TO THE STRAYING PROBLEM

Several novel allurements, such as fiscal benefits and extensions of grazing privileges, could supplement the Wild Horses Act to encourage individuals or associations to adopt and to enter into cooperative agreements.

As "excess" wild horses are removed from peak stray areas,⁹⁵ they will have to be relocated onto other public tracts,⁹⁶ placed in holding facilities for adoption,⁹⁷ or humanely destroyed.⁹⁸ Adoption has been the most

92. See 16 U.S.C. § 1334 (1976); 43 C.F.R. § 4710.3 (1981). Conceivably, under cooperative agreements wild horses wandering onto private lands could "intermingle" with domestic horses. This could create a question of ownership as ranchers attempted to retrieve their property. The Act allows persons claiming ownership on public lands to recover their horses if the state's branding and stray laws so permit. 16 U.S.C. § 1335 (1976). Final determination of ownership rests with federal authorities. *American Horse Protection Ass'n v. United States Dep't of Interior*, 551 F.2d 432, 439-42 (D.C. Cir. 1977); *State ex rel. Nevada State Bd. of Agriculture v. United States*, No. 78-0076, at 4-6 (D. Nev. March 29, 1979); *Sheridan v. Andrus*, 465 F. Supp. 662, 664 (D. Colo. 1979). See generally 43 C.F.R. §§ 4720.1-3 (1981). It would seem logical that § 1335 would apply to cooperative agreements affecting *private* lands, since the Act extends its protective umbrella to such private maintenance arrangements. 16 U.S.C. § 1334 (1976).

93. See *infra* notes 109, 123-25 & accompanying text.

94. For example, the BLM has received 141 requests since 1975 from Nevada property owners to gather horses from their private rangelands, *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 7.

95. See *supra* notes 78-86 & accompanying text.

96. The Act forbids most relocation: "Nothing in this chapter shall be construed to authorize the Secretary to relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist." 16 U.S.C. § 1339 (1976). However, wild horses could be culled and taken to another public region which they currently roam.

97. See *supra* note 26 & accompanying text. Permanent BLM distribution centers are located in California, Nebraska, Nevada, Oregon, Pennsylvania, Tennessee, Texas, Washington, and Wyoming. "Semi-permanent" centers are utilized periodically in Arizona, Colorado, Idaho, Montana, New Mexico, and Utah. U.S. Department of the Interior, Bureau of Land Management, *So You'd Like to Adopt a Wild Horse. . . Or Burro?*, at 3 (May 1982) (adoption pamphlet available from the Consumer Information Center, Pueblo, Colorado). See also *FOURTH REPORT TO CONGRESS*, *supra* note 26, at 6.

98. According to the BLM, less than three percent of all captured horses are destroyed. *THIRD REPORT TO CONGRESS*, *supra* note 6, at 12.

widely utilized procedure to dispose of horses following roundups.⁹⁹ Recently, the BLM increased adoption fees.¹⁰⁰ This might dampen public interest and subsequently reduce the number of horses placed into private maintenance. Fewer adoptions would probably result in the termination of more culled horses.¹⁰¹ So long as the BLM continues to remove wild horses from public or checkerboard regions, the Adopt-a-Horse program is the solution most closely approaching the Act's protective and regulatory intentions while easing rangeland ecological pressures associated with horse overpopulation and straying.¹⁰² Financial incentives should be constructed to accommodate would-be custodians who might balk at the high fees. It seems anomalous to saddle private citizens attempting to further the goals of the Act with the program's economic burdens. The success of the congressional policy to protect wild horses should not depend upon the generosity of a small portion of the public that could afford the higher fees. Since Congress declared wild horse preservation to be a truly

Even though § 1333(b) allows humane destruction, such termination rarely should be utilized as a method of regulating horse populations, since the objective of the Act is to prevent human slaughter of the animals. *See supra* notes 14-15, 19-29 & accompanying text.

99. *See supra* note 26 & accompanying text.

100. 48 Fed. Reg. 9260 (1983) (to be codified at 43 C.F.R. §§ 4740.4-2 to -3). Adoption applicants must pay a "custodial fee" of \$125 per horse and \$75 per burro plus transportation costs to the holding facility. *Id.* at 9262 (to be codified at 43 C.F.R. § 4740.4-3(d)(1)). Previously, fees had been limited to \$25 per animal. Haitch, 'Orphan' Horses, N.Y. Times, April 25, 1982, § 1, at 49, col. 5-6. As of October, 1980, overall expenses to the adopter, including vaccination, handling and transportation costs, averaged \$90-\$160. BLM FOUR-YEAR AUTHORIZATION REPORT, *supra* note 26, at 94.

Originally the BLM proposed that the adoption fees for horses be increased to \$200 per animal. 47 Fed. Reg. 32,406 (1982). Eighty-four percent of the 199 public comments the agency received in response to the suggested rulemaking were opposed to this figure,

primarily because the writers believed the proposed fee for horses would reduce the number of animals adopted, limit removal of excess wild horses from the public lands, make it difficult for fixed or lower income individuals to adopt animals, equal or exceed the local market value of domestic horses, lead to destruction of healthy animals, and increase adoption program costs.

48 Fed. Reg. 9260, 9260 (1983). Only ten percent of the public comments supported the \$200 fee. *Id.* Last year's suggested fees were the subject of recent litigation. American Horse Protection Ass'n v. Watt, No. 82-0559 (D.D.C. June 30, 1982) (stipulation between parties to stay judicial proceedings pending completion of informal rulemaking under 5 U.S.C. § 553 (1976)). The BLM agreed not to destroy any horses until 30 days after publication of the final adoption charges in the *Federal Register*, *id.*, which became effective March 4, 1983. 48 Fed. Reg. 9260, 9260 (1983).

101. Haitch, *supra* note 100, at 49, col. 5-6. The BLM contended that the \$125 fee "will permit an increase in the number of horses adopted," and the \$75 price tag would not reduce the adoption demand for burros. 48 Fed. Reg. 9260, 9261 (1983). Considering that horses and burros previously have been adopted for \$25 or less, *see* Haitch, *supra* note 100, at 49, col. 5-6, it seems more likely that a price escalation of between \$50-\$100 per animal under the new fees will have some negative impact on adoption demand.

102. Evidence suggests that the program has been abused by commercial exploiters who "adopt" the horses and then sell them to industrial manufacturers. *See Adopt-a-Horse Program: Hearing Before the Subcomm. on Governmental Efficiency and the District of Columbia of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 26, 39, 42 (1979); Note, *supra* note 26, at 537.

national concern,¹⁰³ perhaps a larger fiscal pool could be tapped to defray some of the adoption costs.

A special public lands user fee could be established to subsidize horse adoption or management endeavors. The duty could be assessed to those uses which directly compete with wild horses for range resources and which would specifically benefit from horse removal from checkerboard regions.¹⁰⁴ Such a charge could be nominal and still generate significant revenues. For example, assume Congress authorized a duty analogous to the grazing fees under PRIA, in which domestic livestock operators are charged to graze the public lands.¹⁰⁵ To simplify the illustration, suppose the duty equals ten cents per head of livestock grazed annually. Since nearly 4.5 million domestic livestock graze on 170 million acres of public range,¹⁰⁶ the fee theoretically would generate \$450,000. This would account for 75 percent of the adoption program's expenditure in fiscal year 1981.¹⁰⁷ To raise additional dollars, this hypothetical charge could be extended to other private uses of the public lands.¹⁰⁸ These subsidies could

103. See 16 U.S.C. § 1331 (1976).

104. For example, livestock grazing the public lands would restrict forage availability for horses and wildlife. Also, grazing interests would obtain the direct benefit of reduced range competition as horses are culled. Since grazing fees under PRIA charge ranchers the economic value they derive from use of the public tracts, *see infra* note 105, an extension of a wild horse duty to livestock activities would seem logical.

105. Under PRIA,

[f]or the grazing years 1979 through 1985, the Secretaries of Agriculture and Interior shall charge the fee for domestic livestock grazing on the public rangelands which Congress finds represents the economic value of the use of the land to the user, and under which Congress finds fair market value for public grazing equals the \$1.23 base established by the 1966 Western Livestock Grazing Survey multiplied by the result of the Forage Value Index (computed annually from data supplied by the Economic Research Service) added to the Combined Index (Beef Cattle Price Index minus the Price Paid Index) and divided by 100: *Provided*, That the annual increase or decrease in such fee for any given year shall be limited to not more than plus or minus 25 per centum of the previous year's fee.

43 U.S.C. § 1905 (Supp. V 1981). FLPMA also authorizes the Secretary to set grazing fees. 43 U.S.C. § 1751 (1976 & Supp. V 1981).

106. TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1981, at 146 (1981). Realistically, not all of this livestock would compete with wild horses.

107. Of the Act's fiscal 1981 budget of \$1,160,000, \$400,000 was spent to remove "excess" horses, and \$600,000 was utilized "to place the gathered horses in private care." *T Quarter Circle Ranches, Inc. v. Watt*, No. 81-110, at 8.

108. For example, energy development industries operating in federal regions, and recreational facilities within national parks, could be assessed meagre charges. The larger the pool of uses assessed, the lower the fee can be for each category. Using the cattle illustration, *see supra* text accompanying notes 105-06, a charge of one cent or less per head of cattle, coupled with comparable fees for other public range uses, could generate tens or hundreds of thousands of dollars in revenue. To justify the application of such fees, presumably there might have to be a reasonable relationship between the activity charged and the benefit derived (*e.g.*, wild horse adoption). The Property Clause, U.S. CONST. art. IV, § 3, cl. 2, implies that such a connection ought to exist. For example, Congress has provided the Secretary of Interior broad discretion under various statutes to regulate federal lands and resources for

bolster the Adopt-a-Horse program and would enable "excess" horses to be gathered from peak stray areas without needless destruction of the animals. The straying problem would be pared, and the horses would be at least partially spared human interference and degradation.

Another economic allurement could be the creation of a special federal tax deduction or tax credit for wild horse adoption expenses.¹⁰⁹ Under the present tax code, custodians probably could not deduct their adoption costs because most adopters are not engaged in the business of raising wild horses for a profit.¹¹⁰ The deductions afforded "not-for-profit" enterprises¹¹¹ do not apply to the ordinary custodian, since these costs are not outlays deductible without regard to the "business-for-profit" requirement.¹¹² The Wild Horses Act could also preclude deduction of one's out-of-pocket adoption expenses. Adopters cannot obtain title to adopted horses until after one year of humane care,¹¹³ and deductions would have to be taken during the tax year that the adoption costs were accrued.¹¹⁴

Congress would have to specifically declare a tax advantage for adoption if the federal tax system is to be of service. A new deduction could spur individuals to adopt while simultaneously furthering the Act's

the benefit of the general public. *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971); *United States v. Ohio Oil Co.*, 163 F.2d 633, 639-40 (10th Cir. 1947), *cert. denied*, 333 U.S. 833 (1948). This includes the power to assess user fees to guarantee that the federal government exacts a "fair return" from persons exploiting resources from the public lands. *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971); *Kerr-McGee Corp. v. Watt*, 517 F. Supp. 1209 (D.D.C. 1981). This delegated proprietary authority is a valid exercise of Congress' power to "make all needful Rules and Regulations respecting" federal lands under the Property Clause. *United States v. Ohio Oil Co.*, 163 F.2d 633, 639-40 (10th Cir. 1947), *cert. denied*, 333 U.S. 833 (1948). Arguably, to be a "needful" regulation "respecting" federal property, there should be a nexus between the regulated activity and the public land management goal to be achieved through the establishment of use charges.

109. Such tax benefits could be extended to landowners entering cooperative arrangements under § 1336 of the Act.

110. Usually the costs of activities "not engaged in for profit" are not deductible. *See* I.R.C. § 183(a), (c) (1982). Generally, tax deductions are allowed for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." *Id.* § 162(a).

111. *See id.* § 183(b).

112. *See id.*

113. 16 U.S.C. § 1333(c) (Supp. V 1981).

114. *See* I.R.C. § 162(a) (1982). There are some instances in which the federal tax code allows deduction for certain expenditures even if the taxpayer does not "own" the property he has purchased. In the case of land sales on contract, while purchaser *B* takes possession of the parcels for his use, vendor *A* retains legal title until *B* pays the full contract price, frequently over a period of several years. *See generally* C. SMITH & R. BOYER, *supra* note 8, at 154. In the interim *B* still may deduct state and local property taxes from his federal return. I.R.C. § 164(a)(1) (1982). The Internal Revenue Code also enables a taxpayer to deduct business payments required as a condition to his continued use of property to which he has not taken or is not taking title or equity. *Id.* § 162(a)(3). Similarly, a transfer of possession of wild horses without conveyance of legal title would still provide the adopter an equitable interest in the animals which, by analogy to the above tax provisions, could be sufficient "ownership" to maintain a "year of purchase" deduction for custodial expenses at the time of adoption. This assumes, of course, that adoption fees can qualify as deductible expenses under the Code.

preservation of the animals.¹¹⁵ Precedents exist to support the creation of a tax incentive for the protection of animal life.¹¹⁶ One state statute provides an extremely low property tax assessment for real property owners wishing to classify qualified lands as wildlife habitats.¹¹⁷ Another state exempts from real property taxation land owned by organizations using the property for certain charitable endeavors,¹¹⁸ including environmental and conservation objectives,¹¹⁹ such as a wild bird sanctuary.¹²⁰ The Internal Revenue Code authorizes deductions for charitable contributions to organizations established for the prevention of cruelty to animals.¹²¹ While tax laws may be an unusual tool to protect wildlife in general or horses in particular, it is not an unreasonable expansion of their central mission to effectuate an important social policy.¹²²

115. Any deductions or credits would have to be carefully structured to prevent commercial exploiters from abusing the tax code while profiting from the horses' destruction. Since only four horses may be adopted per person annually, unless the Secretary authorizes otherwise, it is unlikely that business interests would derive enough economic benefit from either resale of the horses or from a tax deduction to justify adoption abuse. See 16 U.S.C. § 1333(b)(2)(B) (Supp. V 1981).

116. This article recommends such a tax policy be applied to wild horses. The precedents mentioned below illustrate that tax structures have been used to pursue the societal goals of the preservation and protection of animals. See *infra* notes 117-22 & accompanying text.

117. E.g., IND. CODE §§ 6-1.1-6.5-1 to -25 (1982). If particular parcels of land qualify as a wildlife habitat, see *id.* § 6-1.1-6.5-2, the property is assessed at a rate of \$1.00 per acre "for general property taxation purposes." *Id.* § 6-1.1-6.5-8.

118. N.Y. REAL PROP. TAX LAW § 420-a (McKinney Supp. 1982).

119. *New York Botanical Garden v. Assessors of Washington*, 55 N.Y.2d 328, 336, 434 N.E.2d 703, 706, 449 N.Y.S.2d 467, 470 (1982); *North Manuring Wildlife Sanctuary, Inc. v. City of Rye*, 48 N.Y.2d 135, 139-40, 397 N.E.2d 693, 695, 422 N.Y.S.2d 1, 3 (1979), *aff'd on remand*, 75 A.D.2d 855, 427 N.Y.S.2d 843 (1980); *Mohonk Trust v. Board of Assessors of Gardiner*, 47 N.Y.2d 476, 484, 392 N.E.2d 876, 880, 418 N.Y.S.2d 763, 767 (1979).

120. *North Manuring Wildlife Sanctuary, Inc. v. City of Rye*, 48 N.Y.2d 135, 139-40, 397 N.E.2d 693, 695, 422 N.Y.S.2d 1, 3 (1979), *aff'd on remand*, 75 A.D.2d 855, 427 N.Y.S.2d 843 (1980). For a detailed analysis of New York's charitable real property tax exemptions, see P. Swords, *Charitable Real Property Tax Exemptions in New York State* (1981).

121. I.R.C. §§ 170(a)(1), (c)(2)(B) (1982). Organizations for prevention of cruelty to animals can be designated as tax-exempt under the Code. *Id.* § 501(c)(3).

122. The national significance of the Wild Horses Act is suggested in § 1331's declaration of congressional policy. See *supra* notes 22, 74 & accompanying text.

There are several other sections of the Internal Revenue Code that are specifically tailored to achieve various environmental objectives. The Hazardous Substance Response Revenue Act of 1980, Pub. L. No. 96-510, tit. II, §§ 211(a), (c), 94 Stat. 2797 (1980), levied a tax on crude oil, see 26 U.S.C. § 4611 (Supp. V 1981), and on manufactured chemicals, see *id.* § 4661, to raise revenues for "Superfund" pursuant to 42 U.S.C. § 9631(b)(1)(A) (Supp. V 1981), to respond to injury claims and costs related to releases of oil and hazardous substances into the environment. *Id.* § 9631(c). Another "environmental" tax provision includes the amortized deduction that pollution control facilities may elect under I.R.C. § 169 (1982). Also, businesses investing in certain types of energy property, such as solar, wind, ocean and geothermal, are entitled to an investment credit as an incentive to develop alternatives to fossil fuels. *Id.* § 46(a). Another tax section allows landowners to deduct contributions of full or partial real property interests to charitable organizations so long as the property is used for "conservation purposes," including "the protection of a relatively natural fish, wildlife or plant habitat." *Id.* § 170(f)(3)(B)(iii), (h)(4)(A)(ii). Clearly, Congress has demonstrated that the federal

Extensions of grazing permits and leases for landowners¹²³ entering cooperative agreements under § 1336 could also ease the straying problem, since such arrangements would diminish the number of requests BLM receives to return strays to the public range.¹²⁴ Even if the BLM normally allows permits and leases to continue automatically, absent a serious cause for cancellation, extensions still could be preferentially given to parties opting for cooperative engagements.¹²⁵

Another approach to the straying conflict would be an increase in the number of "wild horse ranges." From a practical standpoint, merely designating an area of the public lands as a horse refuge would not affect existing relations between wild horses and landowners. Horses could still cross public and private borderlines, regardless of the label assigned to the region. If these ranges are to prove effective in easing the straying problem, they should be defined to coincide with the horses' territorial use patterns so that the animals would normally remain within the refuge boundaries.¹²⁶ Fencing would still be useful in peak stray areas between the range and private property.¹²⁷ Straying could continue despite the establishment of refuges. As equine populations increase near the range boundaries, horses might be compelled to migrate in search of greater food supplies. While fencing would prevent the animals from entering private tracts, the horses could be forced to roam beyond the refuge at other unfenced locations or to move toward the center of the designated range. If forage remained sparse, and if geographic characteristics and fencing hindered herd movements, the horses might begin to exhaust the refuge's resources, at least on relatively small ranges.¹²⁸ The BLM could respond with continued roundups, which would reinstate the current practice rather than improve upon it. Still, such ranges would provide a haven specifically created to preserve the horses' needs. Such a "preferred status" *within* the assigned range¹²⁹ would require the BLM to utilize alternative management

tax system is an appropriate instrument to attain ecological protection.

123. The Secretary of the Interior has the discretion to regulate and renew leases and permits. 43 U.S.C. § 315b (1976).

124. Since § 1334 does not apply to public tracts, there is some question whether cooperative agreements should be necessary to protect wild horses on the public parcels. *See supra* notes 59-66 & accompanying text.

125. The Taylor Grazing Act provides preferences in issuing renewals. 43 U.S.C. § 315b (1976).

126. *See supra* note 30 & accompanying text.

127. *See supra* notes 87-89 & accompanying text.

128. This would not be a problem in the larger wild horse refuges, since the "border herds" would likely have ample space to roam within range boundaries.

129. While this priority in land use would exist within the particular wild horse refuge, no such exalted status would be awarded horses on "ordinary" public lands. *See supra* notes 75-76 & accompanying text.

options¹³⁰ before removing the animals from the refuge.

Special refuges rarely have been used in the past,¹³¹ and particular ranges have been criticized as ineffective in protecting the horses' interests.¹³² Congress explicitly discouraged the establishment of ranges, since these would involve intensive management creating a "zoo-like" effect contrary to the free-roaming nature of the animals.¹³³ The Act was intended to preserve wild horses within their natural, rather than artificial, habitats.¹³⁴ However, one may reasonably question whether wild horses function in a truly "natural" environment under current management procedures. Since 1971 the BLM has conducted frequent, substantial roundups of herds from public lands, and the agency proposes to continue such policies.¹³⁵ This widespread human interference generates the same "zoo-like" result that Congress wished to avoid, because wild horses are culled and placed within BLM holding facilities to await adoption or destruction.¹³⁶ While designated ranges would concentrate the horses' territories, they would be superior to continual roundups resulting in a "corral ecosystem." Congress should reconsider its aversion toward refuges and should contemplate amending the Act to facilitate their implementation.¹³⁷

VI. CONCLUSION

Section 1334 of the Wild Horses Act provides landowners an inexpensive and convenient method of removing straying horses from their private property. The BLM is under a "ministerial duty" to return the horses to the public range. However, this obligation does not compel culling from public portions of checkerboard tracts. Such exorbitant regulation is

130. For example, in a horse range, the BLM could alleviate resource deterioration by first reducing livestock grazing or by increasing "on-the-ground" improvements under PRIA. 43 U.S.C. §§ 1903-04 (Supp. V 1981). Thereafter, if horse numbers needed to be thinned pursuant to the Wild Horses Act, roundups could be conducted.

131. *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, *supra* note 75, at 169-70 n. 164. Only three ranges had been established as of 1980. Wild Horse & Burro Report, *supra* note 29, at 1.

132. H. RYDEN, *supra* note 16, at 262-78.

133. H. CONF. REP. NO. 681, *supra* note 9, at 2159; H.R. REP. NO. 480, *supra* note 9, at 4-5.

134. S. REP. NO. 242, *supra* note 9, at 2151; H.R. REP. NO. 480, *supra* note 9, at 4-5; H. CONF. REP. NO. 681, *supra* note 9, at 2159.

135. As of September 1981, the BLM and the Forest Service have captured approximately 38,200 "excess" horses and burros since the Act's inception. *FOURTH REPORT TO CONGRESS*, *supra* note 26, at 4. The BLM recommended that 24,000 "excess" horses be culled in fiscal years 1980 and 1981. Thereafter, removal would be continued at a rate of over 10,000 horses annually. *THIRD REPORT TO CONGRESS*, *supra* note 6, at 11, 25.

136. See *supra* notes 97-98 & accompanying text.

137. Early versions of the Wild Horses Act suggested that at least twelve ranges be created. *Protection Hearings*, *supra* note 36, at 17-18 (statement of Gilbert Gude, U.S. Representative, Maryland).

contrary to the Act's requirements that horse management be conducted at minimum feasible levels, and it usurps the "multiple use-sustained yield" philosophy of the Act, FLPMA, and PRIA, that seeks to accommodate all range uses to attain thriving ecological balance. Excessive, perpetual roundups on the public lands should not be the primary approach to eliminate straying. "Excess" horses could be gathered, and fencing could be constructed, in peak stray areas. Cooperative agreements between landowners and the BLM would enable wild horses to graze on private and checkerboard lands without constant removal. Innovative economic solutions, such as special tax deductions and user fee subsidies for horse custodians, could increase the number of adoptions, so that animals removed from "peak stray roundups" would not need to be destroyed. Tax advantages and preferential extensions of grazing permits and leases could encourage property holders to enter cooperative agreements. Designated wild horse ranges could be increasingly utilized. These refuges, coupled with "peak stray fencing," could reduce straying if boundaries correspond to the horses' nomadic patterns of use.

There are many alternatives more consistent with the purposes of the Wild Horses Act than perennial roundups from public and private lands pursuant to § 1333 and § 1334. The BLM will hopefully undertake such options more vigorously, and perhaps Congress will ponder some of the novel devices available, so that the integrity of private land uses may be preserved, and wild horses may continue to be protected as truly "free-roaming" symbols of American history.