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THE CONTINUING SAGA OF WILD HORSE MANAGEMENT: FINDING A BALANCE IN THE CASE OF ONE OF AMERICA'S ICONIC SYMBOLS

ELSPETH VISSER*

Like the wild West Wind that Shelley yearned to be, the mustangs, the best ones at least, were "tameless, and swift, and proud."

—J. Frank Dobie¹

INTRODUCTION

Wild horses have long captured the imagination of American audiences. The wild Mustang early on came to symbolize the freedom and untamed beauty of the American West.² Since Congress passed the Wild and Free-Roaming Horses and Burros Act ("the Act") in 1971, wild horses that live in the western states have been protected under federal law as "symbols of the historic and pioneer spirit of the West" and as part of an effort to preserve the ecological diversity of the area.³ This legislation resulted from increased public protest over the inhumane capture and slaughter of wild horses, which had led to a significant decline in their numbers from the late 1800s on.⁴ The Act declares that wild horses living on public lands are to be protected and managed by the federal government, and that the Secretary may "designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation."⁵

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¹ J. FRANK DOBIE, *THE MUSTANGS* xi (Little, Brown and Company, 2005).

² J. EDWARD DE STEIGUER, *WILD HORSES OF THE WEST: HISTORY AND POLITICS OF AMERICA'S MUSTANGS* 2 (The University of Arizona Press, 2011).

³ 16 U.S.C. § 1331 (2012).

⁴ Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 507 (1985).

⁵ 16 U.S.C. § 1333.

Additionally, it stipulates that the Bureau of Land Management (“BLM”) conduct a population inventory, and “make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals.”⁶ If wild horses should stray onto private property, the property owner is required to contact a federal marshal to remove the animals, and may not conduct the removal himself.⁷ Five years after the Act was promulgated, the constitutionality of the law was challenged in *Kleppe v. New Mexico*.⁸ In this case, the New Mexico livestock board captured three burros from public lands and sold them at auction.⁹ The BLM demanded their return to public lands under the Act, and the livestock board sued, claiming that the Act was unconstitutional.¹⁰ The Supreme Court ruled that the Act was constitutional under the property clause of the Constitution, which “provides that ‘Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.’”¹¹

Wild horse populations in the western states have, however, soared in the last several decades, and the BLM has “removed more than 267,000 wild horses and burros” during the period from 1971 to 2007.¹² The BLM has said that there are “roughly twice as many horses as what the lands can sustain, posing threats to cattle and native wildlife, plants, and soils.”¹³ There are three main ways in which the BLM has tried to manage the overpopulation of wild horses: removal, sterilization,¹⁴ and adoption,¹⁵ with removal being the most controversial. Since the BLM began conducting horse removals in accordance with the Act in the 1970s, several

⁶ *Id.* at § 1333(b)(1).

⁷ *Id.* at § 1334.

⁸ *Kleppe v. New Mexico*, 426 U.S. 529, 529 (1976).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 535 (citing U.S. CONST. art. IV, § 3, cl. 2).

¹² Nadia Aksentijevich, *An American Icon In Limbo: How Clarifying the Standing Doctrine Could Free Wild Horses and Empower Advocates*, 41 B.C. ENVTL. AFF. L. REV. 399, 405 (2014).

¹³ Phil Taylor, *Wyo. Asks Court to Force BLM to Remove Wild Horses*, WYOFILE (Jun. 23, 2015), <http://wyofile.com/brief/wyo-asks-10th-circuit-to-force-blm-removal-of-wild-horses/> [<https://perma.cc/RQ8J-TMV8>].

¹⁴ *Conflict Over Birth Control for Wild Horses*, THE OREGONIAN (Apr. 19, 2015), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/04/conflict_over_contraception_fo.html [<https://perma.cc/64BF-F8LG>]; *Fertility Control*, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/prog/whbprogram/science_and_research/fertility_control.html [<https://perma.cc/G4KP-WKCU>] (last updated Nov. 18, 2015).

¹⁵ Kristen H. Glover, *Managing Wild Horses on Public Lands: Congressional Action and Agency Response*, 79 N.C. L. REV. 1108, 1111–12 (2001).

cases have come before the courts in which wild horse advocacy groups have challenged the legality of BLM's methods.¹⁶ Because wild horses are only allowed to inhabit lands in which they lived at the time the 1971 Act was passed, the policy has been not to relocate them to other areas or federal rangelands.¹⁷ This, in addition to continued population increases, has led the BLM to continue its removal program in accordance with federal legislation.¹⁸ It is not the concept of removal that leads to legal battles, but how the BLM chooses to remove the wild horses.¹⁹ Today, the BLM maintains a removal schedule of around one per year.²⁰ While these removals may have helped curb the wild horse population on public lands, it has created a whole new problem for the BLM. There are estimated to be over 50,000 wild horses in the possession of the BLM, and this has led to budgeting problems as well.²¹ The BLM's methods for controlling the population size have been criticized by environmentalists and horse advocates.²² For the last ten years or so, there has been an ongoing battle between wild horse advocates who deplore the BLM's roundup and removal of wild horses from public lands, and ranchers who use public grazing lands for their own herds.²³ The only way that the situation will be fairly and adequately resolved is for policy makers to approach the problem in a balanced way by considering the interests of ranchers, wild horses, and the western ecosystem. After all, the "wild horse is an integral part of the western range that is here to stay . . . a wild animal seeking an existence in the arid west, one natural resource among many . . . which should be managed within the framework of a larger whole."²⁴

¹⁶ See, e.g., *American Horse Prot. Ass'n., Inc. v. Watt*, 694 F. 2d 1310, 1314 (D.C. Cir. 1982); *American Horse Prot. Ass'n., Inc. v. Andrus*, 608 F.2d 811, 812 (9th Cir. 1979); *American Horse Prot. Ass'n., Inc. v. Frizzell*, 403 F. Supp. 1206, 1215 (D. Nev. 1975).

¹⁷ DE STEIGUER, *supra* note 2, at 181.

¹⁸ *Id.* at 186–87.

¹⁹ *Id.* at 181–82.

²⁰ BUREAU OF LAND MGMT., TENTATIVE WILD HORSE AND BURRO REMOVAL AND FERTILITY CONTROL TREATMENT SCHEDULE (Aug. 23, 2016), http://www.blm.gov/wo/st/en/prog/whb_program/herd_management/tentative_gather_schedule.html [<https://perma.cc/ZL7H-BYBY>].

²¹ Aksentijevich, *supra* note 12, at 406.

²² E.g., Taylor Halversen, *Preservationists Sue BLM Over Alleged Wild Horse Mismanagement*, UTAH PUBLIC RADIO (Aug. 25, 2014), <http://upr.org/post/preservationists-sue-blm-over-alleged-wild-horse-mismanagement>.

²³ E.g., Laura Leigh, *Cattlemen Fight Wild Horse Birth Control Program to Continue Welfare Ranching on Federal Land*, WILD HORSE EDUCATION (Feb. 23, 2015), <https://wildhorseeducation.org/2015/02/23/cattlemen-fight-wild-horse-birth-control-program-to-continue-welfare-ranching-on-federal-land/>.

²⁴ Pitt, *supra* note 4, at 505.

In this Note, I will discuss the policies that have been instituted up to this point by the BLM for population control, such as removal and sterilization. I will then suggest several methods of wild horse population control which, when used together, could create a multifaceted approach to the problem. I mainly examine ways to decrease the horse population; however, I also emphasize that controlling the least populous grazing animal in the West will not make as huge an environmental impact as rancher interest groups claim. In order to make a more significant environmental impact, livestock grazing must also be reduced or a quasi-rotation system must be implemented to allow the rangelands to recover from excessive grazing. In focusing on the wild horse, however, it will become clear that "[t]he law is the key to [wild horses'] survival. . . . Yet however important the rule of law may be to the survival of the West's wild horses, its implementation has rarely been straight forward or, for that matter, even rational."²⁵

I. BRIEF HISTORY OF MUSTANGS IN THE UNITED STATES

Today, most scientists agree that horses disappeared from the North American continent at the end of the Ice Age.²⁶ When Europeans first arrived in the New World, they gave no reports of having seen horses, nor did the Native peoples have a word for "horse."²⁷ Modern Mustangs descend from Spanish horses, mainly Andalusians and Barbs, that were introduced to North America as a result of Columbus's second transatlantic journey in 1493.²⁸ The name Mustang comes from the Spanish words *mesteno* and *mesta*.²⁹ *Mesta* "refers to a group of stock raisers or herders" and *mestenos* are "[h]orses that escaped from a range controlled by a *mesta*."³⁰ Native Americans early on came to appreciate and use horses in their daily lives, so that "[t]oday, it is all but impossible to envision the American Indian of old without his horse; indeed, already by the nineteenth century, Native Americans themselves could not remember a time when they did not have the horse."³¹ Although other horse breeds were introduced to North America from Europe during the

²⁵ DE STEIGUER, *supra* note 2, at 181.

²⁶ *Id.* at 49.

²⁷ *Id.*

²⁸ *Id.* at 2, 49, 51.

²⁹ David L. Wilson, *The Legend of the Pacing White Mustang*, 90 FOLKLORE 153, 153 (1979).

³⁰ *Id.*

³¹ DE STEIGUER, *supra* note 2, at 2.

seventeenth and eighteenth centuries, it was not until the mid-nineteenth century that Americans began in earnest to breed these horses with wild Mustangs to the extent that “Spanish-type and American horses could be seen co-mingling on the Great Plains.”³² It is estimated that between 1825 and 1850, the wild horse population was around 2 million.³³ As long as horses were useful for farming and ranching, their large numbers in the western states, increased partly from continued breeding by ranchers, were not a significant problem; however, by the 1890s, technical advances in farming equipment, in addition to a “faltering cattle economy,” decreased the need for horses to the extent that ranchers “abandon[ed] literally millions of horses to roam freely on the range.”³⁴ Once horses were no longer useful, their presence became more of a nuisance to ranchers and other private property owners, because they were no longer being used purposefully, and became a burden on the land, because “the enactment of increasingly restrictive grazing regulations on federal lands meant that the days of the free-roaming horse were surely numbered.”³⁵ Wild horses were sold to England during the Boer Wars (1880–1902) and WWI in an attempt to reduce their population out west.³⁶ It is estimated that more than 425,000 horses were exported to the UK prior to WWI, and that, just in 1916, 350,000 horses were sent to the European theater.³⁷ During the first half of the twentieth century, wild horse populations were dramatically decreased due to the indiscriminate capturing and killing of the animals, so that by the 1960s, there were fewer than 18,000 wild horses,³⁸ and by 1979, there were only around 10,000 left.³⁹ Because of the inhumane treatment of Mustangs and their dangerously low numbers, people began to take action, namely in the form of “Wild Horse Annie.”

II. THE BEGINNINGS OF HORSE PROTECTION ADVOCACY AND THE ACT

Velma Bronn Johnston, known as “Wild Horse Annie,” was the original force behind the wild horse advocacy movement.⁴⁰ Johnston, born

³² *Id.* at 104.

³³ Wilson, *supra* note 29, at 153.

³⁴ DE STEIGUER, *supra* note 2, at 2.

³⁵ *Id.* at 3.

³⁶ DE STEIGUER, *supra* note 2, at 139.

³⁷ *Id.* at 140.

³⁸ *Id.*

³⁹ Wilson, *supra* note 29, at 153.

⁴⁰ *ISPMB Achievements*, INT’L SOC’Y FOR THE PROT. OF MUSTANGS AND BURROS, <http://www.ispmb.org/Achievements.html>.

in 1912 and a lifelong resident of Nevada,⁴¹ knew that early on the wild horse population was a problem in her home state, but believed that “removing them could have been done in a more humane fashion,” particularly because by the 1950s when she began her advocacy efforts in earnest, the population had already been significantly decreased.⁴² The experience which initially triggered her outrage was in 1950 outside Reno when she noticed blood dripping out from a horse trailer going toward a slaughterhouse.⁴³ After World War II, horses became a popular choice for inclusion in canned pet food.⁴⁴ The growth of the pet-food industry led to an increased need for horse meat; a need met by the Bureau of Land Management which sanctioned 100,000 wild horses to be removed from rangelands in Nevada alone between 1945 and 1949.⁴⁵ This, coupled with inhumane ways of conducting roundups, such as by aircraft and trucks, which resulted in the death and injury of many horses, led to the significant decline in the Mustang population.⁴⁶ Johnston was realistic about the situation, however, recognizing that, although wild horses needed to be protected in the western states, their population size also needed to be controlled in order for the integrity of the western rangelands to be maintained; the legislative program that she wished to see implemented combined three important elements: preservation of wild horses and burros, cessation of inhumane roundup procedures, and effective population management on the rangelands.⁴⁷

Johnston first attempted to remedy the situation in her home state by successfully initiating first a county law in 1952, which banned roundups by aircraft, and then a state law in 1955 which banned roundups by aircraft and motorized vehicles in nonfederal Nevada lands.⁴⁸ Her work had to continue at the federal level, however, not only because state laws could not protect wild horses on federal lands, but also because in 1957, state legislators attempted to repeal the 1955 law.⁴⁹ From the late 1950s until 1971, when the Wild and Free-Roaming Horses and Burros

⁴¹ DE STEIGUER, *supra* note 2, at 151.

⁴² ALAN J. KANIA, *WILD HORSE ANNIE: VELMA JOHNSTON AND HER FIGHT TO SAVE THE MUSTANG*, 28 (University of Nevada Press, 2012).

⁴³ *Id.* at 7.

⁴⁴ DE STEIGUER, *supra* note 2, at 153.

⁴⁵ *Id.*

⁴⁶ *Id.* at 152.

⁴⁷ KANIA, *supra* note 42, at 31.

⁴⁸ DE STEIGUER, *supra* note 2, at 157.

⁴⁹ *Id.*

Act became law, Johnston worked closely with Nevada Congressman Walter Baring to pass federal legislation to protect the Mustangs.⁵⁰ She was also the head of Wild Horse Organized Assistance, Inc., which aided her mission to protect the wild horse.⁵¹ Her efforts resulted first in H.R. 2725, the precursor to the 1971 Act, in January 1959.⁵² In September 1959, H.R. 2725 became the Hunting Wild Horses and Burros on Public Lands Act, also known as the “Wild Horse Annie Act,” or Public Law 86-234, which made it illegal for roundups conducted on federal lands to make use of aircraft and motorized vehicles, thus essentially federalizing the Nevada law of 1955.⁵³ Although the “Wild Horse Annie Act” was an important step in protecting wild horses and raising public awareness of their plight, it was not going to be sufficient for their long term preservation, nor was it going to resolve the conflicts over land usage in the west.

On December 18, 1971, President Nixon signed into law the Wild and Free-Roaming Horses and Burros Act (“the Act”).⁵⁴ The Act states that “all wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary [of the Interior] for the purposes of management and protection.”⁵⁵ They are considered to be “components of the public lands,” and the Secretary may “designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation.”⁵⁶ Additionally, the Act takes into account the overall environment wherein the wild horses dwell, and the manner of management must “achieve and maintain a thriving natural ecological balance on the public lands,” in consideration of the “recommendations of qualified scientists in the field of biology and ecology.”⁵⁷ Population levels are expected to be monitored, as the Act provides that the Secretary must “maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands” and “determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands.”⁵⁸ If an overpopulation exists, the Secretary must “remove excess animals from the range so as to achieve appropriate management levels,”

⁵⁰ KANIA, *supra* note 42, at 43.

⁵¹ Pitt, *supra* note 4, at 506–07.

⁵² *Id.* at 160.

⁵³ *Id.*

⁵⁴ 16 U.S.C.A. § 1331.

⁵⁵ 16 U.S.C.A. § 1333(a).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 16 U.S.C. § 1333(b)(1) (2012).

and methods such as sterilization and “destruction of excess animals” are also considered acceptable forms of population control.⁵⁹

III. RECENT DEVELOPMENTS: CONTINUED HORSE ADVOCACY, PUBLIC LAND USE, AND ENVIRONMENTAL CONCERNS

In 2004, an amendment was proposed to the 1971 Act, called the Burns Amendment, which was passed “as a rider on the 2005 Omnibus Appropriations Bill.”⁶⁰ The Amendment stipulates that “[a]ny excess animal . . . shall be sold if—(A) the excess animal is more than 10 years of age; or (B) the excess animal has been offered unsuccessfully for adoption at least 3 times.”⁶¹ Additionally, any “excess animal that meets either of the criteria in paragraph (1) shall be made available for sale without limitation, including through auction to the highest bidder, at local sale yards or other convenient livestock selling facilities”⁶² Critics of the amendment argue that it “revoked the protected status these animals had enjoyed under the 1971 act and instantly made them available for sale to the private sector, most likely for slaughter” and that it was an “under-the-radar attempt to give public-land ranchers an advantage in the wild horse debate.”⁶³ In 2007, the last horse slaughter facility in the United States, located in Illinois, was officially closed by the Seventh Circuit Court of Appeals’ decision in *Cavel International, Inc. v. Madigan*.⁶⁴ *Cavel International*’s business consisted entirely of slaughtering horses and exporting the meat, which was shipped exclusively overseas to Europe and Asia.⁶⁵ At issue in this case was an Illinois statute, the Illinois Horse Meat Act, which made it illegal to slaughter horses destined for human consumption, in addition to prohibiting the import and export of horse meat.⁶⁶ *Cavel International* objected to the statute, arguing that it violated the Commerce Clause; however, the court did not find their arguments convincing and upheld the statute.⁶⁷ *Cavel International* subsequently closed.⁶⁸ This decision came right after a Fifth Circuit decision which upheld a similar

⁵⁹ *Id.* at (b)(1)–(2).

⁶⁰ DE STEIGUER, *supra* note 2, at 199.

⁶¹ 16 U.S.C. § 1333(e)(1) (2012).

⁶² *Id.* at (e)(2).

⁶³ DE STEIGUER, *supra* note 2, at 200.

⁶⁴ *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

⁶⁵ *Id.* at 552–53.

⁶⁶ *Id.* at 553.

⁶⁷ *Id.* at 554.

⁶⁸ DE STEIGUER, *supra* note 2, at 141.

state statute banning the slaughtering of horses for human consumption.⁶⁹ Unfortunately, the banning of horse slaughtering in the United States resulted in the selling and shipping of horses from the States to Mexico, where slaughtering practices are far less humane than they would be in this country.⁷⁰ The Burns Amendment, together with the prohibition of horse slaughter in the United States, has thus led to further activism on behalf of wild horses shipped across the border for slaughter.⁷¹

Increased activism has resulted in several attempts at legislation to counteract the Burns Amendment.⁷² Certain members of Congress have, however, been working on legislation to repeal the Burns Amendment, which enables horses to be sold for slaughter to buyers in Mexico.⁷³ Representative Nick Rahall proposed a bill in January 2005 which was “intended to reinstate the prohibition on the commercial sale and slaughter of wild, free-roaming horses and burros.”⁷⁴ Although the amendment, which was placed as a rider on an appropriations bill, was removed in 2006 from the larger bill, Rahall, who partnered with Representative Ed Whitfield, reintroduced the bill in 2007.⁷⁵ While the bill passed by a vote of the House of Representatives, a “companion bill never made its way through the Senate; thus, Rahall’s attempt to overturn the Burns amendment stalled out before becoming law.”⁷⁶ Rahall has continued to craft further legislation for the wild horse cause. Rahall most recently wrote a bill entitled “Restore Our American Mustangs,” or ROAM, introduced in 2009, to be an amendment to the 1971 Act.⁷⁷ Several of the important issues raised include:

[I]nstituting fertility control to slow the reproduction of wild horses; identifying new rangelands, sanctuaries, and exclusive use areas for the animals; exhausting all options of maintaining horse and burro populations in the range

⁶⁹ See *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326 (5th Cir. 2007).

⁷⁰ DE STEIGUER, *supra* note 2, at 201.

⁷¹ *Id.* at 201–02.

⁷² William Nack, ‘They Have to be Free,’ ESPN.COM (May 20, 2005), <http://www.espn.com/espn/news/story?id=2063939>.

⁷³ *Id.* at 202.

⁷⁴ *Id.*

⁷⁵ *Congress Addressing Horse Slaughter Cruelty in Legislation*, HUMANE SOC’Y OF THE U.S., Jan. 15, 2009), http://www.humanesociety.org/news/press_releases/2009/01/congress_introduces_horse_slaughter_bill_011509.html.

⁷⁶ *Id.* at 203.

⁷⁷ *Id.* at 204.

before their capture and removal; prohibiting the use of helicopters in gathers, sales for slaughter, and the destruction of animals unless terminally ill; more aggressively promoting the adoption program; and applying criminal penalties to any person transporting a live or deceased horse or burro for processing into commercial products.⁷⁸

Currently, this bill, or a revised version of it, has not yet made it into law.⁷⁹

A number of wild horse protection groups exist today and continue to advocate for the preservation of wild horses in the West, including the American Wild Horse Campaign, America's Wild Horse Advocates, Wild Horse Preservation League, and Equine Advocates.⁸⁰ These groups, in general, seek to raise awareness of the ongoing problems in the western states regarding the proper regulation and preservation of wild horses.⁸¹ Their views can be extreme, however, and, "while the general public sympathizes more with the views of horse protectionists than with the views of ranchers, elements of the protectionist movement may be too extreme for the average American," in addition to the fact that "horse advocates' stridently litigious and inflexible approach to the problem may in time do more harm than good for their cause."⁸² The conflict between ranchers and wild horses over the use of public lands thus continues.

Horse advocates and environmentalists continue to raise concerns about the methods utilized by the BLM for managing horse populations, and the continuing conflicts over grazing rights and environmental conservation efforts. One legal issue which has restricted successful litigation for horse advocacy groups is the doctrine of standing. These litigants' standing to sue on behalf of wild horse interests has been called into question in several recent court cases.⁸³ There are two components of the standing doctrine, constitutional and prudential.⁸⁴ The constitutional standing doctrine today involves three requirements: (1) the demonstration of an injury in fact, (2) an injury "fairly traceable" to defendant, and

⁷⁸ DE STEIGUER, *supra* note 2, at 204.

⁷⁹ *Id.* at 205.

⁸⁰ *Coalition*, American Wild Horse Campaign, <https://www.americanwildhorsecampaign.org/coalition>.

⁸¹ *Id.*

⁸² DE STEIGUER, *supra* note 2, at 212.

⁸³ *E.g.*, *Colorado Wild Horse & Burro Coalition, Inc. v. Salazar*, 890 F. Supp. 2d 99 (D.D.C. 2012); *In Def. of Animals v. Salazar*, 713 F. Supp. 2d 20 (D.D.C. 2010); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13 (D.D.C. 2006).

⁸⁴ Aksentjevich, *supra* note 12, at 408.

(3) the injury is “likely to be redressed by a favorable decision by a court.”⁸⁵ The prudential standing doctrine stipulates that a plaintiff must show that “his or her injury is within a zone of interest that the statute or constitutional provision serves to protect,” and “specifically prohibits plaintiffs from asserting generalized grievances or third-party legal rights.”⁸⁶ The difficulty comes in articulating a traceable injury to the plaintiffs caused by the BLM’s policies toward wild horses. In some cases, courts have found that horse advocates have successfully articulated an injury. For example, in *In Defense of Animals v. U.S. Department of the Interior*, the plaintiffs claimed that their injury was the result of the “lost enjoyment and interaction with wild horses in their natural habitat,” and the court held that the plaintiffs had “established a concrete and particularized injury in fact.”⁸⁷ In the end, the plaintiffs met their burden, standing was established, and the case proceeded on the merits, though the court in the end ruled that the BLM’s use of holding facilities for wild horses did not violate the 1971 Act.⁸⁸ In contrast, the plaintiffs were found not to have standing by the U.S. District Court for the District of Columbia in *In Defense of Animals v. Salazar*,⁸⁹ because they had “failed to show a sufficient causal nexus between the long-term holding and the asserted injury.”⁹⁰ Scholars have criticized the ambiguity with which courts have treated the standing doctrine, and, in the case of wild horse advocates, this ambiguity has led to inconsistent lower court decisions, which obviously impacts the success with which these advocacy groups can bring claims against the BLM’s management policies.⁹¹

The most contentious issue surrounding the preservation of wild horses in the West concerns access to public lands. While ranchers’ grazing rights are an important consideration, the overgrazing of livestock on rangeland has led to some significant environmental problems such as native species endangerment, desertification, and “nonpoint source pollution of surface waters” in the western states.⁹² The BLM’s management

⁸⁵ This three-part test was articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also *id.* at 410.

⁸⁶ Aksentijevich, *supra* note 12, at 409.

⁸⁷ *Id.* at 416, analyzing *In Defense of Animals v. U.S. Department of the Interior*, 909 F. Supp. 2d 1178 (2012).

⁸⁸ *In Defense of Animals*, 909 F. Supp. 2d at 1195.

⁸⁹ *In Defense of Animals v. Salazar*, 675 F. Supp. 2d 89 (D.D.C. 2009).

⁹⁰ Aksentijevich, *supra* note 12, at 419.

⁹¹ *Id.* at 411, 420–21.

⁹² Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 724 (2005).

of these lands has not improved this problem, because they continue to allow excessive grazing, despite recent scientific research that demonstrates the unsustainability of such practices.⁹³ Scholars have examined this problem through the lens of property law, noting that the law of capture historically applied during the settlement of the West, and has been termed the “law of the rush,” meaning “the rush to acquire the first and, hence, best rights to bison, water, grass, gold, the land itself.”⁹⁴ During the nineteenth and early twentieth centuries, these “rushes” were “undertaken by persons seeking to exploit free resources for profit, as well as by emigrants seeking new homes.”⁹⁵ The rush to claim public land encouraged ranchers to graze even more livestock on land adjacent to the land they had already claimed in order to solidify their claims before their neighbors did.⁹⁶ The “tragedy of the commons” principle applies in this case, because “a resource available to all, without regulation, will be overused because it is in no one’s interest to conserve.”⁹⁷ As has been discussed above, the fight over land use in the West to this point has focused mainly on controlling the possession of resources, rather than on the proper maintenance and stewardship of them. In order to preserve better the natural resources of the West, individual concerns must yield to revised public policies which promote the safe and healthy management of the rangeland.

In the following sections, I will discuss four policy reforms that could help control the wild horse population in the West. First, I will examine ways in which public land could be managed more effectively for the preservation of native wildlife and wild horses, as well as for the needs of ranchers. Second, I will suggest that the BLM should institute a policy of relocation in order to help with the overpopulation of current Herd Management Areas (“HMAs”). Third, I will argue that the Seventh Circuit’s decision in *Cavel International, Inc. v. Madigan*⁹⁸ to outlaw the commercial slaughter of horses in the United States should be revisited, and that the humane slaughter of horses for human consumption should be made legal, as it is in other Western countries. This would prevent

⁹³ *Id.*

⁹⁴ *Id.* at 733; Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 ENVTL. L. 481, 483 (2006).

⁹⁵ Donahue, *supra* note 92, at 733.

⁹⁶ DE STEIGUER, *supra* note 2, at 138.

⁹⁷ Donahue, *supra* note 92, at 734; Erik Schlenker-Goodrich, *Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Range Resource*, 16 J. ENVTL. L. & LITIG. 139, 140 (2001).

⁹⁸ *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

horses from being sent to Mexico for inhumane slaughter, provide access to a market in the United States for horse meat (which is considered a gourmet food in other parts of the world including Italy, China, and Iceland),⁹⁹ and help control the wild horse populations through legal humane slaughter. Finally, I emphasize the importance of changing the perception of Mustangs within the horse community. As has been proven by riders such as Elisa Wallace, an internationally recognized event rider, Mustangs are far more versatile than most horsemen and women given them credit for. A focus on their versatility in different areas of riding could lead to more interest in the Mustang as a performance horse, and thus to more adoptions.

IV. SUGGESTED POLICY REFORMS

A. *Public Land Use Reform and Relocation*

1. History

In the Western states, the government regulates the usage of around 270 million acres of rangeland for grazing livestock chiefly through the Bureau of Land Management and the U.S. Forest Service.¹⁰⁰ The states in which wild horses currently live, and which are subject to land use policies of rangelands, are Arizona, Colorado, Wyoming, Nevada, Utah, California, Idaho, Oregon, Montana, and New Mexico.¹⁰¹ Historically, the practice of allowing free use of rangelands for grazing livestock was introduced by the Spanish when they established ranches in Nevada four hundred years ago.¹⁰² The practice was adopted by the United States in the mid-nineteenth century after the country gained the western lands by treaty from Mexico at the end of the Mexican War in 1848.¹⁰³ What was a successful method of land management when used by a relatively small number of ranches became an unsuccessful one once westward expansion made the western United States far more populous.¹⁰⁴ Initially, the United States granted 160 acres to ranchers settling the West through the

⁹⁹ Caty Enders, *Why You Really Should (But Really Can't) Eat Horsemeat*, THE GUARDIAN (Jan. 9, 2015), <https://www.theguardian.com/environment/2015/jan/09/eating-wild-horse-meat-america> [<https://perma.cc/6GKW-VFMC>].

¹⁰⁰ Donahue, *supra* note 92, at 723.

¹⁰¹ *Id.*

¹⁰² Stimpert, *supra* note 94, at 482.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Homestead Act of 1862, but because ranchers needed additional acreage for their livestock, they began to utilize unowned rangeland adjacent to their ranches for additional grazing, after the Spanish custom.¹⁰⁵ As more ranchers began to use public rangelands, however, conflicts arose over access to the range, with the result that Congress passed the Unlawful Enclosures Act of 1885.¹⁰⁶ Using public land for grazing continued to be an acceptable practice, particularly after the U.S. Supreme Court ruled in 1890 that unenclosed, public rangelands were essentially open to anyone who chose to use them for the purposes of grazing livestock.¹⁰⁷ It was during this time in the late 1800s that the range began to be overtaxed, with livestock numbers increasing significantly and “exceed[ing] the carrying capacity of the range in many areas.”¹⁰⁸

In 1934, Congress passed the Taylor Grazing Act,¹⁰⁹ which essentially brought an end to the practice of open ranges by instituting a policy of federal range management in order to “protect rangeland health and stabilize the livestock industry by allocating range resources.”¹¹⁰ What were originally “common-pool” resources became directly regulated by the federal government for allocation to individual ranchers.¹¹¹ It was intended by Congress to be a “transitional statute, temporarily alleviating the problem of overgrazing until the federal government determined how and if it would dispose of the federal rangelands.”¹¹² The Taylor Act authorized the Secretary of the Interior to “establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska),” which “in his opinion

¹⁰⁵ *Id.* at 489–90.

¹⁰⁶ 43 U.S.C.A. § 1061 (Westlaw through Pub. L. No. 114-254); *see also* Stimpert, *supra* note 94, at 491.

¹⁰⁷ *See* Buford v. Houtz, 133 U.S. 320, 326 (1890) (“We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use.”).

¹⁰⁸ Stimpert, *supra* note 94, at 493.

¹⁰⁹ 43 U.S.C.A. § 315 (Westlaw through Pub. L. No. 114-254).

¹¹⁰ Stimpert, *supra* note 94, at 494.

¹¹¹ John Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 467–68 (1992) (“Like . . . other common-pool resources, public grasslands are characterized by (1) the difficulty of regulating access to them and (2) the adverse effects of exploitation by one user on all the others.”).

¹¹² Hillary M. Hoffmann, *A Changing of the Cattle Guard: The Bureau of Land Management's New Approach to Grazing Qualifications*, 24 J. ENVTL. L. & LITIG. 243, 251–52.

are chiefly valuable for grazing and raising forage crops.”¹¹³ The grazing districts were then subdivided into allotments, based on the acquisition by ranchers of a grazing permit issued by the BLM,¹¹⁴ which could be fenced in by ranchers for the “care and management of the permitted livestock . . . within such grazing districts under permit issued by the authority of the Secretary.”¹¹⁵ The permittee, however, does not gain any ownership rights in the allocated land, but simply provides him with grazing rights.¹¹⁶ Additionally, the Act provided that:

[w]henever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights.¹¹⁷

This legislation established the United States Grazing Service, which merged in 1946 with the United States General Land Office, and together became the current Bureau of Land Management.¹¹⁸ Although successful in part, the “grazing management system created by the Taylor Act is impeding ecologically sustainable management and use of the public lands in the present era.”¹¹⁹ Later legislation, including the Federal Land Policy and Management Act and Public Rangeland Improvement Act, mentioned below, have helped to counteract some of the negative consequences of the Taylor Act, but have still not created a fully sustainable infrastructure for dealing with the increasing problems on the rangelands.¹²⁰

In 1976, Congress passed the Federal Land Policy and Management Act.¹²¹ This legislation:

¹¹³ 43 U.S.C.A. § 315.

¹¹⁴ *Id.* at (b).

¹¹⁵ *Id.* at (c).

¹¹⁶ *Id.* at (b).

¹¹⁷ *Id.*

¹¹⁸ DE STEIGUER, *supra* note 2, at 139.

¹¹⁹ Schlenker-Goodrich, *supra* note 97, at 140.

¹²⁰ *Id.* at 141.

¹²¹ 43 U.S.C. § 1701 (2012).

[E]stablished a planning process for BLM lands and directed the Secretary of the Interior to manage these lands according to the principle of multiple use. Thus, any given area of BLM land, unless reserved by statute or administrative action for a specific use, must be simultaneously available for recreation, mineral production, timber cutting, water production, and the regulated grazing of wild horses, burros, cattle, and wildlife.¹²²

This policy of multiple use extends to HMAs, and these areas are therefore not for the exclusive use of wild horses, but are shared with other animals and with other human uses as well.¹²³ One final piece of legislation is the Public Rangeland Improvement Act of 1978.¹²⁴ The Act requires the Secretary of the Interior and the Secretary of Agriculture to “update, develop (where necessary) and maintain on a continuing basis thereafter, an inventory of range conditions and record of trends of range conditions on the public rangelands, and shall categorize or identify such lands on the basis of the range conditions and trends thereof as they deem appropriate.”¹²⁵

The Taylor Grazing Act has been amended several times with varied success.¹²⁶ After being challenged by several organizations representing ranchers, including the Public Lands Council, three of the four 1995 amendments were upheld by the Supreme Court in *Public Lands Council v. Babbitt* in 2000.¹²⁷ In 2006, eighteen further amendments were enacted, this time creating stricter requirements for the obtainment of permits.¹²⁸ These were challenged by the environmentalist group Western Watersheds Project in *Western Watershed Project v. Kraayenbrink* for violations of the National Environmental Policy Act and the Endangered Species Act.¹²⁹ In this case, the amendments were struck down by the 9th Circuit for violations of the NEPA and ESA.¹³⁰

¹²² DE STEIGUER, *supra* note 2, at 185.

¹²³ *Id.*

¹²⁴ 43 U.S.C. § 1903 (2012).

¹²⁵ 43 U.S.C. § 1903(a) (2012).

¹²⁶ *See* 43 C.F.R. § 4100 *et seq.* (1986).

¹²⁷ *See* *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000); *see also* Schlenker-Goodrich, *supra* note 97, at 142.

¹²⁸ Hoffmann, *supra* note 112, at 252.

¹²⁹ *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir., 2010); National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; Endangered Species Act, 16 U.S.C. § 1531.

¹³⁰ *Kraayenbrink*, 632 F.3d. At 477.

2. Herd Management Areas and Wild Horse Ranges

Today, wild horses live in HMAs, which were set up by the BLM from portions of the public land under their management authority.¹³¹ HMAs are subsets of Herd Areas, which the BLM established under the 1971 Act.¹³² Over the years, the HMAs have gotten progressively smaller and are now roughly 36% smaller than they were when they were first established in the 1970s.¹³³ Within each HMA, the population of wild horses and burros is monitored and kept within an Appropriate Management Level, or “AML,” which figure represents “the optimum number of horses which results in a thriving natural ecological balance and avoids deterioration of the land.”¹³⁴ If the horse population within an HMA exceeds the limit imposed by the BLM, the agency will implement removal procedures to decrease the number to what is considered to be an appropriate level for that HMA.¹³⁵ The BLM’s imposition of AMLs has been criticized by some for its arbitrariness and for not being a very scientific way of measuring an ecologically sound population.¹³⁶ The enforcement of AMLs also leads to population-based removal, which policy has been ruled by at least one federal district court as “inconsistent with the law.”¹³⁷

There are also three Wild Horse Ranges, or “WHRs,” which were established by the Department of the Interior solely for the protection of wild horses.¹³⁸ The first set up was the Nevada Wild Horse Range, created in 1962 on Nellis Air Force Base, the second was the Pryor Mountain Wild Horse Range, established in 1968 in Montana, while the third was Little Book Cliffs, established in 1971 in Colorado.¹³⁹ The location of the WHRs centered mainly around the particular types of herds themselves. For example, the horses which inhabit the Pryor Mountain Wild Horse

¹³¹ BUREAU OF LAND MGMT., *Rangeland and Herd Management*, http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management.html [<https://perma.cc/PK44-3UWT>] (last visited Mar. 21, 2017).

¹³² *Id.*

¹³³ DE STEIGUER, *supra* note 2, at 182.

¹³⁴ WESTERN GOVERNORS’ ASS’N, *Wild Horse and Burro Management*, <http://westgov.org/policies/303-wildlife/851-wild-horse-and-burro-management> [<https://perma.cc/R778-9PZL>] (last visited Mar. 21, 2017).

¹³⁵ *See Rangeland and Herd Management*, *supra* note 131.

¹³⁶ DE STEIGUER, *supra* note 2, at 186–87.

¹³⁷ *Id.* at 187.

¹³⁸ *Id.* at 182.

¹³⁹ *Id.*

Range are unique in their genetic makeup from other western wild horses.¹⁴⁰ While most wild horses today are the result of breeding Spanish horses with other European imports, the Pryor Mountain herd is believed to be directly descended from Spanish horses and are referred to as the “Colonial Spanish Horse” or the “Spanish Mustang.”¹⁴¹ The Nevada Wild Horse Range is not open to the public, due to its location on the air force base, and the land is also used for weapons development and flight training.¹⁴² Finally, the Little Book Cliffs wild horse range provides habitation for 80 to 120 horses on 36,113 acres.¹⁴³ Although the WHRs do not protect very many wild horses, they are an example of one solution to the overgrazing problem experienced today in the West: by creating more WHRs, horses would not have to compete as much with livestock for forage, and livestock would in turn have more grazing area. A redistribution of herds to WHRs would also be an environmentally friendly option, because, just as crop rotation is necessary to keep the soil rich, such redistribution would give the land a chance to recover from years of overgrazing.

3. Reform and Relocation

Currently, Mustangs are not allowed to be relocated to public lands which they did not inhabit in the year the Wild Horses and Burros Act was passed (1971).¹⁴⁴ They can be moved around within the public lands administered by the BLM, but not outside of them,¹⁴⁵ and they can also be relocated to private land.¹⁴⁶ As has been mentioned above, most of the time, wild horses are simply removed from the overpopulated HMAs and held indefinitely in corrals, rather than being redistributed to different

¹⁴⁰ PRYOR MOUNTAIN WILD MUSTANG CTR., *About the Horses*, http://www.pryormustangs.org/about_horses.shtml [https://perma.cc/8G25-GDVP] (last visited Mar. 21, 2017).

¹⁴¹ *Id.*

¹⁴² U.S. DEP'T OF THE INTERIOR, *Nevada Wild Horse Range: Herd Management Area Plan*, 1, 43, http://www.blm.gov/style/medialib/blm/nv/field_offices/las_vegas_field_office/wild_horse_burro/las_vegas_herd_management.Par.9168.File.dat/NWHR2.pdf [https://perma.cc/G54Y-4JYP] (last visited Mar. 21, 2017).

¹⁴³ BUREAU OF LAND MGMT., *Little Bookcliffs Wild Horse Area*, http://www.blm.gov/co/st/en/fo/gifo/recreation/bookcliffs_area_page/little_bookcliffs.html [https://perma.cc/RCL8-R74S] (last visited Mar. 21, 2017).

¹⁴⁴ See *Wild Horse and Burro Quick Facts*, U.S. DEP'T OF THE INTERIOR, https://www.blm.gov/wo/st/en/prog/wild_horse_and_burro/horse/history_and_facts/quick_facts.html (last visited Mar. 21, 2017).

¹⁴⁵ Alfred W. Buckley & William R. Buckley, *Straying Wild Horses and the Range Landowner: The Search for Peaceful Coexistence*, 4 PUB. LAND L. REV. 29, 43 (1983).

¹⁴⁶ Aksentijevich, *supra* note 12, at 417.

HMA or alternative areas.¹⁴⁷ The federal government owns around forty-seven percent of the land in the western states,¹⁴⁸ and the BLM manages more federal land in the country than any other federal agency, with 99.9% of land under their control concentrated in the West.¹⁴⁹

Wild horses often share their HMAs with sheep and cattle because the HMAs are typically not fenced.¹⁵⁰ This also leads to horses straying onto privately owned lands as well, which has caused disputes between private landowners and the BLM.¹⁵¹ For example, in 2011, the Rock Springs Grazing Association (“RSGA”), a Wyoming corporation that allows certain ranchers to graze their livestock on their privately owned land, tried to get the BLM to remove the horses from their land that abuts an HMA.¹⁵² The proportion of RSGA livestock to wild horses in Wyoming’s checkerboard lands¹⁵³ is telling: RSGA grazes around 70,000 sheep and 5,000 cattle, compared to a wild horse population of around 2,000.¹⁵⁴ RSGA received a court order which stipulated that the BLM remove the wild horses from their privately owned lands as well as from some of the public parcels interspersed.¹⁵⁵ The BLM proceeded to conduct helicopter roundups of 1,263 horses from the area, which action provoked a lawsuit led by the American Wild Horse Preservation Campaign in March of 2015.¹⁵⁶ The lawsuit was partially successful, from the plaintiffs perspective, for Judge Freudenthal held that the BLM violated NEPA by “failing to conduct an analysis of the impacts of the roundup on the natural environment and by failing to consider alternatives to the proposed

¹⁴⁷ See *Rangeland and Herd Management*, *supra* note 131.

¹⁴⁸ Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), http://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html?_r=0 [<https://perma.cc/X94R-QZT7>].

¹⁴⁹ CONG. RES. SERV., *Federal Land Ownership: Overview and Data* 8 (Dec. 29, 2014), <https://fas.org/sgp/crs/misc/R42346.pdf> [<https://perma.cc/PR7F-2KLL>].

¹⁵⁰ Lani Frazer, *An Unnecessary Evil: The Politics of Wild Horse Roundups*, BERKELEY POL. REV. (Nov. 2, 2014), <http://bpr.berkeley.edu/2014/11/02/an-unnecessary-evil-the-politics-of-wild-horse-roundups/> [<https://perma.cc/4WNR-BX32>].

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Checkerboard lands are defined as a “two-million acre area of alternating public and private land parcels one square mile each in size. The private land parcels in the checkerboard are controlled by the Rock Springs Grazing Association (RSGA).” AMERICAN WILD HORSE PRESERVATION, *Update: Wyoming Checkerboard Lawsuit and Hearing*, <http://www.wildhorsepreservation.org/media/update-wyoming-checkerboard-lawsuit-hearing-ruling> [<https://perma.cc/EAR6-CNEQ>] (last visited Mar. 21, 2017).

¹⁵⁴ Frazer, *supra* note 150.

¹⁵⁵ *Update: Wyoming Checkerboard Lawsuit and Hearing*, *supra* note 153.

¹⁵⁶ *Id.*

action.”¹⁵⁷ Unfortunately for horse advocates, Judge Freudenthal also ruled in favor of the BLM on two issues: 1) the BLM was allowed to remove horses from private or public lands at the express request of private landowners, and 2) the BLM did not violate the Federal Land Policy and Management Act by reducing the number of wild horses below the AML stipulated by the agency itself.¹⁵⁸ Thus, although the Court ruled that the BLM must examine the environmental impacts of their protracted roundups and consider alternatives to this practice, the Court did not forbid them from removing horses from public lands at the behest of private landowners, whose interests would clearly be served by a reduction in the wild horse population.¹⁵⁹

This recent conflict in Wyoming is just one example of how the private interests of ranchers and the preservation of wild horses collide. But roundups are not the way to solve the problem of land use control, for the horses are held indefinitely in small corrals,¹⁶⁰ rather than being relocated or redistributed to other HMAs or even to new HMAs. Both from an economic standpoint and from the standpoint of animal rights, this is a less than ideal situation, particularly when the wild horse population is taken below the BLM's own standard AML levels. From an environmental perspective, grazing is extremely hard on the soil and is the “most widespread cause of species endangerment” in the Western states.¹⁶¹ Because the number of wild horses far outweighs the number of livestock grazing on public lands,¹⁶² the reduction of the wild horse population is clearly not the only change that needs to be made to public land management out west. If the government wants to decrease the competition for grazing between ranchers' herds and wild horses, they could designate additional HMAs and put a smaller number of horses on each allotment, so that they can be spread out more evenly. But the relocation of wild horses will only help improve soil conditions to a certain extent. A reduction or redistribution of livestock is also an important factor in the improvement of land use management out west. Without compromise between ranchers and environmentalists, which include wild

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ THE CENTER FOR BIOLOGICAL DIVERSITY, *Grazing*, http://www.biologicaldiversity.org/programs/public_lands/grazing/ [<https://perma.cc/L5LC-HVKK>] (last visited Mar. 21, 2017).

¹⁶² It is estimated that the number of cattle grazing on public lands outweigh the number of wild horses at least 50 to 1. AMERICAN WILD HORSE PRESERVATION, *FAQ*, <http://www.wildhorsepreservation.org/faq> [<https://perma.cc/5KK7-33SK>] (last visited Mar. 21, 2017).

horse advocates, the situation will never improve. There are ways to reduce horse populations, including sterilization, which the BLM already practices, and relocation, in addition to euthanasia (discussed below); however, even if wild horses were removed from the area entirely, the rangeland would still be overtaxed by livestock.¹⁶³ Other wild species, including wolves, are also threatened by the large number of grazing cattle.¹⁶⁴

B. Reconsideration of Horse Euthanasia and the Processing of Horse Meat for Human Consumption in the United States

The inhumane slaughter of American horses is not a new phenomenon, nor is it a problem particular to Mustangs. For example, the horse racing industry has been criticized for decades due to their frequent disposal of retired or injured horses, some of them high stakes winners, in slaughter-houses across the world.¹⁶⁵ The United States also used to be a top exporter of horse meat, and in 2006, one year before *Cavel International, Inc. v. Madigan*,¹⁶⁶ this country was the “fifth largest exporter of edible equine, shipping over 26 million pounds of horse meat and generating \$40 million in sales” from only three slaughter-houses, two in Texas and one, Cavel International, in Illinois.¹⁶⁷ Commercial horse processing essentially came to an end in this country in 2007, when the Fifth Circuit upheld a Texas statute which forbade the slaughter of horses in that state,¹⁶⁸ and the Seventh Circuit followed suit by upholding a similar Illinois statute in *Cavel International*.¹⁶⁹ While horse enthusiasts consider slaughtering horses to be nigh unthinkable, if done humanely, it is no different from any other animal slaughter for human consumption.

¹⁶³ AMERICAN WILD HORSE PRESERVATION, *Grazing Cattle: The New Invasive Species*, <http://www.wildhorsepreservation.org/media/grazing-cattle-new-%E2%80%98invasive-species%E2%80%99> [https://perma.cc/T8YJ-K849] (last visited Mar. 21, 2017).

¹⁶⁴ *Id.*

¹⁶⁵ For example, the 1986 Kentucky Derby winner Ferdinand ended up dying in a Japanese slaughter-house in 2002, and Exceller, who won the 1978 Jockey Club Gold Cup, also died in a slaughter-house in 1997 in Sweden. Bill Finley, *Horse Racing: 1986 Derby Winner Was Slaughtered*, *Magazine Reports*, N.Y. TIMES (June 23, 2003), <http://www.nytimes.com/2003/07/23/sports/horse-racing-1986-derby-winner-was-slaughtered-magazine-reports.html> [https://perma.cc/H9MC-UQ9R].

¹⁶⁶ *Cavel Int'l Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

¹⁶⁷ Bradley J. Sayles, *The Decline of Edible Equine: A Comment on Cavel International Inc. v. Madigan*, 2 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 103 (2010).

¹⁶⁸ *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007).

¹⁶⁹ *See Cavel Int'l*, 500 F.3d at 553.

Humane societies in the United States have tried to petition the government to prevent horses from being shipped to Mexico for such purposes; however, this would not prevent buyers from Mexico from purchasing the horses in the United States and taking them across the border themselves.¹⁷⁰ According to the American Veterinary Medical Association, between 2006–2007, the number of horses from the United States exported to Mexico to be slaughtered increased by 312%.¹⁷¹

Since 2008, there has been a resurgence of interest in domestic horse slaughter by companies in states where the practice is not illegal; however, in 2014, President Obama, along with Congress, stymied these entrepreneurial efforts by “forbidding the U.S. Department of Agriculture from spending an estimated \$5 million a year to conduct slaughterhouse inspections required to process and sell horse meat in the United States.”¹⁷² This was actually a reinstatement of a similar ban on funding for USDA inspections of potential horse meat processing slaughterhouses, which was lifted in 2011.¹⁷³ Additionally, animal rights activists, such as the Humane Society, continue to lobby with Congress for further restriction on the BLM’s use of euthanasia among wild horse populations.¹⁷⁴ The Humane Society classifies horses as pets, as does American society as a whole, which is one reason that commercial horse slaughter tends to be viewed negatively in the U.S.,¹⁷⁵ while it may be acceptable in other countries. The biggest problem with general bans in statutes such as the Texas and Illinois ones, and with Congressional interference in the industry, is that horses which could be humanely euthanized and prepared responsibly for human consumption in the U.S. are instead sent to Mexico or overseas where they are often treated cruelly and where the meat is not always safely prepared.¹⁷⁶ Additionally, because horses cannot be sent to slaughter in the U.S., they sometimes die from neglect and starvation because their owners either cannot afford to pay for them or

¹⁷⁰ DE STEIGUER, *supra* note 2, at 202.

¹⁷¹ *Id.* at 201.

¹⁷² Stewart M. Powell, *More Horses being shipped to Mexico, Canada for slaughter*, CT POST (Apr. 5, 2014), <http://www.ctpost.com/local/article/More-horses-being-shipped-to-Mexico-Canada-for-5379495.php> [<https://perma.cc/8FA9-69NM>].

¹⁷³ Susanna Kim, *The Strange World of U.S. Horse Meat Regulation*, ABC NEWS (Feb. 26, 2013), <http://abcnews.go.com/Business/find-horse-meat-us/story?id=18598602> [<https://perma.cc/RU7B-AD4F>].

¹⁷⁴ Caty Enders, *Why you really should (but really can't) eat horsemeat*, THE GUARDIAN (Jan. 9, 2015), <http://www.theguardian.com/environment/2015/jan/09/eating-wild-horse-meat-america> [<https://perma.cc/2A6D-SKMD>].

¹⁷⁵ Kim, *supra* note 173.

¹⁷⁶ Powell, *supra* note 172.

choose not to, instead of through humane euthanasia.¹⁷⁷ If meat processing facilities were allowed to process horse meat, horses would be treated more humanely according to higher standards, there would be fewer horses in serious need of rescue, and this country would benefit more from the commercial aspect of the meat exporting business, as it used to.

Interestingly, it is not illegal to eat horse meat in the United States.¹⁷⁸ The public perception of the consumption of horse meat is, however, very negative in this country. For example, a chef in Philadelphia who recently decided to add horse meat to his restaurant menu received bomb threats and pictures of slaughtered horses from horse advocates once he made public his culinary decision.¹⁷⁹ In addition, all five of his restaurants were visited by FDA inspectors who advised him not to serve horse meat at his restaurant.¹⁸⁰

Horse slaughter is not an easy or pleasant issue to discuss. It is, however, a realistic and practical solution to some of the wild horse population problems in the West, in addition to the problem of neglected, starved, and abused horses generally. Although horses are more akin to pets than, say, cows or sheep, they should also not be viewed in the same way as dogs and cats, as the Humane Society and other horse advocates suggest, for several important reasons. First, the sheer size of a horse makes adoption by the vast majority of people impossible. Horses do not live indoors and require a large amount of space in which to graze and get exercise, whereas dogs and cats require very little space in comparison and can be walked several times a day for the requisite exercise. Secondly, horses are incredibly expensive animals to own. Taking into account boarding fees—if a person does not own his own barn, hay, grain, and vet care, which are only the most basic expenses—owning a horse can already cost in excess of one thousand dollars per month.¹⁸¹ While dogs and cats require food, vet care, and shelter; maintenance expenses for small pets are far lower than those for horses.¹⁸² Finally, owning and caring for a horse requires additional specialized knowledge and skill, in addition

¹⁷⁷ Allison Aubrey, *Congress Blocks Slaughtering Horses for Meat in U.S.*, NPR (Jan. 17, 2014), <http://www.npr.org/sections/thesalt/2014/01/17/263123572/congress-blocks-slaughtering-horses-for-meat-in-u-s> [<https://perma.cc/8H8V-HU8J>].

¹⁷⁸ Sayles, *supra* note 167, at 103.

¹⁷⁹ Enders, *supra* note 174.

¹⁸⁰ *Id.*

¹⁸¹ Nancy S. Loving, DVM, *How Much Does a Horse Cost?*, THE HORSE (Aug 1, 2012), <http://www.thehorse.com/articles/29502/how-much-does-a-horse-cost> [<https://perma.cc/87HY-SHXM>].

¹⁸² Paul Sullivan, *Animal Lovers, Beware of Ownership Costs*, N.Y. TIMES, Nov. 17, 2010, at B5.

to a certain degree of physical fitness and strength, just to handle them. Basic understanding of smaller pets like dogs and cats is far closer to general knowledge than the same for horses, in addition to the fact that a person is dealing with animals that weigh up to one hundred pounds versus animals that weigh over one ton. For these reasons, horses simply cannot be equated with small pets from a practical standpoint.

If the U.S. allowed slaughter-houses to process horse meat, the USDA and FDA could closely regulate the practice to ensure that horses are treated humanely and that the meat is safe for human consumption. Horses that otherwise would be shipped to various parts of the world for inhumane slaughter or starved to death in a field would instead be treated humanely and not forced to suffer. In terms of the Mustang populations specifically, it should be mentioned that these horses, though protected for their historic and cultural value, are not pets. Recently, a proposal came before the Mohave County, Arizona Board of Supervisors to reduce the wild burro population by issuing hunting permits, which was highly contested by animal rights activists and denied by the Board.¹⁸³ While I would not advocate for the reintroduction of hunting practices for dealing with wild horse overpopulation, I would suggest that sending a certain number of excess horses to a slaughter-house would be a similar way of dealing with the problem, without the sometimes harsh methods employed by hunters.¹⁸⁴ Surely sending horses to be euthanized humanely at a slaughter-house cannot be any worse than having them rounded up by helicopters or confined to small pens for months at a time.

C. *Changing Public Perceptions of the Mustang*

Although historically, Mustangs have not been thought of as performance horses, over the last couple of decades their use in the horse world has expanded, albeit in a limited way.¹⁸⁵ For example, Mustangs are touted as being excellent trail horses because of their endurance,

¹⁸³ *Arizona officials look to control burro population*, DESERET MORNING NEWS (Jan. 23, 2016).

¹⁸⁴ Wayne Pacelle, *Breaking News: Obama Administration grounds aerial hunting, other inhumane predator killing practices on refuges in Alaska*, THE HUMANE SOCIETY: A HUMANE NATION (Aug. 3, 2016), <http://blog.humane-society.org/wayne/2016/08/breaking-news-obama-administration-grounds-aerial-hunting-inhumane-predator-killing-practices-refuges-alaska.html>.

¹⁸⁵ Michael Behar, *Mustang Redemption*, MOTHER JONES, Jan.–Feb. 2010, <http://www.motherjones.com/politics/2010/01/dangerous-felons-wild-horses> (last visited Mar. 21, 2017).

sure-footedness, and intelligence.¹⁸⁶ They are also, however, now being used as performance horses in disciplines such as dressage, jumping, and eventing; a trend which, if it continues, could aid adoption efforts; for example, Elisa Wallace, a top U.S. event rider, has trained several Mustangs and rides them in dressage and eventing competitions.¹⁸⁷ Her high-profile rides with her Mustangs in top competitions, such as the Rolex Kentucky Three-Day Event and the Wellington Global Dressage Festival, have attracted a fair amount of attention in the horse world, demonstrating that “the American Mustang is not just for cowboys.”¹⁸⁸ Although she never thought she would become a Mustang advocate, Wallace is pleased that she is helping to change public perception of the breed because when she was told a Mustang could not compete at top level competitions, she knew she had to prove that they could.¹⁸⁹ Another example is Mustang Leadership Partners, a Tennessee company that advocates for and trains Mustangs.¹⁹⁰ They focus on dressage training and “natural horsemanship,” and compete with Mustangs in national dressage competitions.¹⁹¹ Another organization that champions the versatility of Mustangs is the Mustang Heritage Foundation, whose mission “is to increase adoption of wild horses held in the Bureau of Land Management’s off-range short term and long term corrals and pastures” by promoting the breed’s “versatility, trainability, and worth as an equine companion through innovative and exciting gentling programs and competitions.”¹⁹² One of the competitions the Foundation runs is called Extreme Mustang Makeover, an event held in various locations across the country that brings together horse trainers and riders who have taken an unbroken and essentially unhandled Mustang, and trained it for riding in one hundred days.¹⁹³ In line with the organization’s mission, the competition is meant

¹⁸⁶ *Mustang Horse Breed*, THE TRAIL RIDER, <http://trailridermag.com/article/mustang-horse-breed-15386> [<https://perma.cc/R5XS-8AYD>] (last visited Mar. 21, 2017).

¹⁸⁷ Wallace Eventing, <http://wallaceeventing.com/about/> [<https://perma.cc/72BJ-A48E>] (last visited Mar. 21, 2017).

¹⁸⁸ *Id.*

¹⁸⁹ Lindsay Berreth, *Ringside Chat: Elisa Wallace Can’t Get Enough Of Her Mustangs*, CHRONICLE OF THE HORSE (Feb. 2, 2015), <http://www.chronoffhorse.com/article/ringside-chat-elisa-wallace-enough-mustangs> [<https://perma.cc/2XUV-Q4PP>].

¹⁹⁰ *Mission and Vision*, MUSTANG LEADERSHIP PARTNERS, <http://www.mustangleadershippartners.com/> [<https://perma.cc/63N8-35BR>] (last visited Mar. 21, 2017).

¹⁹¹ *Id.*

¹⁹² *Mission, Extreme Mustang Makeover*, MUSTANG HERITAGE FOUND., <http://extrememustangmakeover.com/mission/> [<https://perma.cc/9753-CGNA>] (last visited Mar. 21, 2017).

¹⁹³ *Extreme Mustang Makeover Events*, MUSTANG HERITAGE FOUND., <http://www.mus>

to “showcase the beauty, versatility and trainability of the American Mustangs who roam freely on public lands throughout the west where they are protected by the Bureau of Land Management.”¹⁹⁴ The horses are often put up for adoption at these competitions, another way of spreading the word about the breed’s abilities to the general public.¹⁹⁵

Competitors like Elisa Wallace and organizations like the Mustang Leadership Partners and the Mustang Heritage Foundation are starting to change the public perception of the Mustang breed. This is an important step that may encourage the adoption of more Mustangs. If people are more aware of the apparent versatility of the breed, they may be more likely to adopt them. It is important for horse advocate organizations to emphasize the wide range of equestrian disciplines in which Mustangs can excel in order to promote the breed further and change the public perception of what a modern-day Mustang really is.

CONCLUSION

Wild horses are a beautiful symbol of our pioneering past and should be treasured and protected as such. At the same time, however, their numbers must be curbed in some way in order to maintain the sustainability of public lands out west. Relocation is certainly a possible solution to this problem, if Congress would amend the Act to allow the BLM to populate additional federally owned ranges with the excess horses from current HMAs. This is really only a temporary solution, however, even assuming that Congress could agree to implement a new policy. Also, environmental concerns would not abate, because the rangelands would still be overtaxed due to the number of livestock in addition to an increased horse population. The only way to combat the depletion of minerals in the soil and protect the ecosystem is to reduce the number of animals grazing on the rangelands.

There is no single solution to the overpopulation of wild horses, and the polarization of the issue by ranchers and horse advocates has not helped the problem, but rather perpetuated it through an “all or nothing” mentality. Wild horse populations can be controlled by several safe and effective means which, when used together, can achieve the desired results without relying solely on one method of control. This will take the

tangheritagefoundation.org/emm.php [<https://perma.cc/V8YW-BD6F>] (last visited Mar. 21, 2017).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

economic burden of widespread sterilization off of the BLM and be more cost effective in the long run. The continued implementation of sterilization, a well-structured relocation scheme, the reintroduction of carefully regulated horse euthanasia in the United States, and the continued efforts of horse advocates and professionals toward changing the public perception of the Mustang, are all methods which, when used together, can help curb the overpopulation of wild horses. While neither ranchers nor horse advocates would get exactly what they want, both sides would approve of at least one or two of these policies, and the resulting reduction in wild horse population would help preserve both wild horses and western rangelands, an outcome with which both sides can be satisfied.