

**A. The Ochoco Forest's Interpretation of the Act Is Improper**

District Ranger Slater Turner has threatened to prosecute individuals under 16 U.S.C. § 1338 for providing hay to horses facing starvation in the winter. These threats can be attested to and confirmed by Gayle Hunt<sup>2</sup> and other members of the Central Oregon Wild Horse Coalition. The Ochoco Forest's interpretation of the Act to allow such criminal prosecution has no basis in the law. Under the Act, a person may only be criminally prosecuted for "maliciously caus[ing] the death or harassment of any wild free-roaming horse . . . ." 16 U.S.C. § 1338(a)(3). Importantly, "the Wild Free-Roaming Horses and Burros Act only prohibits the harassment of wild horses when it is done '*maliciously*. . ..'" *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986) (quoting 16 U.S.C. § 1338(a)(3) (1982) (emphasis added)).

Under your strained interpretation, a camper who feeds a wild horse an apple, not understanding the harm it may cause, "shall be subject to a fine of not more than \$2,000, or imprisonment for not more than one year, or both." 16 U.S.C. § 1338(a). That is because your interpretation overlooks the statutory requirement that the individual act with malice. Malicious harassment means:

any intentional act *demonstrating deliberate disregard for the well-being of wild free-roaming horses* and burros and which creates a likelihood of injury or is detrimental to normal behavior pattern of wild free-roaming horses or burros including feeding, watering, resting, and breeding. Such acts include, but are not limited to, unauthorized chasing, pursuing, herding, roping, or attempting to gather wild free-roaming horses or burros. It does not apply to activities conducted by or on behalf of the Forest Service or the Bureau of Land Management in implementation or performance of duties and responsibilities under the Act.

36 C.F.R. § 222.60 (emphasis added). Feeding a wild horse on the brink of death cannot possibly demonstrate "deliberate disregard for the well-being" of the horse. To the contrary, feeding under these circumstances goes to improving the well-being of wild horses. *See* 36 C.F.R. § 222.60 ("Humane treatment means kind and merciful treatment, without causing unnecessary stress or suffering to the animal."). Thus, your interpretation of the Act defies common sense.

Providing supplemental feed to wild horses on the brink of starvation is not unlawful under 16 U.S.C. § 1338. Indeed, the Ochoco Forest's own inaction will inevitably result in wild horses not receiving the food they need and therefore constitute inhumane treatment under the Act.

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<sup>2</sup> Ms. Hunt is the President and Founder of the Central Oregon Wild Horse Coalition which was established as a non-profit organization in 2002.

*Inhumane treatment means* causing physical stress to an animal through any harmful action or omission that is not compatible with standard animal husbandry practices; causing or *allowing an animal to suffer from a lack of necessary food*, water, or shelter; using any equipment, apparatus, or technique during transportation, domestication, or handling that causes undue injury to an animal; or failing to treat or care for a sick or injured animal.

36 C.F.R. § 222.60 (emphasis added).

While we understand that in most situations individuals should not feed wild horses, there are exceptions to this guideline, such as when the feeding is being coordinated by a coalition or group of individuals with experience in the supplemental feeding of wild horses. As demonstrated herein, we strongly believe that a trier of fact would determine that the threat of criminal prosecution of individuals offering supplemental feed to starving wild horses is wholly improper and contrary to law, particularly if it does not occur in urbanized areas and is performed in a way that avoids direct interaction with the wild horses. Because your threat of criminal prosecution will deter individuals from feeding starving horses thereby causing the horses to suffer and die, it is completely at odds with the Act's purpose to prevent the inhumane treatment of wild burros and horses.

**B. The Act Has Never Been Used To Criminally Prosecute Individuals Under These Circumstances And For Good Reason**

We are not aware of the prosecution of an individual under similar circumstances. In fact, 16 U.S.C. § 1338(a) has been applied to punish indisputably cruel acts, such as shooting a wild horse or selling wild horses to a slaughterhouse. *See United States v. Binks*, 23 F. App'x 912 (10th Cir. 2001) (convicting defendant for shooting a wild horse, causing the horse to suffer and ultimately its death); *United States v. Christiansen*, 504 F. Supp. 364 (D. Nev. 1980) (denying motion to dismiss indictment charging the defendant with willfully removing wild horses from public lands and maliciously causing the death of one wild horse). The following three court decisions highlight the application of Section 1338 to true criminal behavior:

(1) *United States v. Johnson*, 685 F.2d 337 (9th Cir. 1982). The defendant was convicted under 16 U.S.C. § 1338(a)(1) for removing six wild horses from public land and later selling those horses, where an orphan colt was among the horses and its mother was found dead from being dragged by the defendant's truck. *Id.* at 338.

(2) *United States v. Tomlinson*, 574 F. Supp. 1531 (D. Wyo. 1983). The defendant was indicted under 16 U.S.C. § 1338(a)(3) for malicious harassment of wild horses because he removed the wild horses from federal lands and sold them to a slaughterhouse. The court recognized that "[t]he conduct alleged goes to the heart of the evil which the Burros Act was