UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CLOUD FOUNDATION, INC., et al.,

Plaintiffs

v. **Civil Action No. 09-1651 (EGS)**

KEN SALAZAR, in his capacity as Secretary, United States Department of Interior, et al.,

Defendants

MEMORANDUM IN REPLY TO BLM'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I. Introduction

Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims that BLM's actions are illegal and arbitrary and capricious under the Wild Free Roaming Horses and Burros Act (WFHBA), 16 U.S.C. § 1331 et seq. and NEPA, 42 U.S.C. §4321 et seq. and should be set aside under the Administrative Procedure Act, 5 U.S.C. §706. Moreover, the Declaration of Jim Sparks dated August 31, 2009, purportedly in response to the Court's question regarding the urgency which prevented BLM from agreeing to hold off this round up for longer than two days, assists plaintiffs in demonstrating that they are likely to succeed on their claims.

In response to the initial statement of counsel that BLM's urgency was driven by a concern for a mid-September snow-fall, the Court and plaintiffs Court now learn that the urgency is driven by a whole host of factors having absolutely ***nothing*** to do with concerns for the horses or their range. Instead, the declaration demonstrates that what is driving this roundup, among other factors, is 1) a need to allow three hunters the "opportunity of a lifetime" to each hunt a bighorn sheep[1]; 2) concern for the ability of the contractor and trucks hauling caught horses to navigate the area in case of rain[2] or snow [3]; 3) desire to make available the 70 horses for a national adoption day. Mr. Sparks seems not to consider that there are over 30,000 wild horses held by BLM in captivity that could be offered for adoption, Verified Complaint at §39, without needing to additionally displace the Pryor wild horses from their homes.[4] Mr. Sparks' declaration greatly assists plaintiffs in demonstrating that what is at the heart of this supposedly urgent need to complete the roundup now, within 10 days, are not factors Congress charged the agency with considering under the WFHBA. This declaration also speaks volumes about the agency's rationale, moreso than the 29 paragraph litigation affidavit submitted in support of BLM's opposition memorandum.

[1] BLM implies that these hunters will be granted access to the public lands, as opposed to the general wild horse viewing interested public, to whom the entire range has been closed.
[2] The weather forecast for the area does not mention rain, much less snow, in the 80 plus degree for the next 10 days.
[3] In light of the weather forecast, it is unlikely to snow.
[4] The commenting public overwhelmingly favored maintaining the horses on the range, rather than removing them so they could be candidates for adoption. This is more indicative of where the public interest lies than in BLM's interpretation that the public would rather take these free-roaming splendid animals into captivity.

Under clear principles of judicial review under the APA, when an agency

> relies on factors Congress did not specify it to consider, that agency action may be set aside. An administrative action must be vacated where the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Thus, because Mr. Sparks' August 31st declaration demonstrates that reliance on factors Congress did not intend the agency to consider, plaintiffs have demonstrated that their claims under the WFHBA are likely to be successful.

Plaintiffs agree that applicants for injunctive relief must demonstrate each of the four injunction factors. Defendants' Opposition (Def. Opp.) at 3. Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims on additional grounds, even without the aid of Mr. Sparks' declaration.

As will be reviewed below, under well established principles of judicial review, when an agency fails to consider important aspects of a problem. that agency action may be set aside. Here, for example, one would be hard pressed to think of a clearer example of arbitrariness than where BLM continues to rely on a drought that ended three years ago, and the 2004 NRCS study which relied on the two worst years of the drought, as the basis for needing to remove wild horses now to protect the range.

II. PLAINTIFFS HAVE DEMONSTRATED THAT THEY ARE LIKELY TO SUCCEED ON THEIR WFHBA AND NEPA CLAIMS

A. PLAINTIFFS' WFHBA CLAIMS

1. BLM's Determination that Wild Horses Have Damaged the Range

BLM has not established a "rational connection between the facts found and the choice made" in order to adequately oppose this TRO. Indeed, they have not even met the most fundamental requirement of this standard: that ANY facts were found. The basis for removing "nearly all wild horses present within the Range and adjacent lands" is allegedly degradation of the range. As set forth in the moving papers, all parties agree that it is impossible to determine which animals are eating which particular forage. Not one shred of evidence has been presented that the alleged range degradation is caused by the legally protected wild horses. Following the BLM's logic, they should also be removing mule Deer and Big Horn sheep to the same extent as the proposed removal of nearly all the wild horses.

Defendants seek to convince the Court that their agency determinations of range degradation are entitled to deference as "highly technical" findings and that they are based on "expertise." Def. Opp. at 8. However, Plaintiffs have presented more than adequate grounds for this Court to find that the determination of "excess" made in this case is not based on "expertise" at all. Not only have plaintiffs demonstrated that, with respect to this very range, BLM's past accusations of wild horse damage to range conditions, turned out, after independent examination, to be baseless. See Exhibit A to the Kathrens' Declaration at 259 ("damage to range had been done 50 to 100 years earlier and appeared to be the work of domestic sheep. The horses had neither caused

this condition, nor were they greatly aggravating it.") In addition, experts reviewing BLM's data, including the 2004 NRCS study based on the 2002-2003 drought, have criticized it as being done with outdated techniques. See Exhibit 3 to Plaintiffs' Memo (Comment on this EA by Dr. Judith Von Ahlfeldt, a former U.S. Forest Service ecologist, with a PhD in Plant Ecology from Colorado State University who explained that BLM's methods and techniques in assessing range conditions were "outdated" and that it was arbitrary for the agency to determine that removal of wild horses from an area that is desert will improve conditions in that area) Accord Exhibit 2 (Comment of Jeff Powell, range scientist, explaining that abundance of wildflowers was not indicative of overgrazing by wild horses but a product of a 200% increase in precipitation in 2009 in the area). Added to these past and current assessments, is the comprehensive 1990 Government Accounting Office Report, Rangeland Management, Improvements Needed in Federal Wild Horse Program, Exhibit 5, which was submitted to BLM during the comment period. ("GAO found that despite Congressional direction, BLM's decisions on how many wild horses to remove from federal rangelands have not been based on direct evidence that existing wild horse populations exceed what the range can support.")

Plaintiffs understand that this Court's function is not to determine which range techniques are the best. But neither is the Court's function to – as BLM would have it – accept BLM's determination because it is BLM's determination. Instead, reviewing courts should be mindful of the possibility that what is operating is really not agency expertise. Cf. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C.Cir.1970)

(A court should intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making.")

BLM argues that Judge Collyer's recent decision in Colorado Wild Horse and Burro Coalition, 2009 WL 2386140 (D.D.C.) is distinguishable because in that case BLM had not made a determination that the horses it planned to remove were "excess." BLM states that since it has determined 70 Pryor wild horses are excess, essentially, "that is the end of the matter." However, where, as here, plaintiffs have demonstrated it is likely that they will ultimately be able to prove that BLM's determination is unfounded, the Court cannot just ratify BLM's removal of horses because it has checked the "excess" box. Congress amended the WFHBA in 1978 to allow removals of wild horses based on its determination that there were increases in wild horse populations during the period from 1971 to 1978. Nevertheless, it is the law of this Circuit that the "Secretary's discretion remains "bounded" and that "[h]is orders are subject to review and may be overturned if his action is arbitrary." American Horse Prot. Ass'n, Inc. v. Watt, 694 F.2d 1310, 1319 (D.C. Cir. 1982) Here, plaintiffs have demonstrated that they are likely to succeed in showing that BLM's determination that wild horses need to be removed from the Pryors is unlawful and arbitrary.

2. BLM's Determination that It is Willing to Risk Genetic Harm to the Herd

BLM is required by its own regulations to ensure that wild horse populations are "self-sustaining." 43 C.F.R. §4700.0-6(a) ("Wild horses and burros shall be managed as self-sustaining populations of healthy animals.") BLM has adhered to this concern historically and the Brooks letter, Plaintiffs' Exhibit 7 demonstrates this concern.

Furthermore, the studies cited in the Verified Complaint, the letters from Dr. Cothran, BLM's expert on genetic viability of wild horse populations (who repeatedly had to warn BLM of the risks associated with maintaining too small of a population) were all before the agency at the time it made its decision. BLM has made an about-face from concern about the ability of the herd to sustain itself to take the bold and intrusive step of conducting the largest removal of these horses in the history of the range. And it has not explained why it no longer has the concerns it used to have in doing so.. For this reason, plaintiffs are likely to succeed on the merits of their WFHBA claim regarding genetic viability.

While the BLM acknowledges that the herd is currently genetically very healthy with substantial diversity of DNA material, they also acknowledge that the removal of most of the wild horses would require substantial management by the BLM to monitor the herd's continued genetic viability. First, this substantial management is in direct contravention of the Wild Horse and Burro Protection Act, which mandates "minimal management efforts". Second, the proposed substantial management completely ignores the nature of wild horse bands among the herd. Family units function in a particular way which has ensured their genetic viability for millions of years. To "manage" them by causing more stallion competition (page 11) and more frequent exchange of mares (page 11), the BLM is no only imposing it's own scientific experiment on herd breeding, but also will likely result in the very problem of insufficient diverse genetic material.

Lastly, the opposing papers suggest that the BLM will "maintain" the horses that they propose to gather so that they can be reintroduced if necessary. Certainly one must consider that the BLM currently "manages" over 33,000 wild horses from other gathers.

The best management of this herd is presented by the BLM's opposition papers at page 12: allow nature to regulate the herd's population. If insufficient forage or water is available, some horses will die. "Fighting among stallions would increase" thereby keeping the number of breeding stallions in check. Then a list of potential outcomes is given, including the possibility that the body condition would deteriorate and foals and mares would suffer most when resources are limited. It seems as though nature has a management plan that is significantly more efficient than the BLM's.

B. PLAINTIFFS' NEPA CLAIMS

Plaintiffs incorporate by reference the arguments set forth in their principal brief regarding the likelihood that they will succeed on their NEPA claims. BLM's narrow purpose and need caused it to discard any alternatives but the Proposed Action and the No Action. Plaintiffs contend that it is entirely appropriate for the Court to consider that under the substantive statute governing BLM's actions in managing wild horses, BLM is required to ensure its management activities are at "the minimal feasible level" and that BLM's failure to assess any alternatives that were less invasive than removal of wild horses subjects the decision to reversal or a remand to either prepare an EIS or a more fully considered EA.

III. PLAINTIFFS AND THE WILD HORSES WILL BE IRREPARABLY HARMED BY BLM'S PLANNED ACTIONS

The Declaration of Ginger Kathrens adequately explains how plaintiffs, the wild horses removed and the wild horses left on the range will be irreparably harmed. Tellingly, BLM is unable to explain whether and how removal of the wild horses from

the range will benefit them. Instead, all BLM is able to state is that removal will benefit the horses on the range. It is clear that BLM did not undertake to analyze this effect *at all* not only under NEPA but under the WFHBA. As plaintiffs explained in their Memorandum, it is as if the horses to be removed do not exist.

Finally, the opposing papers suggest that "social stress would increase." If this court balances nothing else, it is strongly urged that they consider which would cause more social stress to the horses: being driven by heliocopters, atvs, men on horseback, into traps where they are then forced into submission to load into a trailer to never be with their family band members again or to have stress because there is a potential that forage will be scarce at times in specific, desert-like portions of the range.

IV. THE BALANCING OF THE EQUITIES FAVORS PLAINTIFFS

BLM contends that its financial outlays demonstrate that the equities balance in its favor. BLM seems to lose sight of the fact that the PMWHR is a range "created primarily but not necessarily exclusively" for the wild horses there. 16 U.S.C. §1332. BLM's historical practice of allowing the wild horses to be at "60 horses over AML" for a decade, as explained in Plaintiffs' opening brief demonstrates that BLM will not be harmed at all by waiting until this Court can resolve these issues on summary judgment.

V. THE PUBLIC INTEREST FAVORS AN INJUNCTION

During the conference call between the parties and the Court yesterday, the Court inquired as to the status of the pending bill to amend the WFHBA. As the undersigned explained, that bill has passed the House. Congressional interest in resolving BLM's administration of the WFHBA is high. On August 28, 2009, one of the Congressional sponsors of the bill wrote to BLM to express his concern not only for the Pryor herd but

all the other wild horses BLM is removing at an alarming rate. That letter is attached hereto as Exhibit 1. The public interest dictates that the Pryor horses be left on the range at least until this Court can resolve the issues presented on summary judgment.

The public opposition to BLM's planned highly intrusive, arbitrary and callous actions has been overwhelming. The public also has an interest in ensuring that when Congress passes a law aimed at protecting a national treasure, the courts will step in when the agency charged with protecting that national treasure threatens it with harm.

For the foregoing reasons, a Temporary Restraining Order should issue.

DATED: September 1, 2009

Respectfully submitted,

/s/ Valerie J. Stanley
Valerie J. Stanley, Esquire
D.C. Bar No. 384882
329 Prince George Street
Laurel, MD 20707
(301) 549-3126

Of Counsel:

Mara C. Hurwitt, Esquire
D.C. Bar No. 482409
6248 Windham Hill Run
Alexandria, VA 22315
Phone: (703) 922-9226