

SHOULD THE WILD FREE-ROAMING HORSES AND BURROS ACT OF 1971 BE REIGNED IN OR TURNED OUT TO PASTURE?

I. INTRODUCTION

The 1971 Wild Free-Roaming Horses and Burros Act recognized American mustangs¹ as “... living symbols of the historic and pioneer spirit of the West.”² The wild horse originated in North America and left the continent via the Bering Land Bridge³ before the remaining members of the species in North America went extinct between 13,000 and 11,000 years ago.⁴ The species was reintroduced into North America in 1493 on Columbus’ second voyage.⁵ Since returning to the continent, horses have played an essential role in this country.⁶ Prior to the automobile, horses were a leading means of transportation by carrying people and supplies across the country in the westward expansion movement, as well as pulling freight stages and farming equipment.⁷ After the creation of the automobile,⁸ the value of the horse changed from transportation to meat

¹ Okla. State University Dep’t of Animal Science, *Mustang*, <http://www.ansi.okstate.edu/breeds/horses/mustang/> (last updated May 7, 2002) (the word *mustang* is of Spanish origin meaning wild or stray and is often used interchangeably with the term wild horse).

² Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1331 (West 2012).

³ National Park Service, *Bering Land Bridge*, <http://www.nps.gov/bela/historyculture/index.htm> (last visited Sept, 22, 2012) (a land mass that connected Asia and the Americas which allowed for people and animals to travel across).

⁴ Jay F. Kirkpatrick, Ph.D. and Patricia M. Fazio, Ph.D., *Wild Horses as Native North American Wildlife*, http://www.wildhorsepreservation.org/pdf/Wild_Horses_as_Native_North_American_Wildlife.pdf, at 1 (last modified Jan. 2010).

⁵ *Id.* at 2

⁶ See Bureau of Land Mgmt, *The Mustang Country Wild Horses & Burros Herd Management Areas near the Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area*, http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winne_mucca_field_office/programs/wild_horse___burro.Par.75828.File.dat/Mustang_Country_final070313_ver3.pdf, at 6 (last visited Nov. 27, 2012).

⁷ *Id.*

⁸ *Id.*

for pet food.⁹ In the 1950s, many people freely captured and killed wild horses for pet food, and thus the population of an American icon decreased.¹⁰ Animal activists and agencies lobbied for regulations to protect the wild horse, and in 1959 Congress passed the Wild Horse Annie Act, which prohibited removal of animals from the rangeland via motorized vehicles, often used to transport horses to slaughter.¹¹ Legislation grew more strict and incorporated management measures when Congress enacted the 1971 Wild Free-Roaming Horses and Burros Act¹² (“Act”) designed to preserve the wild horse as a living symbol, incorporate them into the multi-use public rangeland management plan,¹³ and improve the diversification of the rangeland.¹⁴ Congress concluded the dwindling wild horse population deserved protection because the wild horses “... contribute to the diversity of life forms within the Nation and enrich the lives of the American people....”¹⁵

The Act gives the Secretary of the Interior (“Secretary”) the authority to enforce vague management and protection standards such as round up restrictions, and adoption and transfer of title policies, and orders the Secretary to remove excess horses from the public rangeland in order to eliminate overpopulation and establish a “...thriving natural ecological balance on the public lands.”¹⁶ Congress recognized that the Secretary would not necessarily be the most qualified person to individually decide the amount of wild horses that should remain on the range, and thus the Act states that the Secretary should take recommendations from scientists to determine the best management approach.¹⁷ Current scientists are

⁹ *Treatment of Wild Horses and Burros on Land Belonging to the United States: Hearing on H.R. 343 – H.R. 2725 – H.R. 4289 – H.R. 7531 Before the Subcomm. No. 2 on the Comm. on the Judiciary, at 10 (1959)* [hereinafter H.R. 1959 Hearing].

¹⁰ *Id.* at 10-11.

¹¹ *See Protection of Wild Horses on Public Lands: Hearing on H.R. 795, H.R. 5375 and Related Bills Before the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs H.R., 92nd, Congr., at 2 (1971)* [hereinafter H.R. 1971 Hearing].

¹² BUREAU OF LAND MGMT, *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, <http://www.wildhorseandburro.blm.gov/92-195.htm> (last visited Nov. 27, 2012).

¹³ MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE-ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO. 92-242, at 2 (1971).

¹⁴ MR. UDALL, IMPROVING THE RANGE CONDITIONS OF THE PUBLIC GRAZING LANDS, H.R. REP. NO. 95-1122, at 8 (1978) (the public rangeland values include wild horses and burros, and “... livestock grazing, fish and wildlife habitat and production, water and soil conservation benefits, and recreation.”)

¹⁵ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1331 (West 2012).

¹⁶ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹⁷ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333 (West 2012).

finding that wild horses are native to North America and thus different management strategies should be implemented.¹⁸ Traditionally, wild animals¹⁹ are protected by legislation instead of being managed and regulated²⁰ and are able to thrive naturally without fear of being removed from their native land.²¹ In the Act, Congress mandated that the wild horse be “... protected from capture, branding, harassment, or death...,”²² but current management practices demonstrate that the Secretary is not protecting wild horses.²³ The Secretary is instead removing thousands of horses each year because of the deteriorating health of the rangeland²⁴ despite Congress’ original intent and scientific findings that horses should not be indiscriminately removed from the land.²⁵ While horses are being removed from the public rangeland, livestock that graze on the same land for a minimal fee are increasing in population despite research that finds the rangeland is in a less than satisfactory state.²⁶ Studies have found that livestock do more damage to the rangeland than wild horses, yet the native horse is removed from the land while the Secretary and Bureau of Land Management (“BLM”) grant the non-native livestock²⁷ permits to graze on the land at the expense of the horse and health of the rangeland.²⁸ The BLM permits this political battle to take place when they consider the interests of the livestock industry more superior than the current and long-term health of the rangeland.²⁹

¹⁸ Kirkpatrick, *supra* note 4, at 1.

¹⁹ POSITIVE SOLUTIONS USA, *What is Wild and What is Not*, DISCOVER WILD, <http://www.maninnature.com/School/Discover/DW1.pdf> (last visited Nov. 27, 2012) (Wild animals are not dependent on humans for resources and do not live in captivity, while domesticated animals are tamed and kept by humans).

²⁰ See generally Dep’t of Environmental Conservation, *Permits and Licenses*, <http://www.dec.ny.gov/63.html> (last visited Nov. 27, 2012) (Fishing and hunting are managed through hunting restrictions, but are still protected by the amount of hunting licenses issued per state in order to have a balance between supply and demand).

²¹ See generally Trails.com, *How Does the Endangered Species Act Protect Species*, http://www.trails.com/list_1197_endangered-species-act-protect-species.html (last viewed Nov. 27, 2012).

²² Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1331 (West 2012).

²³ See *infra* Part III.B.

²⁴ See *infra* Part III.B.

²⁵ MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE- ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO 92-242, at 4 (1971).

²⁶ See U.S.GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 3 (1990).

²⁷ U.S. Environmental Protection Agency, *Background of Beef Production in U.S.*, <http://www.epa.gov/agriculture/ag101/beefbackground.html> (last visited Nov. 27, 2012).

²⁸ See GAO/RCED-90-110, *supra* note 26, at 3.

²⁹ See *id.* at 18.

The Act is written with such ambiguity that it allows the BLM and the Secretary to disregard Congress's original intent to protect an American icon, and also ignore the current best available science which demonstrates that wild horses are in fact native to the land and should not be regulated like a non-native, domesticated animal.³⁰ Due to vague language, the Act is being used as a political lever to favor agencies that are competing for the same rangeland resources as the wild horse by removing them from their native land and instead giving those vital resources to the livestock industry to make a monetary gain.³¹

Part II of this Comment will provide an overview of the evolving legislative text. Part III will illustrate problems, as well as corresponding recommendations, with how the Secretary and BLM are incorrectly implementing the Act, such as failing to recognize new science that demonstrates wild horses are native to the land and the BLM and Secretary should be protecting the horses instead of regulating; and mismanaging and favoring of the livestock industry over the wild horses in terms of resources at the expense of the health of the public rangeland. Part IV will provide recommendations to the Secretary and BLM that will better the wild horses and align their motives with the original intent of the Act.

II. EVOLUTION OF THE ACT

A. Legislation

1. *The First Legislative Action - The Wild Horse Annie Act*

Prior to the 1950s, wild horses overran the land in states such as Nevada to the point where the remaining grazing land was at jeopardy for growing sheep and cattle herds that were grazing on the same land.³² In the years immediately following World War II, ranchers initiated their own solution by capturing and killing the wild horses.³³ Additionally, wild horse populations decreased when the species became targets for hunters as the demand for fresh horse meat for pet food increased.³⁴ The traditional way of rounding up horses using cowboys on horseback was too slow and costly, thus wranglers turned to aircraft to round up the

³⁰ See *infra* Part III.

³¹ See *infra* Part III.

³² H.R. 1959 Hearing, *supra* note 9, at 24.

³³ *Id.* at 25.

³⁴ *Id.* at 24-25.

herds.³⁵ Wild horses were driven by aircraft into fan-shaped corrals where they were trapped or sidelined³⁶ and dragged into trucks.³⁷

A House of Representatives Subcommittee convened on July 15, 1959, to consider bills concerning the treatment of wild horses and the mechanized means of driving these horses.³⁸ Among legislation introduced at the 1959 meeting was a proposal to bar "... the use of aircraft or motor vehicles to hunt certain wild horses or burros on land belonging to the United States."³⁹ Use of a motorized vehicle or aircraft to kill or capture any "... wild unbranded horse, mare, colt, or burro running at large on any of the public land..." would result in a fine of not more than \$500 and/or imprisonment of not more than six months.⁴⁰ The term "motorized vehicle" included any self-propelled vehicle such as an automobile, truck, wagon, or motorcycle.⁴¹

The House of Representatives passed this legislation unanimously.⁴² The bill was known as the "Wild Horse Annie Act" after Velma Johnston, a leading advocate for wild horses who was nicknamed Wild Horse Annie, and became public law on September 8, 1959.⁴³

2. 1971 Wild Free-Roaming Horses and Burros Act

The Wild Free-Roaming Horses and Burros Act of 1971, signed into law December 15, 1971,⁴⁴ clarified and enhanced various aspects of the 1959 Wild Horse Annie Act.⁴⁵ The new legislation prevented any person from removing, selling, or causing the death or harassment of wild horses.⁴⁶ Management practices for the Secretary to uphold were added in order to create an ecological balance on the public rangelands.⁴⁷ De-

³⁵ *Id.* at 25.

³⁶ *Id.* at 26. (Where a front foot and a hind foot are tied together, and the fur and skin is burned off from the rope when the horse struggles.)

³⁷ *Id.* at 25-26.

³⁸ *Id.* at 1.

³⁹ *Id.* at 1 on *H.R. 2725*.

⁴⁰ *Id.* at 2 on *H.R. 2725*.

⁴¹ *Id.*

⁴² Dep't of the Interior Bureau of Land Mgmt., *History of the Program*, http://www.blm.gov/wo/st/en/prog/wild_horse_and_burro/wh_b_information_center/facts_and_stats/history_of_the_program.html (last updated Aug. 23, 2011).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ *Id.*

spite the passage of the 1959 law, populations of wild horses were still decreasing.⁴⁸

The new Act required "...the protection, management and control of wild free-roaming horses and burros on public lands," and identified horses and burros as, "... all unbranded and unclaimed horses and burros on public lands of the United States."⁴⁹ Section 1333 required the Secretary to receive recommendations from qualified scientists in order to make these determinations.⁵⁰ Furthermore, Section 1340 required both the Secretary of the Interior and the Secretary of Agriculture to submit a joint report to Congress every twenty-four calendar months which included a summary of enforcement of the Act, and recommendations for other appropriate actions.⁵¹

The Senate Committee on the Interior and Insular Affairs specifically stated, "... that it is the sense of Congress that the few remaining wild free-roaming horses and burros be given protection as part of our national heritage ... the animals are to be considered an integral part of the natural ecological system of the public lands."⁵² The authors of the legislation recognized at the time of legislation that there was a lack of information concerning wild horses and burros, and that additional legislation might be necessary.⁵³ They also recognized that there would be a need to maintain an ecological balance which would encompass 'some' control over the amount of wild horses and burros.⁵⁴ It was elaborated that any reduction of animals that would take place would need to be carefully weighed before the reduction started and that the reduction provision was not intended for the indiscriminate removal of wild horses.⁵⁵

i. 1976 Federal Land Policy and Management Act

The 1959 Wild Horse Annie Act explicitly eliminated the use of any aircraft to round up wild horses,⁵⁶ and the 1971 Wild Free-Roaming

⁴⁸ *H.R. 1971 Hearing, supra* note 11, at 2.

⁴⁹ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195), supra* note 12.

⁵⁰ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333 (West 2012).

⁵¹ *See The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195), supra* note 12.

⁵² MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE- ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO 92-242, at 5 (1971).

⁵³ *Id.*

⁵⁴ *Id.* at 4.

⁵⁵ *Id.*

⁵⁶ *H.R. 1971 Hearing, supra* note 11, at 2.

Horses and Burros Act maintained those restrictions.⁵⁷ However, in 1976, the Federal Land Policy and Management Act amended the 1971 Act to allow for the incorporation of helicopters to aid in roundups.⁵⁸ Helicopter use would be permitted only after a public hearing took place and only under the supervision of the Secretary or a duly authorized official from the Department.⁵⁹ In addition, helicopter use had to comply with the Secretary's described humane procedures.⁶⁰

ii. 1978 Public Rangelands Improvement Act

On September 30, 1978 the Public Rangelands Improvement Act ("PRIA") of 1978 passed the Senate by a fifty-nine to seven vote.⁶¹ PRIA amended the 1971 Wild Free-Roaming Horses and Burros Act to add and define the meaning of 'excess animals,' and included a more specific management aspect in regards to overpopulation and destroying and adopting excess horses.⁶²

On May 10, 1978, the House Committee on Interior and Insular Affairs analyzed the condition of rangeland and public grazing standards.⁶³ The committee found that there was a need for development of a program that would improve overall grazing conditions on the public rangeland.⁶⁴ The committee reported that eighty-percent of the BLM's one hundred seventy million acres of land were experiencing less than satisfactory conditions.⁶⁵ Specifically, "... vast segments of the ... public grazing lands ... [were] producing less than their potential for livestock, wildlife,[sic] habitat, recreation, forage, and water and soil conservation benefits...."⁶⁶

⁵⁷ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

⁵⁸ *Id.*

⁵⁹ Bureau of Land Mgmt., *The Federal Land Policy and Mgmt Act of 1976 (2001)*, at 34 <http://www.blm.gov/flpma/FLPMA.pdf>.

⁶⁰ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

⁶¹ GOVTRACK, *To Pass H.R. 10587, The Public Rangelands Improvement Act of 1978*, <http://www.govtrack.us/congress/votes/95-1978/s1070> (last visited July 8, 2012).

⁶² *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

⁶³ See MR. UDALL, *IMPROVING THE RANGE CONDITIONS OF THE PUBLIC GRAZING LANDS*, H.R. REP. NO. 95-1122, at 1 (1978).

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1.

The legislation was introduced to protect the health of the rangeland and the animals and wildlife that live on it.⁶⁷ The committee noted that the wild horse and burro population increased since the 1971 action took place because the law had protected the herds so well.⁶⁸ The BLM reported that there was an excess of as many as 20,000-30,000 animals on the rangeland.⁶⁹ Due to this increase there was a new need to prevent habitat destruction by not exceeding the rangeland carrying capacity, and because of this concern, the term 'excess' was expressed so as not to exceed how many horses the rangeland could support.⁷⁰ The amendment expresses that it is the Secretary's responsibility to decide how to control excess animals.⁷¹ One proposed method was the use of sterilization options to achieve sought after wild horse population sizes, in order to not deplete rangeland resources and decrease having to round up excess horses.⁷² The amendment added removal procedures such as the order of horses that should be rounded up if there is overpopulation.⁷³ Additional specifications as to what to do with the horses once they have been removed from the range was added such as adoption protocol for qualified individuals.⁷⁴

III. PROBLEMS ARISING FROM THE ACT

A. *Wild Horses Should be Protected*

The leading intention for the 1971 legislation was to protect wild horses from man because they were declining in numbers.⁷⁵ Wild animals that are native to the environment and dwindling in numbers are customarily granted more protection through legislation such as the Endangered Species Act and are thus safer from management and regulatory policies.⁷⁶ Current BLM practices are to manage and regulate herds of wild horses by removing them from the land.⁷⁷ The BLM finds these

⁶⁷ See generally *id.*

⁶⁸ *Id.* at 21.

⁶⁹ *Id.*

⁷⁰ See *id.* at 22.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 22-23

⁷⁵ MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE- ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO 92-242, at 1-3 (1971).

⁷⁶ See generally About.com, *Endangered Species*, <http://biology.about.com/od/ecology/a/aa102408a.htm> (last visited Nov. 27, 2012).

⁷⁷ See U.S.GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 11 (1990).

management practices to be appropriate because they regard the wild horse as a non-native,⁷⁸ introduced species and should be able to regulate the species to an appropriate population size.⁷⁹ Contrary to the BLM's belief, new science has determined that wild horses are native to North America and should be strictly protected instead of managed.⁸⁰

1. New Scientific Research Demonstrates Why Wild Horses Should be Protected

On December 13, 2010, the Office of the Inspector General released a memorandum analyzing whether the science behind the BLM's program was inaccurate and whether wild horse and burro roundups are justified or necessary.⁸¹ The BLM has since recognized that their science needs to be evaluated, and has requested a review and report from the National Academy of Sciences/National Research Council.⁸²

The original authors of the 1971 Act accepted that they had a lack of information at the time of creating the Act, and noted that additional legislation or action might need to take place later.⁸³ Horses living on the rangeland were deemed 'wild' simply because they were living freely on the public rangelands, or if they did not have a preexisting brand that could trace them to an owner.⁸⁴ The language was ambiguous for the purpose of not having to use bloodlines or technical limitations to classify the animal living on the rangeland.⁸⁵ The Act does specify that the Secretary shall consult with "... individuals whom he determines have scientific expertise and special knowledge of wild horse and burro protection, wildlife management and animal husbandry as related to rangeland management," and that the Secretary should be looking to qualified scientists in the field of ecology or biology in order to manage the wild

⁷⁸ BUREAU OF LAND MGMT., *How to Adopt a Wild Horse or Burro*, http://www.blm.gov/wo/st/en/prog/whbprogram/adoption_program/how_to_adopt.html (last modified July 12, 2012) (The BLM regards wild horses as descendants from escaped or released horses from Native Americans, Spanish explorers, miners, ranchers, or U.S. Cavalry).

⁷⁹ *See infra* Part III.B.

⁸⁰ *See infra* Part III.A.1.

⁸¹ U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, C-IS-BLM--2010, BUREAU OF LAND MGMT. WILD HORSE AND BURRO PROGRAM, at 2, 9 (2010).

⁸² *Id.* at 9.

⁸³ MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE- ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO 92-242, at 4-5 (1971).

⁸⁴ MR. LANE, AMENDMENT OF TITLE 18, UNITED STATES CODE, TO PROHIBIT THE USE OF AIRCRAFT OR MOTOR VEHICLES TO HUNT CERTAIN WILD HORSES OR BURROS ON LAND BELONGING TO THE UNITED STATES, H.R. REP. NO. 833, at 5 (1959).

⁸⁵ *Id.*

horses.⁸⁶ While the best available method during the creation of the Act may have been an objective test, today's scientists are able to shed new light on the origin of horses on public lands through advances in genetics.⁸⁷

In Dr. Ross MacPhee's letter to the National Academy of Sciences, he stated, "[n]ative species means, with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or currently occurs in that ecosystem," while an alien/non-native species is, "[a]ny species, including its seeds, eggs, spores, or other biological material capable of propagating that species, that is not native to that ecosystem."⁸⁸ He explained that *Equus caballus* appeared in North America in the grassland environment⁸⁹ in the late Miocene.⁹⁰ He concluded that this early appearance demonstrates that it is "[m]isleading to imply that the animals introduced by Europeans after 1500 CE had to somehow 're-adapt' to such grasslands."⁹¹ This raises the question of how the current wild horse inhabiting ancestral grasslands can be deemed an alien species when horses are historically native to the central North American grassland ecosystem.⁹² The Secretary has been notified of this new scientific evidence, yet the wild horse continues to be managed like a non-native species.⁹³

Wild horses are often recognized as feral and intrusive animals, but this new research suggests that they are not as alien as they were once thought to be.⁹⁴ Fossil records have demonstrated that the modern *Equus caballus* is most like the North American species that went extinct between 13,000 and 11,000 years ago.⁹⁵ This demonstrates that the current horse has genetic ties to the horse that originated in North America many

⁸⁶ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A. §1333 (West 2012).

⁸⁷ See generally Kirkpatrick, Ph.D., *supra* note 4, at 2.

⁸⁸ Letter from Dr. Ross MacPhee, Curator of the American Museum of Natural History in New York, New York on establishing *Equus caballus* as an endemic species, to The National Academy of Sciences (Sept. 21, 2011) (on file with author).

⁸⁹ *Id.*

⁹⁰ University of California Museum of Paleontology, *The Miocene Epoch*, <http://www.ucmp.berkeley.edu/tertiary/miocene.php> (last visited Sept. 22, 2012) (23.03 to 5.3 million years ago today there was a warmer global climate where there was an expansion of grasslands).

⁹¹ MacPhee, *supra* note 88.

⁹² See *id.*

⁹³ See generally *id.*

⁹⁴ See Jay F. Kirkpatrick, Ph.D. and Patricia M. Fazio, Ph.D., *The Surprising History of America's Wild Horses*, Live Science (July 24, 2008), <http://www.livescience.com/9589-surprising-history-america-wild-horses.html>

⁹⁵ Kirkpatrick, Ph.D., *supra* note 4, at 2.

years ago and thus cannot be a non-native animal.⁹⁶ It is recognized that the domestication of horses before they were reintroduced matters little from the biological standpoint because the species originated here.⁹⁷

An example of a similar situation is *Equus Przewalskii*, or Mongolian wild horse, that disappeared from Mongolia a hundred years ago and has since survived in zoos.⁹⁸ *Equus Przewalskii* was released in the 1990s after being held captive in zoos in order to provide needed medical assistance and administration of food.⁹⁹ The new research poses the question: if a once native species is held captive in a domesticated setting, should they be deemed native again once they are reintroduced to the wild?¹⁰⁰ The situation has been analogized to *Equus caballus*, except the amount of time and the way the species was held captive from their native habitat.¹⁰¹ Like *Equus Przewalskii*, *Equus caballus* was removed from the land for a myriad of years when the species traveled across the Bering Land Bridge before going extinct in North America, but just because there was not a continuous presence, the wild horse should not lose its recognition as a native animal.¹⁰²

It has been acknowledged that [t]he non-native, feral, and exotic designations given by agencies are not merely reflections of their failure to understand modern science but also a reflection of their desire to preserve old ways of thinking to keep alive the conflict between species (wild horses), with no economic value anymore (by law), and the economic value of commercial livestock.¹⁰³

Given that Section 1333 explains that the Secretary should seek the recommendations of qualified scientists,¹⁰⁴ modern scientific findings need to be incorporated into the Secretary's actions.¹⁰⁵ Once the research from the National Academy of Sciences is finalized the Secretary must amend the current management practices to be timely and relevant and include scientific findings.¹⁰⁶ Science has grown exponentially since the

⁹⁶ *Id.* at 2-6.

⁹⁷ *Id.* at 5.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 2-6.

¹⁰³ *Id.* at 6.

¹⁰⁴ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333 (West 2012).

¹⁰⁵ See U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, C-IS-BLM-0018-2010, BUREAU OF LAND MGMT. WILD HORSE AND BURRO PROGRAM, at 14 (2010).

¹⁰⁶ See *id.*

framing of the Act,¹⁰⁷ and should be incorporated in order to manage the horses with the best available methods.¹⁰⁸ If the wild horse is recognized as a native animal, then the current Act would need to be amended to focus specifically on protection, instead of the current practices of regulation and removal.¹⁰⁹ Regardless, if the wild horse is found to be native or non-native, management practices must change in order to maintain and incorporate the Act's intent to protect the wild horses.¹¹⁰

B. Current Management Practices Must be Modified

The Secretary internally delegates to the BLM the responsibility of upholding management practices that are expressly designated to the Secretary in the Act.¹¹¹ The BLM is required to manage the herds of wild horses on the rangeland with a direct correlation to the rangeland's health and condition,¹¹² but the success of the rangeland or the wild horse is not always the BLM's leading motivation.¹¹³ Current poor management practices are causing unnecessary herds of wild horses to be removed from the rangeland,¹¹⁴ and either shipped and permanently housed in long term holding pastures¹¹⁵ or sold and killed at slaughterhouses.¹¹⁶ If current science is not able to solidify the genetic controversies of qualifying the wild horse as a native animal,¹¹⁷ then better management practices must be created and practiced immediately in order for the BLM to be in compliance with the Act and Congress's original intent.¹¹⁸

¹⁰⁷ UNDERSTANDING SCIENCE, *Modern Science: What's Changing?*, http://undsci.berkeley.edu/article/modern_science (last visited Nov. 27, 2012).

¹⁰⁸ See *infra* Part III.A.1.

¹⁰⁹ See Kirkpatrick, Ph.D., *supra* note 4, at 1-6.

¹¹⁰ See *infra* Part III.B.

¹¹¹ See U.S.GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 9 (1990).

¹¹² *Id.* at 11.

¹¹³ See *id.* at 18.

¹¹⁴ See U.S.GOV'T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MGMT.: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 49 (2008).

¹¹⁵ See GAO/RCED-90-110, *supra* note 26, at 15.

¹¹⁶ Dave Philipps, *Wild horses sold by US later ending up at slaughterhouses?*, NBCNews, Sept. 29, 2012, http://openchannel.nbcnews.com/_news/2012/09/29/14153296-wild-horses-sold-by-us-later-ending-up-at-slaughterhouses?lite.

¹¹⁷ See *supra* Part III.A.1.

¹¹⁸ See *infra* Part III.B.

1. The Health of the Rangeland is a Political Factor Used to Remove Horses

The public rangelands are home to wild horses and burros as well as grazing livestock and other natural wildlife.¹¹⁹ The 1978 PRIA currently gives the authority each year to set the grazing fee in order for the livestock industry to graze their animals on the public rangeland.¹²⁰ Also, the PRIA amended the 1971 Act and incorporated management aspects, such as removing horses, to better the less than satisfactory conditions of the rangeland.¹²¹ The condition and health of the rangeland is determined by how much can be supported from vegetative areas, specifically forage values, watershed and soil quality.¹²² The health of the rangeland is an indicator as to the number of horses and burros that have to be removed each year in order to avoid rangeland deterioration.¹²³

i. The Law is Being Used to Aid the Livestock Industry at the Expense of the Horse

Since the formation of the Wild Horse Annie Act in 1959, the BLM and livestock industries have believed that it was their responsibility to restrict wild horse populations so they would not hamper and compete with the livestock's resources.¹²⁴ It was the intent of these organizations, when forming the 1959 legislation, to be statutorily clear that horse ranges cannot interfere with projected or existing allotment management plans such as rotational grazing systems¹²⁵ because they are one of the greatest advancements in their management.¹²⁶

Wild horses and burros have long been considered as a secondary interest group, compared to the domestic livestock and hunting industries,

¹¹⁹ GAO-09-77, *supra* note 114, at 3.

¹²⁰ The United States Dep't of the Interior, Bureau of Land Mgmt., *Budget Justifications and Performance Information Fiscal Year 2013*, http://www.doi.gov/budget/appropriations/2013/upload/FY2013_BLM_Greenbook.pdf, at XII-7 (last visited July 8, 2012).

¹²¹ See MR. UDALL, IMPROVING THE RANGE CONDITIONS OF THE PUBLIC GRAZING LANDS, H.R. REP. NO. 95-1122, at 2 (1978).

¹²² *Id.* at 3.

¹²³ See GAO-09-77, *supra* note 114, at 34.

¹²⁴ See *H.R. 1959 Hearing*, *supra* note 9, at 75.

¹²⁵ Minn. Dep't of Agric., *Conservation Practices Minnesota Conservation Funding Guide* <http://www.mda.state.mn.us/protecting/conservation/practices/grazing.aspx> (last viewed Nov. 27, 2012) (a management plan where livestock are rotated to alternative pastures in order to optimize grass growth and prevent overgrazing).

¹²⁶ See *Protection of Wild Horses and Burros on Public Lands: Hearing on S. 862, S. 1116, S. 1090 and S. 1119 Before the Subcomm. On Public Lands of the Comm. on Interior and Insular Affairs, 92nd, Congr.* at 152-154 (1971).

whose organizations have had dominant use of public lands.¹²⁷ Whenever the rangeland has weakened, the wild horses and burros have been one of the first to be blamed and removed, even though they have not been the only cause of the declining rangeland.¹²⁸

Regardless of the congressional committee's intent in 1971 to expressly eliminate the "... possibility of monetary gain from exploitation of these animals,"¹²⁹ the Act does prohibit and criminalize any person who sells or commercially processes a wild horse.¹³⁰ This language was established to not only protect the species but to deter the struggles of the 1950s of horses being sold for profit to slaughterhouses from repeating itself.¹³¹ Contrary to the 1971 original intent, the 1978 PRIA favored the livestock industry and allowed for the BLM to make a profit by removing wild horses and adding more livestock to the rangeland at a permit rate of \$1.23 per animal.¹³² The BLM currently does not keep an annual count of how many livestock animals are grazed on public rangeland each year, but almost 18,000 permits and leases are granted to ranchers with each rancher having hundreds, or even thousands of animals.¹³³ By comparing an increase of horses and burros being removed from the land¹³⁴ with the high amount of grazing permits being issued to the livestock industry,¹³⁵ it is clear that the livestock industry is indirectly making a profit by being able to graze their animals for a lowly priced permit fee.¹³⁶ Additionally, the BLM is financially gaining from removing horses from the land and putting livestock on the land because of the current \$1.35 per animal grazing fee¹³⁷ whereas the wild horses do not

¹²⁷ See U.S.GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 18 (1990).

¹²⁸ See *id.* at 3, 18.

¹²⁹ MR. JACKSON, PROTECTION, MANAGEMENT, AND CONTROL OF WILD FREE-ROAMING HORSES AND BURROS ON PUBLIC LANDS, S. REP. NO 92-242, at 4 (1971).

¹³⁰ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹³¹ See *id.*

¹³² MR. CHURCH, PUBLIC RANGELANDS IMPROVEMENT ACT OF 1978, S. REP. NO 95-1237, at 4, 47 (1978) (the fee was designed for the amount of forage needed for one head of cattle or five sheep for one month).

¹³³ BUREAU OF LAND MGMT, *Fact Sheet on the BLM's Mgmt of Livestock Grazing*, <http://www.blm.gov/wo/st/en/prog/grazing.html> (last updated July 23, 2012).

¹³⁴ U.S.GOV'T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MGMT.: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 49 (2008).

¹³⁵ *Fact Sheet on the BLM's Mgmt of Livestock Grazing*, *supra* note 133.

¹³⁶ See *Budget Justifications and Performance Information Fiscal Year 2013*, *supra* note 120, at XII-7.

¹³⁷ *Id.*

give the BLM a financial gain by remaining on the public grazing land.¹³⁸ This monetary gain is an incentive for the BLM to remove horses and replace their herds with livestock¹³⁹ regardless of Congress's original intent or the language of the Act which prohibits individuals from making a profit.¹⁴⁰

ii. Livestock Make a Greater Impact on the Rangeland than they are Being Credited For

Previous findings have discovered that livestock are more detrimental to the rangeland vegetation than wild horses.¹⁴¹ The United States General Accountability Office ("GAO")¹⁴² released a report in August 1990 ("Report") to the Secretary on rangeland management and the needed improvements in regard to wild horses and burros.¹⁴³ The Report summarized how the BLM has failed in implementing Congress's specific direction and how the removal of wild horses and burros lacked evidence that existing herds exceed what the rangeland can support.¹⁴⁴ The GAO explained how they have previously documented that the damage to the public's land is coming from overgrazing, and how the rangeland has remained in 'unsatisfactory' conditions.¹⁴⁵ Deciphering which species of animal is ultimately destroying the rangeland is a difficult yet important task in order to maintain a healthy rangeland and to eliminate the correct number of animals from the correct species.¹⁴⁶ This important task is left to BLM assigned field staff to determine if it is the livestock or horses that are destroying a certain area and are then able to pursue options to

¹³⁸ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹³⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 18 (1990).

¹⁴⁰ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹⁴¹ GAO/RCED-90-110, *supra* note 26, at 24.

¹⁴² U.S. Gov't Accountability Office, *About GAO*, <http://www.gao.gov/about/index.html> (last visited July 9, 2012) (the General Accounting Office is a nonpartisan agency and is often times called the "congressional watchdog," because they investigate how United States taxpayer dollars are being spent in the federal government).

¹⁴³ GAO/RCED-90-110, *supra* note 26, at 1.

¹⁴⁴ *Id.* at 2-3.

¹⁴⁵ *Id.* at 18.

¹⁴⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 28 (2008).

remove that animal.¹⁴⁷ Additionally, it is ultimately the responsibility of the Secretary to maintain a thriving ecological balance.¹⁴⁸

The Report specifically noted that the primary cause of the less than satisfactory rangeland condition is the poorly managed livestock grazing aspect.¹⁴⁹ It explained that rangeland health has not improved but instead decreased because livestock eat twenty times more in resources than wild horses or burros, and there are more head of livestock than wild horses.¹⁵⁰ In some areas, the Report found that livestock use increased after wild horses and burros were removed.¹⁵¹ The BLM could not offer the GAO information that would demonstrate how removing wild horses and burros have caused a significant improvement on the rangeland.¹⁵²

Assessments to determine the health of the rangeland must be monitored on a frequent basis¹⁵³ and then action should be taken from this data.¹⁵⁴ It is a necessity that the best available science at the time be utilized to determine if a herd of cattle are eating and destroying the rangeland more than a herd of wild horses.¹⁵⁵ If it is undetermined what species is causing harm to the rangeland, then there should be reductions in all species until a more exact answer can be calculated.¹⁵⁶ If horses are found to be native, then no horses should be removed from the land¹⁵⁷ and livestock permits should be issued on the basis of what the remaining rangeland can support.¹⁵⁸ Horses would then be placed in the wildlife category and their population size would be monitored with the assistance of state wildlife officials.¹⁵⁹ Politics and monetary gain cannot be a factor as to what species to favor when deciding what animals should be removed from the rangeland.¹⁶⁰ The health of the rangeland will continue

¹⁴⁷ *Id.*

¹⁴⁸ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333(a) (West 2012).

¹⁴⁹ GAO/RCED-90-110, *supra* note 26, at 18.

¹⁵⁰ *Id.* at 24.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.*

¹⁵³ U.S.GOV'T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 29 (2008).

¹⁵⁴ Bureau of Land Mgmt., *Draft Goals, Objectives and Possible Mgmt Action (2010)*, at 27 http://www.azgfd.gov/inside_azgfd/documents/Strategy_06_01_2010.pdf.

¹⁵⁵ *Id.*

¹⁵⁶ See GAO-09-77, *supra* note 114, at 28.

¹⁵⁷ See Kirkpatrick, *supra* note 4, at 1.

¹⁵⁸ See *infra* Part III.B.

¹⁵⁹ GAO-09-77, *supra* note 114, at 19.

¹⁶⁰ See U.S.GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM, at 18 (1990).

to decrease unless something is done.¹⁶¹ If the BLM's true intentions are to fix the declining health of the rangeland, the correct solution is to look to science which demonstrates that the high percentage of livestock are harming the rangeland, not the horses.¹⁶²

2. *How Do We Solve The Problem of Excess Horses?*

The Secretary looks to the health of the rangeland as an indicator as to whether horses should be removed in order to "... maintain a thriving natural ecological balance."¹⁶³ Once the determination has been made that there is overpopulation, the Secretary determines how many horses should be removed from the public rangeland by a single ambiguous word – excess.¹⁶⁴ Section 1332 defines excess as, "...wild free-roaming horses or burros (1) which have been removed from an area by the Secretary pursuant to applicable law or, (2) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area."¹⁶⁵ When the Secretary is deeming excess horses, he must remove individual horses with the priority of 1) destroying sick or older animals, 2) capturing and adopting captured horses, 3) destroying animals that are not adoptable.¹⁶⁶ Because horses are the primary species being accused for the decline of the health of the rangeland, the word excess can be easily overused.¹⁶⁷ This ambiguous word gives no definite parameters to be able to determine if there is an overpopulation or what amount of horses have to be removed in order to satisfy the word excess.¹⁶⁸

Once the determination has been made that there is an overpopulation of horses for the current state of the rangeland, the Secretary has the option to control the amount of horses on the land with sterilization methods, or remove the horses from the rangeland and adopt them to private parties or destroy animals that are not deemed adoptable.¹⁶⁹ If herds of horses are going to be labeled 'excess' the Secretary must responsibly decipher what the best option is before they are removed from the range-

¹⁶¹ See generally *id.*

¹⁶² *Id.* at 18.

¹⁶³ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333(b)(2) (West 2012).

¹⁶⁴ *Id.*

¹⁶⁵ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1332(f) (West 2012).

¹⁶⁶ 16 U.S.C.A §1333(b)(2).

¹⁶⁷ See generally GAO/RCED-90-110, *supra* note 26, at 3.

¹⁶⁸ See *id.* at 21.

¹⁶⁹ 16 U.S.C.A §1333(b)(2).

land in order to have an ecological balance and follow the guidelines of the Act.¹⁷⁰

i. Regulate Population Levels on the Rangeland With Birth Control

Birth control methods, such as Porcine Zona Pellucida (“PZP”) which is currently in limited use, are generally supported by the BLM,¹⁷¹ The Humane Society of the United States,¹⁷² the State of Arizona Game and Fish Department,¹⁷³ and National Cattlemen’s Beef Association.¹⁷⁴ According to the Fort Collins Science Center, PZP is a vaccine that blocks fertility in the female horse.¹⁷⁵ Each dose allows for almost two years of fertility control, with full fertility returning to the mare thereafter.¹⁷⁶ The BLM considered the vaccine cost effective and a safe, humane vaccination.¹⁷⁷ This method is supported by the Humane Society¹⁷⁸ unlike the fertility control option suggested by the BLM¹⁷⁹ to castrate stallions and spay mares because these methods alter herd behavior, and are extremely invasive and not cost effective.¹⁸⁰ As recommended by the State of Arizona Game and Fish Department all methods should be implemented cautiously until more field testing on effectiveness and efficiency are proven.¹⁸¹

Reducing the number of horses and burros on the rangeland will directly reduce the number of horses that will need to be rounded up,

¹⁷⁰ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹⁷¹ *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 13.

¹⁷² THE HUMANE SOC’Y OF THE UNITED STATES, *Wild Horse Burro Public Comments*, http://www.humanesociety.org/assets/pdfs/horse/wild_horse_burro_manage_HSUS_comments_090310.pdf, 2, (last visited Sept. 17, 2012).

¹⁷³ The State of Ariz. Game and Fish Dep’t., *Comments for the Bureau of Land Mgmt June 2010 Wild Horse and Burro Strategy Development Document*, (2010), at 5 http://www.azgfd.gov/inside_azgfd/documents/20100824AbbeyLetter.pdf.

¹⁷⁴ NAT’L CATTLEMEN’S BEEF ASS’N, *Wild Horse and Burro Program*, <http://www.beefusa.org/wildhorseandburroprogram.aspx> (last visited Sept. 17, 2012).

¹⁷⁵ FORT COLLINS SCIENCE CENTER, *Reducing Population Growth Rates: Fertility Control in Wild Horse Mares*, <http://www.fort.usgs.gov/wildhorsepopulations/contraception.asp> (last visited Sept. 17, 2012).

¹⁷⁶ *Id.*

¹⁷⁷ CAROL HARDY, CONG. RESEARCH SERV., RS22347, *WILD HORSE AND BURRO ISSUES* at 5 (2005).

¹⁷⁸ *Wild Horse Burro Public Comments*, *supra* note 172, at 2.

¹⁷⁹ *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 13.

¹⁸⁰ *Wild Horse Burro Public Comments*, *supra* note 172, at 4.

¹⁸¹ *Comments for the Bureau of Land Mgmt June 2010 Wild Horse and Burro Strategy Development Document*, *supra* note 173, at 4.

adopted and sent to long term pastures.¹⁸² Additionally, by reducing the number of horses on the public rangeland, the amount of funding for the program will decrease due to fewer horses needing applicable resources.¹⁸³ The BLM should immediately implement birth control methods, such as PZP, into their management procedures.¹⁸⁴ This will alleviate the burden of having to adopt or house in long term pastures as many horses each year, because there will be less excess horses on the rangeland.¹⁸⁵ The Secretary would be fulfilling Congress's original intent by leaving and protecting the species on the range while still maintaining an ecological balance by controlling the number of horses.¹⁸⁶

ii. Adoption

The Act explicitly states that no wild horse or the remains can be sold for commercial products,¹⁸⁷ but with low adoption rates and overflowing long term pastures, the BLM has found no other option but to violate the statute by selling horses to known kill buyers.¹⁸⁸ Since 2009, the BLM has sold at least 1,700 documented horses to a single known advocate of horse slaughter.¹⁸⁹ These horses were contracted and sold for ten dollars a head and were then hauled to small towns on the Mexico border where their traceable records stop.¹⁹⁰

Contrary to the BLM's actions, Section 1333 allows for only qualified individuals to adopt not more than four animals in one year to people who will provide humane care and treatment to the animal.¹⁹¹ Qualified adoption seekers are able to adopt a wild horse or burro from the BLM for a fee of \$125, and after a year of properly caring for the animal, the owner gains official title of the animal.¹⁹²

Many horse owners are reluctant to purchase an animal that has been untouched by humans and are truly wild, so the BLM has created gen-

¹⁸² See *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 13.

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 13.

¹⁸⁵ See *id.* at 4-13 (Currently there are over 38,000 wild horses and burros on the public rangelands and over 35,000 in short and long term holding pastures. The BLM spent over \$30 million in 2009 just on the care of wild horses in holding pastures).

¹⁸⁶ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

¹⁸⁷ *Id.*

¹⁸⁸ See Philipps, *supra* note 116.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1333(b)(2) (West 2012).

¹⁹² *How to Adopt a Wild Horse or Burro*, *supra* note 78.

ting programs where instead of adopting an untouched horse, one can adopt a horse that has had human interaction.¹⁹³ Organizations such as the Mustang Heritage Foundation and the National Wild Horse Association have established programs where participants help put primary training on the horse before the horse is put into the adoption process.¹⁹⁴

Congress should not reduce the standards stated in Section 1333 to determine who a qualified individual is and the BLM needs to fulfill these established standards.¹⁹⁵ Limiting these standards would lawfully allow for unqualified people to step in and purchase an unlimited amount of horses and potentially be in the same position as when the Act was created – people acquiring wild horses to take them to slaughter.¹⁹⁶ If more horses are adopted into qualified private homes once they were rounded up from the range, then fewer animals would be left in short term or long term pastures¹⁹⁷ or illegally sent to kill buyers.¹⁹⁸ An increase in publicity concerning when and where adoptions are held and positive promotional advertisements throughout the equestrian community about the versatility of these animals would increase adoption rates.¹⁹⁹ If the Secretary chooses to remove horses from the rangeland, then it is the responsibility of the Secretary and the BLM to follow the regulations expressed in the Act and only adopt horses to qualified individuals who provide humane treatment, not known kill buyers.²⁰⁰

iii. Destruction

The Act allows for the Secretary to destroy animals in a “...humane and cost efficient manner...” if they have been removed from the land and are unadoptable.²⁰¹ Congress originally recognized that euthanasia was an ethical and humane option when composing the Act.²⁰² The 2008 report issued by the GAO recognizes that despite budget problems the BLM has, “...avoided using two options in the act for dealing with unadoptable animals because of concerns over the public and congressional

¹⁹³ *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 21.

¹⁹⁴ *Id.*

¹⁹⁵ See 16 U.S.C.A §1333(b)(2)

¹⁹⁶ See *supra* Part II.A.

¹⁹⁷ *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 21.

¹⁹⁸ Philipps, *supra* note 116.

¹⁹⁹ *Draft Goals, Objectives and Possible Mgmt Action*, *supra* note 154, at 21-22.

²⁰⁰ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

²⁰¹ *Comments for the Bureau of Land Mgmt June 2010 Wild Horse and Burro Strategy Development Document*, *supra* note 173, at 4.

²⁰² See *id.* at 3-4.

reaction to the large-scale slaughter of thousands of healthy horses.”²⁰³ The BLM’s Director issued a policy in 1982 that prohibited any healthy horse or burro from being destroyed because of ‘public dismay.’²⁰⁴ The Report states that because of this, the BLM is not in accordance with the Act, regardless of their opinion that they will not comply because of potential public outcry.²⁰⁵

If the BLM is refusing to destroy horses, the Secretary should only remove adoptable horses from the public rangeland to ensure all horses removed from the land are successfully adopted to qualified individuals.²⁰⁶ Though euthanizing an animal might be dismal, it is a humane way to destroy an animal and the BLM should not be looking for public acceptance²⁰⁷ if they are following the express guidelines of the Act in an ethical manner.²⁰⁸

3. *The Roundup Process*

The 1976 Federal Land Policy and Management Act amended the 1971 Act to allow the Secretary to “... contract for the use of helicopters or, for the purpose of transporting captured animals, motor vehicles.”²⁰⁹ Today, the current practice of rounding up horses primarily employs the helicopter method.²¹⁰ The BLM contracts with a Federal gather contractor who uses the helicopter to locate and maneuver horses and burros to temporary corals where the animals are trapped.²¹¹ The BLM claims the helicopters are used because they are a practical and safe practice of removing wild horses from the rangeland.²¹² Horses experience not only an increase in stress during the round up because of the helicopter,²¹³ but

²⁰³ U.S.GOV’T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MGMT.: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 59 (2008).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 60.

²⁰⁶ See *supra* Part III.B.2.ii.

²⁰⁷ See GAO-09-77, *supra* note 114, at 60.

²⁰⁸ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

²⁰⁹ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A §1338a (West 2012).

²¹⁰ BUREAU OF LAND MGMT., *Questions and Answers Gather Process*, http://www.blm.gov/nv/st/en/fo/elko_field_office/blm_programs/wild_horse_and_burro/owyhee_rock_creek/questions_and_answers/gather_process.html (last modified May 6, 2012).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

many deaths have been reported because of the rapid pace the horses are driven by the helicopter.²¹⁴

There are various other means to round up horses than helicopter, such as gathering on horseback²¹⁵ and water and bait trapping.²¹⁶ The BLM explains that these means are not effective because they are not as efficient as using a helicopter and are very time consuming.²¹⁷ The Humane Society of the United States favors the use of bait trapping with a unique mineral and salt mix and explains this is a preferable method because helicopter driven round ups can compromise the health of the horses if they are being driven quickly in severe weather conditions.²¹⁸ The GAO reported data from six out of the ten states that could not be verified by the BLM, that in the fiscal years of 2005 through 2007 there were 302 horses and burros that died accidentally or had to be euthanized out of the 24,855 removed.²¹⁹ During the Tuscarora roundup in 2010, thirty-four horses died or were euthanized out of the 1,224 removed from the rangeland.²²⁰ The BLM has noted, “[t]he success of gathering and safely and humanely caring for or handling [wild horses and burros] will be based on contractor and BLM staff’s patience, expertise and experience.”²²¹

The reality is that the BLM displays the weakness of their management system and their lack of patience, expertise and experience each time a wild horse or burro has been killed due to extreme and excessive force from the helicopter, coupled with the BLM’s reluctance to slow down a round up or use alternative means to trap the horses.²²² If the BLM refuses to use the helicopter procedure of rounding up horses with

²¹⁴ U.S.GOV’T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MGMT.: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES, at 48-49 (2008).

²¹⁵ *Questions and Answers Gather Process*, *supra* note 210.

²¹⁶ Martin Griffith, *BLM will use bait to trap wild horses*, Associated Press, April. 1, 2012, <http://www.standard.net/stories/2012/04/01/blm-will-use-bait-trap-wild-horses> (horses are lured into a confined area by enticing them using water, food and salt).

²¹⁷ *Questions and Answers Gather Process*, *supra* note 210.

²¹⁸ *Wild Horse Burro Public Comments*, *supra* note 172, at 6-7.

²¹⁹ GAO-09-77, *supra* note 114, at 49.

²²⁰ Scott Sonner, *34 Wild Horses Died in Recent Nevada Roundup*, *Bureau of Land Management Says*, Associated Press, Aug. 5, 2010, <http://latimesblogs.latimes.com/unleashed/2010/08/thirtyfour-wild-horses-died-in-recent-nevada-roundup-bureau-of-land-management-says.html>.

²²¹ BUREAU OF LAND MGMT., *Agency Expectations to Ensure Safe and Humane Handling of All Gathered Wild Horses*, http://www.blm.gov/nv/st/en/fo/wfo/blm_programs/wild_horses_and_burros/Jackson_Mountains_Gather/agency_intent.print.html (last visited Sept. 17, 2012).

²²² *Cf. Id.*

true expertise and experience, then they must be willing to sacrifice time and resources in order to have a successful roundup.²²³ The health of wild horses should not be placed at the mercy of the BLM's inability to operate a helicopter to successfully maneuver a herd of horses at a reasonably slow pace.²²⁴ Regardless of if the helicopter method is a more efficient means²²⁵ with a technically low casualty rate, any death is more than what should be permitted.²²⁶ The Act expressly states that wild horses should be protected,²²⁷ and if there are known alternative means to safely round up horses then those procedures should be exercised in order to fully protect the horse²²⁸ in compliance with the policy goals of the Act.²²⁹ Additionally, if wild horses are found to be native, then management practices, such as helicopter use, must stop, thus eliminating all fatalities from unnecessary helicopter driven roundups.²³⁰ The Secretary should restrict all helicopter use until the BLM is able to procure a successful helicopter contracting company as well as protocol which will allow for fewer horses to lose their lives during the round up.²³¹

IV. SUMMARY OF RECOMMENDATIONS

The failure to adequately and accurately implement the statute by the Secretary and the BLM has caused thousands of wild horses to be removed from their native land, rounded up, and forced into long term pastures because of ambiguous language enabling them to side with agencies and businesses that will make all parties a profit.²³² Instead of favoring a monetary gain, the Secretary and BLM should be looking towards the original intent of Congress in creating the Act.²³³ The Act recognizes that science is an important factor in determining how to manage the

²²³ Cf. *Questions and Answers Gather Process*, *supra* note 210.

²²⁴ Cf. *Agency Expectations to Ensure Safe and Humane Handling of All Gathered Wild Horses*, *supra* note 221.

²²⁵ *Questions and Answers Gather Process*, *supra* note 210.

²²⁶ See *supra* Part III.B.3.

²²⁷ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

²²⁸ See *Wild Horse Burro Public Comments*, *supra* note 172, at 6-7.

²²⁹ See *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

²³⁰ See *supra* Part III.A-B.

²³¹ See *supra* Part III. B. 3.

²³² See generally U.S.GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-110, RANGE-LAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM (1990).

²³³ *Id.*

horses, and that science is always growing and developing.²³⁴ The Secretary cannot continue to use out of date objective standards but instead must apply the best available science to amend old management practices to better the life and health of the wild horse.²³⁵ Regardless of the scientific findings of whether the wild horse is native or non-native, the Secretary and BLM must adhere to the Act's original intent of protecting the wild horses and thus management practices must be changed immediately.²³⁶

V. CONCLUSION

The 1971 Act created management techniques to protect wild horses and burros while achieving and maintaining a "...thriving natural ecological balance..." on public lands.²³⁷ The Act allowed for a dwindling American icon to rejuvenate its populations by fending off slaughterhouse groups and by requiring those removing the animals from the rangeland to use humane methods.²³⁸ Though the current population of wild horses is rising in numbers, the wild horse is restricted from reaching its sustainable potential because of the BLM's current practices, which are not based in science.²³⁹ The BLM continues to resist research demonstrating that the wild horse is actually a native species, and like other wildlife animals, they should be protected, and not regulated.²⁴⁰ The field of science has grown and developed tremendously²⁴¹ since the Act was passed in 1971, and thus we should be taking advantage of today's scientific developments and implementing them to improve and solidify legislation.²⁴² If wild horses are deemed native, and science can support these findings, these animals should be categorized as wildlife and the Act's intent of protection should be fully implemented.²⁴³ Politics should not interfere with the fate of an American icon, and the cur-

²³⁴ See Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A. §1333 (West 2012).

²³⁵ See U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, C-IS-BLM-0018-2010, BUREAU OF LAND MGMT. WILD HORSE AND BURRO PROGRAM, at 14 (2010).

²³⁶ See *supra* Part III

²³⁷ Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A. §1333(a) (West 2012).

²³⁸ *The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195)*, *supra* note 12.

²³⁹ See *supra* Part III.A.1.

²⁴⁰ See *supra* Part III.A.1.

²⁴¹ *Modern Science: What's Changing?*, *supra* note 107.

²⁴² See *supra* Part III.A.1.

²⁴³ See *supra* Part III.A.1.

rent system of regulating these herds in order to favor the non-native, vested livestock industry²⁴⁴ was not the original intent of the Act's authors in 1971.²⁴⁵ Even if the Secretary and the BLM refuse to recognize these scientific findings, the minimum they could do is immediately better their management techniques by equally removing livestock and horses from the rangeland in order to demonstrate that politics and monetary gain do not determine their decisions.²⁴⁶

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²⁴⁴ See generally GAO/RCED-90-110, *supra* note 26, at 18.

²⁴⁵ See *supra* Part II.

²⁴⁶ See *supra* Part III.B.

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