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## Wyoming v. United States Department of the Interior

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***Wyoming v. United States Department of the Interior*, 839 F.3d 938  
(10th Cir. 2016).**

**Arie R. Mielkus**

Responding to an overpopulation of wild horses on the BLM lands in the state, Wyoming sued the Secretary of the Interior and the BLM for failure to manage the excess numbers. Wyoming’s claim, based on the Wild Horses and Burros Act and Administrative Procedure Act, jumped the gun by bringing it before the BLM made its determination that removal was necessary to manage the overpopulation.

I. INTRODUCTION

Wyoming sought review under the Administrative Procedures Act of the Bureau of Land Management’s (“BLM”) decision to not manage the overpopulation of wild horses in Wyoming.”<sup>1</sup> The state contended that under the Wild Free-Roaming Horses and Burros Act (herein after “Wild Horses and Burros Act”) respondents had a “mandatory, non-discretionary obligation” to remove an overpopulation when found.<sup>2</sup> The Tenth Circuit Court of Appeals affirmed the district court’s holding that the Wild Horses and Burros Act did not require the BLM to immediately remove the wild horses and burros from the seven habitat management areas (“HMA”) at issue.<sup>3</sup>

II. FACTUAL AND PROCEDURAL BACKGROUND

In August 2014, Wyoming’s Governor sent a letter to the U.S. Secretary of the Interior, and the BLM’s Acting Director requesting action on seven HMAs within the state.<sup>4</sup> The Governor’s letter complained of an overpopulation of horses he argued triggered the BLM’s “non-discretionary duty” to remediate under the Wild Free-Roaming Horses and Burros Act.<sup>5</sup> Further, the Governor demanded that the overpopulation of horses be remedied in 60 days, and threatened to sue both the Secretary of the Interior and the Director of the BLM in their official capacities if the over-population was not addressed.<sup>6</sup> At the end of October, the Governor sent another letter stating he intended to instruct the Wyoming Attorney General to file suit for their failure to address the violations listed in the previous letter.<sup>7</sup>

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1. Wyoming v. United States Department of the Interior, 839 F.3d 938, 941 (10th Cir. 2016).

2. *Id.* at 941.

3. *Id.* at 942.

4. *Id.* at 941.

5. *Id.*

6. *Id.*

7. *Id.*

In November 2014, the BLM responded to the Governor's letter acknowledging his concerns and stating that Wyoming had removed 1,263 wild horses in the southwestern area of the state, bringing the herd's levels beneath the appropriate management levels ("AML").<sup>8</sup> Further, the BLM outlined a plan for removal of the animals the following year, noting that fiscal and ecological factors would be considered when resolving the overpopulation problem.<sup>9</sup>

In December 2014, Wyoming filed an action for judicial review, proposing that the BLM failed to comply with its nondiscretionary obligations imposed under the Wild Horse and Burros Act.<sup>10</sup> Seeking review under the Administrative Procedure Act, Wyoming alleged the BLM's "final decision not to manage the wild horse in Wyoming" required immediate action.<sup>11</sup> The Wyoming district court granted the BLM's motion to dismiss Wyoming's action, finding no mandatory duty to immediately remove the wild horses.<sup>12</sup> Holding that Wyoming failed to include a "discrete agency action the BLM was required to take" under the Wild Horse and Burros Act.<sup>13</sup> From this Wyoming appealed.

### III. ANALYSIS

#### A. Purpose of the Wild Free-Roaming Horses and Burros Act

The question before the court of appeals was whether § 3 of the Wild Horse and Burros Act "obligated the BLM to gather or otherwise remove excess wild horses from each of the seven HMAs once it learned that the wild horse population in each of those HMAs exceeded the upper limit of their respective appropriate management levels."<sup>14</sup>

The act was designed to protect wild horses and burros from "capture, branding, harassment, or death" on the rangelands of the west.<sup>15</sup> Under the Wild Horses and Burros Act the animals are managed as an "integral part of the natural system of the public lands."<sup>16</sup>

The Wild Horses and Burros Act proved to be so successful that amendments were required in 1978 to protect the rangeland habitat where horses and burros were exceeding its carrying capacity.<sup>17</sup> The amendments allowed for "humane adoption or disposal of excess wild free-roaming horses and burros," granting the Secretary of the Interior greater authority to manage the animals on public land.<sup>18</sup>

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 941-42.

12. *Id.* at 942.

13. *Id.*

14. *Id.*

15. *Id.* at 939 (quoting 16 U.S.C §1331 (2017)).

16. *Id.* at 939-40 (quoting 16 U.S.C. § 1331(a)).

17. *Id.* at 940.

18. *Id.* at 2 (quoting 43 U.S.C § 43 §1901 (2017)).

*B. BLM's management obligations under the Wild Free-Roaming Horses and Burros Act*

In an effort to “achieve and maintain a thriving natural ecological balance on the public lands” the BLM is responsible for inventorying wild horses and burros in each HMA.<sup>19</sup> Additionally, the BLM determines the number of wild horses each HMA can sustain—the AMLs—and how the levels will be achieved.<sup>20</sup> The BLM has determined the upper limit of the AMLs are the “maximum number of wild horses and burros which results in a thriving natural ecological balance and avoids a deterioration.”<sup>21</sup> Thus the AML is the number of animals that would not cause damage to the rangeland habitat while still allowing for the population to grow.<sup>22</sup> It is undisputed that the HMAs at issue were in excess of their upper limit of the determined AML.<sup>23</sup>

*C. Section 3 of the Wild Free-Roaming Horses and Burros Act*

The Secretary’s duties in § 3 are to inventory the population of wild horses and burros to: (1) determine whether an overpopulation exists and whether removal action is necessary; (2) determine AML of the HMA’s; and (3) determine if the AML can be reached by “removal or destruction of excess animals.”<sup>24</sup> Further, when inventory is taken and overpopulation is found in a HMA, then the Secretary “shall” remove excess animals immediately to achieve the AML.<sup>25</sup>

Wyoming claimed § 3 “clearly requires” the BLM to immediately remove excess animals when an overpopulation is determined by an inventory.<sup>26</sup> The “non-discretionary action” required by the BLM is triggered, Wyoming argued, by the inventory revealing the overpopulation.<sup>27</sup> This Court did not agree.<sup>28</sup>

The Court relied on the plain language of the statute and specifically the phrase “whether action should be taken to remove excess animals.”<sup>29</sup> The court interpreted the use of “*whether*” as granting BLM discretion to remove the excess animals.<sup>30</sup> Thus, the purpose of the

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19. *Id.* at 942 (quoting 16 U.S.C § 1331(a)).

20. *Id.* at 940 (citing 16 U.S.C § 1331(b)(1)).

21. *Id.* (quoting Bureau of Land Mgmt., U.S. Dep’t of Interior, BLM Handbook H-4700-1, Wild Horses and Burros Management Handbook 17 (2010), [http://www.blm.gov/style/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_handbook.Par.11148.File.dat/H-4700-1.pdf](http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.11148.File.dat/H-4700-1.pdf)).

22. *Id.*

23. *Id.*

24. *Id.* at 943-43 (quoting 16 U.S.C. §1331(b)(1)).

25. *Id.* 943 (quoting 16 U.S.C. 1331(b)(2)).

26. *Id.*

27. *Id.* at 944.

28. *Id.*

29. *Id.* (quoting 16 U.S.C. 1331(b)(1)).

30. *Id.* (emphasis added).

inventory was to give the BLM discretion.<sup>31</sup> Further, the court found that BLM was only obligated to immediately remove excess animals “after it determines . . . that an overpopulation exists and that action is necessary to remove.”<sup>32</sup> Therefore, Wyoming’s argument that once an overpopulation was discovered the BLM had a duty to remove the animals was missing a step. The BLM also had to “determine that action is necessary to remove excess animals.”<sup>33</sup>

Wyoming did not allege that the BLM action was necessary to reduce the excess population, and thus the claim under the Administrative Procedures Act failed.<sup>34</sup>

Next, Wyoming argued the AMLs were “scientific determinations”<sup>35</sup> and the 1978 amendments to the Wild Horse and Burros Act removed the BLM’s discretion.<sup>36</sup> Again the court disagreed, finding Wyoming’s argument “nothing more than a reformulation of its main argument.”<sup>37</sup> Because the BLM did not define the AML as equating to the removal of excess of animals, removal of the animals was not required following an inventory that reveals an excess.<sup>38</sup> Again the BLM had to determine that an overpopulation existed, and that removal was necessary.<sup>39</sup>

#### IV. CONCLUSION

The State of Wyoming failed to allege a claim under the Administrative Procedures Act for the BLM’s failure to remove excess wild horses and burros upon inventory revealing animals in excess of their AMLs.<sup>40</sup> The court relied on the plain language of the statute to show the BLM’s discretion to remove excess animals after a necessary removal determination.<sup>41</sup> Thus, the BLM was not in violation of the Wild Horse and Burros Act.

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31. *Id.*  
32. *Id.* (quoting 16 U.S.C 1333(b)(2)).  
33. *Id.*  
34. *Id.* at 944.  
35. *Id.* at 945.  
36. *Id.*  
37. *Id.*  
38. *Id.*  
39. *Id.*  
40. *Id.*  
41. *Id.*