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## If All Other Options Fail: The Plight of Wild Horses and the Dubois Case for Horse Slaughtering

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# JOURNAL of LAW REFORM ONLINE

COMMENT

## IF ALL OTHER OPTIONS FAIL: THE PLIGHT OF WILD HORSES AND THE DUBIOUS CASE FOR HORSE SLAUGHTERING

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Brendan Vandor\*

Robert Redford recently joined forces with former presidential candidate Bill Richardson to stop the return of horse slaughtering to the United States. Few among us would bet against that duo in their fight for a cause that appears on its face to be unassailably just. Yet, horse slaughtering is a highly complex issue that boasts its fair share of credible supporters, and the activity is poised for a revival after a six-year ban if Redford, Richardson, and various animal rights groups do not win a recently-brought federal lawsuit. This Comment recommends a multi-pronged approach to solving the problem of wild horse overpopulation—the most commonly-raised justification for horse slaughter—but also supports a highly regulated return of slaughter if the wild horse crisis proves to be unsolvable by less bloody means.

### I. The Problem

For centuries, horses roamed the vast expanses of the American West, as much a symbol of the open frontier as the cowboy. Over the years, however, wars, droughts, and the steady rise of population in the West led to a loss of habitat and grazing areas and drastically reduced the wild horse population.<sup>1</sup> Loss of habitat also pushed wild horses nearer to cattle ranches, rendering them targets for capture or slaughter.<sup>2</sup> In 1971, Congress responded to growing public outrage at horse slaughter by passing the Wild Free-Roaming Horses and Burros Act, legislation

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1. Max Bearak, *Wild Horses and Hard Choices*, N.Y. TIMES (Oct. 11, 2011), <http://green.blogs.nytimes.com/2011/10/11/wild-horses-and-hard-choices/>.

2. See *Cloud's Legacy: The Wild Stallion Returns*, PBS.ORG, <http://www.pbs.org/wnet/nature/episodes/clouds-legacy-the-wild-stallion-returns/wild-horse-roundups-why-are-they-conducted/64/> (last visited Sept. 13, 2013) [hereinafter *Cloud's Legacy*].

replete with language reassuring concerned citizens that wild horses were very much still “living symbols of the historic and pioneer spirit of West.”<sup>3</sup> The 1971 Act accomplished two crucial objectives: it authorized only agents of the Bureau of Land Management (BLM) to gather wild horses on federal public lands, and it made the killing of wild horses a federal crime.<sup>4</sup> Since 1971, the BLM has aggressively pursued a policy of “roundups”—rounding up wild horses and confining them on federal lands—intended to safely and humanely deal with the wild horse problem. Each year, the BLM sets targets for roundups based on research of a given area’s ecological carrying capacity.<sup>5</sup>

However, the BLM’s efforts have impressed few on either side of the policy debate. Cattle ranchers and Indian tribes see wild horses as threats to livestock and resources and are concerned that the BLM is not rounding up enough of the animals. The Navajo and Yakama nations, for example, claim that their exploding horse populations are trampling and overgrazing rangelands, decimating forage resources for cattle, and causing general environmental damage.<sup>6</sup> “Horses are important, but people and their livelihood . . . are important, too,” argued Jeff Eisenberg, executive director for the Public Lands Council, a group that works on public lands issues for ranchers.<sup>7</sup> According to the Navajo Nation, free-roaming horses cost the tribe \$200,000 a year in property damage.<sup>8</sup> Ben Noyes, a wild horse expert with the BLM, explains how horses “muddy up spring water and contaminate it with waste, and when they eat grass they . . .

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3. Bearak, *supra* note 1.

4. See *Cloud’s Legacy*, *supra* note 2.

5. Bearak, *supra* note 1.

6. See Associated Press, *Federal Judge Halts Plans to Start Horse Slaughters*, N.Y. TIMES (Aug. 2, 2013), <http://www.nytimes.com/2013/08/03/business/federal-judge-halts-plans-to-start-horse-slaughters.html>; Associated Press, *Federal Approval Near for Opening of Horse Meat Processing Plant in New Mexico*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/us/horse-meat-processing-plant-approval-near.html>.

7. Jim Robbins, *7 Preserves Envisioned to Manage Wild Horses*, N.Y. TIMES (Oct. 7, 2009), <http://www.nytimes.com/2009/10/08/us/08horses.html>.

8. See Fernanda Santos, *On Fate of Wild Horses, Stars and Indians Spar*, N.Y. TIMES (Aug. 10, 2013), <http://www.nytimes.com/2013/08/11/us/on-fate-of-wild-horses-stars-and-indians-spar.html?hp>; But see Santos, *Navajo Leader Drops His Support for Slaughter of Wild Horses on the Reservation*, N.Y. TIMES (Oct. 7, 2013), <http://www.nytimes.com/2013/10/08/us/navajo-leader-drops-his-support-for-slaughter-of-wild-horses-on-the-reservation.html?src=recg> (explaining that Ben Shelly, the president of the Navajo Nation, has reversed his stance and will order the temporary suspension of the roundups of feral horses on the reservation).

completely uproot it, leaving . . . ranges bare.”<sup>9</sup> Additionally, with no natural predators, horses multiply rapidly.<sup>10</sup> As discussed below, slaughter remains the most frequently used solution to the many ecological problems caused by the exploding wild horse population.

On the other side of the policy debate, animal rights activists contradict the claims of the ranchers and tribes. The Wild Horse and Burro Freedom Alliance points out that wild horses actually have diversified grazing habits and usually only briefly enter cattle-grazing areas for water.<sup>11</sup> Animal rights groups also claim that the BLM’s roundup policy caters to the vested interests of the livestock lobby by rounding up far too many horses and affording cattle more extensive grazing rights on federal lands.<sup>12</sup> Additionally, activists are concerned that the BLM’s method of using helicopters to funnel the horses into holding centers is cruel and inhumane.<sup>13</sup> Indeed, studies show that helicopter-led roundups cause trauma, shatter the herd’s social structure, and cripple the horses with lasting psychological effects.<sup>14</sup>

In addition to the contentious policy debate surrounding the appropriate role of the BLM, recent scientific and academic studies corroborate general sentiment that the BLM is failing at its duties.<sup>15</sup> A report from the National Academy of Sciences stated that the BLM’s current roundup policy is “expensive and unproductive.”<sup>16</sup> The report also states that the BLM does not know how many wild horses there are left in the United States, making the horses’ actual impact on rangelands unclear.<sup>17</sup> It is

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9. Bearak, *supra* note 1.

10. See Dan Frosch, *Report Criticizes U.S. Stewardship of Wild Horses*, N.Y. TIMES (June 6, 2013), <http://www.nytimes.com/2013/06/07/us/report-criticizes-us-stewardship-of-wild-horses.html>.

11. *Cloud’s Legacy*, *supra* note 2.

12. See Bearak, *supra* note 1.

13. See Bearak, *supra* note 1.

14. See Randall Archibold, *Debate Grows Over Roundup of Wild Horses in Nevada*, N.Y. TIMES (Dec. 31, 2009), <http://www.nytimes.com/2010/01/01/us/01horses.html>.

15. See NAT’L RESEARCH COUNCIL, *USING SCIENCE TO IMPROVE THE BLM WILD HORSE AND BURRO PROGRAM: A WAY FORWARD* (2013).

16. Michael Winerip, *The Wild Horses’ Troubled Rescue*, N.Y. TIMES (June 17, 2013), <http://www.nytimes.com/2013/06/17/booming/the-wild-horses-troubled-rescue.html>.

17. See Sean Cockerham, *Science panel: Feds making wild horse situation worse*, MCCLATCHY.COM, <http://www.mcclatchydc.com/2013/06/05/193109/science-panel-feds-making-wild.html#storylink=cpy> (June 5, 2013).

estimated, however, that there are now more wild horses in captivity than in the wild.<sup>18</sup>

Slaughtering is an attractive approach to wild horse overcrowding because it is an easy and relatively cheap solution. It is possible to kill the horses and incinerate their remains, but there are viable economic uses for horsemeat; chief among them is selling it for human consumption. While arranging for the legal adoption of a single horse can run as high as \$1,400, slaughtering a wild horse to be sold for food is of minimal cost and brings a quick profit to ranchers and landowners.<sup>19</sup>

Yet, most Americans feel that eating horsemeat is morally wrong, and a commercial market for horsemeat has never emerged in the United States.<sup>20</sup> The recent furor over Nestle pasta products that were revealed to contain horse DNA is a clear example of our collective aversion to an equine diet.<sup>21</sup> California has gone so far as to proscribe punishment for eating horsemeat under its Criminal Code.<sup>22</sup> As the U.S. Court of Appeals for the Fifth Circuit recently held in upholding a Texas state law banning the sale of horsemeat for human consumption, our nation has never considered horses to be food: “Not once in memory did the cowboy eat his horse.”<sup>23</sup>

Even without a domestic market for horsemeat, the supporters of horse slaughter raise several valid points of why slaughter is the preferable approach to wild horse overcrowding. First, they argue that abuse and neglect of wild horses has actually increased since a ban on slaughter went into effect in 2007. A study by the Government Accountability Office backs up this assertion.<sup>24</sup> Second, supporters argue that slaughtering by private economic

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18. *Id.*

19. See *Cloud's Legacy*, *supra* note 2.

20. See Terry Whiting, *The United States' Prohibition of Horsemeat for Human Consumption: Is This A Good Law?* 48 CAN. VETERINARY J. 11 (2007).

21. Stephen Castle, *Nestlé Removes 2 Products in Horse Meat Scandal*, N.Y. TIMES (Feb. 19, 2013), <http://www.nytimes.com/2013/02/20/world/europe/nestle-pulls-2-products-in-horse-meat-scandal.html>.

22. See Whiting, *supra* note 20.

23. *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 328 (5th Cir. 2007).

24. Associated Press, *Federal Approval Near for Opening of Horse Meat Processing Plant in New Mexico*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/us/horse-meat-processing-plant-approval-near.html>.

actors is much more efficient than having the BLM effectively store thousands of horses on public lands on the taxpayer's dollar. Third, slaughtering horses and exporting the meat would bring in profit from dozens of countries in Europe and Asia that have active markets for the product. Finally, the case for slaughter considers horses' wellbeing: many veterinarians believe that clean, systematic slaughtering is more humane than the haphazard shooting and starving of wild horses who roam too close to cattle ranches.<sup>25</sup>

The state of slaughtering in this country is currently in flux. The last horse slaughterhouses in the country closed in 2007 when funding for federal inspectors was cut from the federal budget.<sup>26</sup> However, in 2011, special interest groups representing the meat processing industry successfully lobbied to insert the funding for inspectors into the budget. The Valley Meat Company of Roswell, New Mexico, formerly a cattle slaughter plant, made national news when it converted its facilities into a horse slaughterhouse and announced plans to open for business on August 5, 2013. Several prominent groups support Valley Meat, including the Navajo Nation.<sup>27</sup>

However, animal rights activists sued Valley Meat before it could open the plant. The activists, led by Redford, Richardson and the Humane Society, among others, also sued the USDA. In the lawsuit, they asked for an immediate injunction under the National Environmental Protection Act for the USDA's failure to conduct the necessary environmental review before granting permission for the opening of the slaughter plant<sup>28</sup> (under law, the plant cannot open for business until it passes a set of federal inspections).<sup>29</sup> In August, the judge in the lawsuit gave the activists a temporary victory when he issued a restraining order halting inspections of the plant for thirty days.<sup>30</sup>

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25. Laura Jane Durfee, *Anti-Horse Slaughter Legislation: Bad for Horses, Bad for Society*, 84 IND. L.J. 353, 357 (2009).

26. See Santos, *supra* note 8.

27. *Id.*

28. Cheryl Hanna, *Robert Redford's foundation joins federal lawsuit to block horse slaughter*, EXAMINER.COM (July 23, 2013), <http://www.examiner.com/article/robert-redford-s-foundation-joins-federal-lawsuit-to-block-horse-slaughter>.

29. Federal Meat Inspection Act of 1906, 21 U.S.C. § 603 (2005).

30. Hanna, *supra* note 28.

The Obama Administration has also made its voice heard on the issue, urging Congress to reinstate the effective ban, which lapsed in 2011, on the production of horsemeat. Congress has responded: both the House and Senate appropriations committees have voted to halt all funding for horse slaughter in Fiscal Year 2014.<sup>31</sup> This came on the heels of several unsuccessful bipartisan efforts in past years to pass bills to ban horse slaughtering.<sup>32</sup> Washington's official response will be clearer once the judge in the Valley Meat case makes her final ruling, which is expected by the end of October.<sup>33</sup>

## II. Reform

There are several possible solutions to the complex issue of wild horse overpopulation that, if pursued concurrently, may point policymakers in the right direction. First, it is crucial to devise a way to accurately count how many wild horses exist. The cost of determining this figure might be high now, but resources will be saved in the long run if the BLM can base its roundup projections on an accurate number of horses. Second, the government should buy back range permits from cattle ranchers to increase space for wild horses to roam. In this weak economic climate, many ranchers would happily sell their land for fair market value.<sup>34</sup> Additionally, the government should allot more space for horse preserves on already-existing federal land, but only if Congress publishes guidelines to ensure that the BLM conducts closer and safer monitoring of the horses.

Other, more novel ideas deserve serious consideration. A proposal to enable individuals with large tracts of land to open horse "ecosanctuaries" is promising.<sup>35</sup> Under this plan, the government would pay to help set up the ecosanctuary and transport wild horses there. Then, private parties would run the

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31. Press Release, The Humane Soc'y of the U.S., *Lawsuit Filed to Block Horse Slaughter* (July 2, 2013), [http://www.humanesociety.org/news/press\\_releases/2013/07/lawsuit-filed-to-block-horse-slaughter-070213.html](http://www.humanesociety.org/news/press_releases/2013/07/lawsuit-filed-to-block-horse-slaughter-070213.html).

32. See Whiting, *supra* note 20, at 1161.

33. See Santos, *supra* note 8.

34. See N.Y. Times Editorial Board, *Wild Horses*, N.Y. TIMES (Nov. 19, 2008), <http://www.nytimes.com/2008/11/20/opinion/20thu4.html>.

35. See Kirk Johnson, *'Ecosanctuary' Plans for Wild Horses Add Tourism to the Mix*, N.Y. TIMES (Mar. 4, 2012), <http://www.nytimes.com/2012/03/15/us/ecosanctuary-plans-for-wild-horses-add-tourism-to-the-mix.html?pagewanted=all>.

ecosanctuary like a business in an attempt to attract tourists.<sup>36</sup> If the model catches on, perhaps a new industry will be born. The government should also partner with wealthy horse lovers like Madeleine Pickens, the wife of oilman T. Boone Pickens, who has been vocal about her plans to create a one-million-acre refuge for wild horses (who would be sterilized upon arrival).<sup>37</sup> Another potential program with seemingly few drawbacks is to bring limited numbers of wild horses to prisons and allow prisoners, under the supervision of horse trainers, to ready the horses for adoption; this would benefit both prisoners and adoptive owners, not to mention the horses themselves.<sup>38</sup>

The most promising of all solutions is the use of contraceptives. The drug with the most immediate potential is PZP, an immunocontraceptive that creates antibodies that prevent sperm from attaching to eggs.<sup>39</sup> Recommended by the National Academy of Sciences, PZP is more tolerable to horses than other hormonal or chemical drugs, and it can be injected through the relatively benign use of a dart.<sup>40</sup> While critics worry that controlling wild horse reproduction in this way could change the horses' behavior,<sup>41</sup> cause out-of-season births,<sup>42</sup> and generally make the animals less "wild,"<sup>43</sup> the benefits outweigh the drawbacks at this time of crisis. PZP has repeatedly shown its effectiveness on a variety of animal populations, from elk to kangaroos. It has been used on deer that crowd urban areas and in one city was responsible for reducing the deer population by sixty percent over a nine-year period.<sup>44</sup>

BLM official policy rejects PZP because the drug wears off after two years, and injecting horses that frequently would be difficult on the open range.<sup>45</sup> However, the BLM's posture on this issue is close-minded. A reasonably attainable path to successful

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36. *See id.*

37. *See* N.Y. Times Editorial Board, *supra* note 34.

38. *See* Craig Harris, *Inmates Train Wild Horses*, ARIZONA REPUBLIC (July 20, 2013), [http://www.lcsun-news.com/ci\\_23699052/inmates-train-wild-horses](http://www.lcsun-news.com/ci_23699052/inmates-train-wild-horses).

39. *See* Jim Robbins, *As Wild Horses Breed, a Voice for Contraception*, N.Y. TIMES (April 20, 2009), <http://www.nytimes.com/2009/04/21/science/21horse.html>.

40. *See id.*

41. *Id.*

42. *Id.*

43. Johnson, *supra* note 35.

44. Robbins, *supra* note 39.

45. *See id.*



population control can be achieved through better monitoring of the horse population by the BLM combined with more funding for scientific research to develop a version of PZP that lasts longer. The efficacy of this solution (e.g., monitoring coupled with PZP implementation) will be augmented if the BLM also pursues partnerships with rich horse lovers to create more space for the horses to thrive.

Policymakers can avoid slaughter altogether if parties on both sides of the debate adopt an attitude of compromise. Each group must be willing to give up some ground. Cattle ranchers and Indian tribes who see wild horses as menaces need to soften their stance and recognize that no matter the circumstances, these animals are a permanent part of the Western landscape. Likewise, animal rights activists must relax their stringent opposition to BLM handling and holding practices. While the agency can certainly improve its practices, it is still essential that it continue to play an active role in rounding up and managing wild horses. The dated frontier ideal of wild horses free to roam where they please is no longer a tenable option, and animal rights activists would do well to realize this.

### III. If All Else Fails...

We must nevertheless consider the “nuclear” option of slaughter. If the aforementioned multi-pronged proposal fails, a highly managed and regulated reintroduction of slaughter is appropriate. There is popular support for the reintroduction of slaughter within certain pockets of the country: in the six years since the slaughter ban went into effect, thirteen states have passed pro-slaughter bills.<sup>46</sup> Therefore, one option is for Congress to empower these states by delegating authority to allow them to create their own slaughter laws, while at the same time keeping in place certain crucial federal environmental and health and safety regulations.

A return of slaughter must also be accompanied by a comprehensive ban on the practice of transporting horses to other countries for eventual slaughter. An estimated 100,000 horses a

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46. See Jennifer O'Brien & Randall Szabo, *2009 Legislative Review*, 16 *ANIMAL L.* 371, 388-95 (2010).

year are shipped in dangerous traveling conditions<sup>47</sup> to Canada and Mexico for this purpose.<sup>48</sup> This ban would also aid the economy. Instead of cheaply selling horsemeat to those countries,<sup>49</sup> both governmental and private actors would be able to reap previously unrealized benefits. As Hugue Dufour, a chef in New York, pointed out, “It’s slightly hypocritical to allow these horses to be slaughtered anyway up in Canada or Mexico and not allow people here to get the income or serve the meat.”<sup>50</sup>

The hope, however, is that it never has to come to this. Pursuing a multifaceted, cooperative strategy of curbing wild horse overpopulation, thereby eliminating the need for slaughter, can lead to positive outcomes for all sides (save, of course, the meat lobby). The wild horse, an enduring symbol of the independent American spirit, can still be saved.

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47. See Jane Smiley, *Why Horse Slaughter Is Necessary*, N.Y. TIMES (May 1, 2009), <http://therail.blogs.nytimes.com/2009/05/01/why-horse-slaughter-is-necessary/>.

48. See Katie Zezima, *Surge in Abandoned Horses Renews Debate Over Slaughterhouse*, N.Y. TIMES (Apr. 6, 2009), <http://www.nytimes.com/2009/04/07/us/07horses.html>.

49. See A.G. Sulzberger, *Slaughter of Horses Goes On, Just Not in U.S.*, N.Y. TIMES (Oct. 23, 2011), <http://www.nytimes.com/2011/10/24/us/Horse-Slaughter-Stopped-in-United-States-Moves-Across-Borders.html?pagewanted=all>.

50. *Id.*