11-2-93

Judge Royce C. Lamberth

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL BLAKE, et al, Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al. Defendants.	Civil Action Case No. 93-0726RCL

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Federal Defendants Bruce Babbitt, Secretary of the Interior, and Jim Baca, Director of the Bureau of Land Management [BLM] hereby oppose plaintiffs' motion for a preliminary injunction. The BLM's actions and policies with respect to wild horse removals are in accordance with the Wild and Free-Roaming Horses and Burros Act [Wild Horse Act], 16 U.S.C. §§ 1331 et seq (1980). and the Administrative Procedure Act [APA], 5 U.S.C. § 706 (1980). Also, the Bureau of Land Management of the United States Department of the Interior's regulation, 43 C.F.R. 4770.3(c), allowing an authorized officer to place in full force and effect a decision to remove wild horses or burros as of the date specified regardless of appeal, is fully consistent with the

Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (as amended 1978) and the Administrative Procedure Act, 5 U.S.C. § 553. This regulation was promulgated on July 6, 1992.

Plaintiffs filed this action on April 8, 1993. Pursuant to an order of this Court, both plaintiffs and defendants filed cross-motions for summary judgment on the merits of this case, on July 26, 1993. Plaintiffs have now filed a motion for immediate injunctive relief, to enjoin the further implementation of 43 C.F.R. § 4770.3(c), the "full force and effect" regulation relating to wild horse round-ups. Since this matter has been fully briefed on the merits, a decision should be forthcoming from this court.

Emergency injunctive relief is not appropriate in this case. Plaintiffs waited for nearly a year to challenge the merits of the full force and effect regulation. Also, rather than seek immediate emergency relief for their alleged irreparable harms, they filed a motion for summary judgment. Now, six and a half months after their original filing, plaintiffs request emergency relief. These actions and delays indicate that emergency relief is not warranted and any alleged harms cannot be that severe or plaintiffs would have acted long ago to seek emergency relief. Federal defendants should not be forced to defend the validity of a regulation, which has been effective for over a year, and also the validity of actions undertaken pursuant to this regulation in the context of a motion for a preliminary injunction.

The only issue that this court must resolve in ruling on plaintiffs' preliminary injunction motion, regarding irreparable harm, is whether plaintiffs will be irreparably harmed in the interval of time before this court reaches a decision on the merits of the pending cross-motions for summary judgment. Plaintiffs are unable to document the harms that they allege and federal defendants have offered proof of the harm that will result if plaintiffs' requested injunction is granted.

For the reasons discussed below, plaintiffs are unlikely to succeed on the merits of their claim. Plaintiffs have failed to demonstrate how they will be irreparably injured in the absence of the injunctive relief they seek. Moreover, the public interest is not served by allowing plaintiffs to force the government to defend agency action, which was judicially reviewable over a year ago, in the context of a request for emergency relief. Accordingly, the court should deny the plaintiffs' motion for a preliminary injunction.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Wild Horse Act, 16 U.S.C. §§ 1331-1340, enacted in 1971, "extended federal protection to wild horses and empowered BLM to manage horses roaming public ranges as a part of the Agency's management of the public lands." American Horse Protection Ass'n v. Watt, 694 F.2d 1310, 1311 (D.D.C. 1982). In time, Congress recognized the need to revise the Wild Horse Act to deal with the overpopulation of wild horses and burros that had resulted since

the passage of the 1971 legislation. H.R. Rep. No. 95-1122, 95th Cong., 2d Sess. 23 (1978).

Consequently, Congress amended Section 3 of the Wild Horse Act, 16 U.S.C. § 1333 through the Public Rangelands Improvement Act of 1978 [Rangeland Act], Pub.L. 95-514, 92 Stat. 1803, 43 U.S.C. §1901 et seq.. The purpose of the Rangeland Act was to provide the Secretary of the Interior with a firm and unequivocal mandate to improve the overall conditions and productivity of the American public rangeland. Section 4(b) of the Rangeland Act, 43 U.S.C. § 1903(b), states that:

> The Secretary shall manage the public rangelands. . . . [T]he goal of such management shall be to improve the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives listed in sections 2(a) and (b)(2) of this Act.

To achieve this goal, Congress expressly noted that changes in the current laws governing the management of wild horses and burros were necessary.

> "In the case of wild horses and burros in the Western States, Congress acted in 1971 to curb abuses which posed a threat to their survival. The situation now appears to have reversed, an action is needed to prevent a successful program from exceeding its goals and causing animal habitat destruction."

H.R. Rep. No. 95-1122, 95th Cong., 2d Sess. 23 (1978), quoted in American Horse Protection Ass'n v. Watt, 694 F.2d 1311.

The Rangeland Act states that:

> The Act of December 15, 1971 [85 Stat. 649, 16 U.S.C. § 1331, et seq.] continues to be successful in its goal of protecting wild free-roaming horses and burros from capture, branding, harassment, and death, but that certain amendments are necessary thereto to avoid

> excessive costs in the administration of the Act, and to facilitate the humane adoption or disposal of excess wild free-roaming horses and burros which because they exceed the carrying capacity of the range, pose a threat to their own habitat, fish, wildlife, recreation, water and soil conservation, domestic livestock grazing, and other rangeland values. (Emphasis added.)

43 U.S.C. § 1901(a)(6)

Consequently, §3(b) of the Wild Horse Act was amended by §7 of the Rangeland Act, 16 U.S.C. § 1333(b), to enlarge the Secretary's discretion to remove excess wild horses from public lands:

> Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to section 202 of the Federal Land Policy and Management Act of 1976; (iii) information contained in a court ordered environmental impact statement as defined in section 2 of the Public Lands Improvement Act of 1978; and (iv) such additional information as becomes available to him from time to time, including the information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above, on the basis of all information currently available to him, that an over-population exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation. 16 U.S.C. § 1333(b)(2). (Emphasis added.)

This section goes on to mandate that: first, old, sick or lame animals be humanely destroyed (16 U.S.C. § 1333(b)(2)(A)); second, animals for which an adoption demand exists be captured and removed for private maintenance and care (16 U.S.C. § 1333(b)(2)(B)); and third, additional excess animals be destroyed

in the most humane and cost efficient manner possible. (16 U.S.C. § 1333(b)(2)(C)).

As noted in American Horse Protection Ass'n v. Watt, 694 F.2d at 1316, the 1978 amendments served to strike a new balance between "protecting wild horses and competing interests in the resources of the public ranges." The thrust of the 1978 legislation was to lessen the protection afforded to wild horses and to clarify the importance of management of the public range for multiple uses, rather than emphasizing wild horse needs. Id. One goal was that of "deal[ing] with range deterioration in areas where excess numbers of wild-free roaming horses and burros exist." H.R. Rep. No. 1122, 95th Cong., 2nd Sess. 9 (1978). The Wild Horse Act had been so successful in providing protection to these animals, the Report stated, that "their numbers now exceed the carrying capacity of the range. Excess numbers of horses and burros pose a threat to wildlife, livestock, the improvement of range conditions, and ultimately their own survival." H.R. Rep. No. 1122, supra at 21.

Because of the risk to the wild horses and burros and their imperiled habitat, Congress directed that BLM act expeditiously to remove excess horses. American Horse Protection Ass'n v. Watt, 694 F.2d 1316-17, and fn. 34 (citing H.R. Rep. No. 95-1122, 95th Cong., 2d Sess. 23 (1978) and 124 Cong. Rec. 19,501, 19503-04, 19507). Individual congressmen indicated that the situation was grave. Id. Most significantly, the Wild Horse Act was

amended to require "immediate" removal of excess horses. 16 U.S.C. § 1333(b)(2).

To accomplish the dual objectives of improved range management and continued protection for wild horses and burros, Congress set forth in detail the guidelines the Secretary must review prior to making a decision that a given range is overpopulated. Although §3(b)(2) does specify certain sources of information which must be considered when available, 16 U.S.C. § 1333(b)(2)(i)-(iv), it also provides that "in the absence of the information contained in (i-iv) [such decision shall be made] on the basis of all information currently available to [the Secretary]." American Horse Protection Ass'n v. Watt, 694 F.2d 1317-19. Section 3(b) does not require the consideration of specific alternatives such as restricted livestock grazing. Id. The mandate of the section requires, quite simply, that the Secretary exercise his discretion on the basis of all information available to him at the point in time at which he is compelled to make his decision. Id.

There is no question that under the Rangeland Act the Secretary need not have perfect knowledge before he may act. See State of Alaska v. Andrus, 580 F.2d 465, 472-74 (D.C. Cir. 1978). Under the Rangeland Act the Secretary has been given specific instructions to act, even without complete information, when he determines that there is an over-population of wild horses. 16 U.S.C. § 1333(b)(2); American Horse Protection Ass'n v. Watt, 694 F.2d 1317-19. Adjustments are to be made later. The endangered

and rapidly deteriorating range cannot wait. American Horse Protection Ass'n v. Watt, 694 F.2d 1317-19.

The legislative history of the Rangeland Act makes it clear that Congress requires the Secretary to manage wild horses as one aspect of the ecological balance of the endangered public range, no different from livestock or wildlife, as follows:

> The goal of wild horse and burro management, as with all range management programs, should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros. [H.R. Rep. No. 1737, 95th Cong. 2d Sess., 15 (1978).]

As noted in BLM documents supporting the need for revised regulations governing wild horse and burro removal decisions, delays of up to two years, due to appeals of removal decisions filed with the Interior Board of Land Appeals, severely handicapped the Secretary's ability to comply with the Wild Horse Act requirements that: a "thriving natural ecological balance on the public lands" be maintained (16 U.S.C. § 1333(a)); and that the Secretary "immediately remove excess animals from the range so as to achieve appropriate management levels (16 U.S.C. §1333(b)(2)) (emphasis added).

> The provisions of 43 CFR 4770.3 allow any person who is adversely affected by a decision of the Authorized Officer to file an appeal. Under the current regulations contained in 43 CFR 4.21, decisions of the Authorized Officer are, with some exceptions, stayed pending resolution of appeals to the Interior Board of Land Appeals (IBLA). Because the regulations in 43 CFR 4700 do not provide an exception, an appeal may delay implementation of wild horse and burro removal decisions for up to 2 years pending the IBLA ruling.

> Several appeals of decisions to reduce the population to the appropriate management level were filed in Nevada during Fiscal Year (FY) 1988. The major issue in the appeals was the adequacy of the procedures used by the Bureau of Land Management (BLM) to establish appropriate management levels. The IBLA ruled in FY 1989 that current and timely data must be used to determine whether and how many animals are excess and therefore must be removed from a herd area. Since that ruling, directives have been issued to all offices that current resource data must be used to support removal decisions. More recent IBLA rulings indicate that the data now being used by the BLM to support removal decisions are adequate.
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> Some of these rulings, however, have come almost 2 years after the appeals were filed. Based upon past experience, the IBLA normally requires about 1 year to decide an appeal. Additional delays can be experienced depending on the timing of the decisions since removals are suspended immediately before and during the peak foaling period to protect the health of pregnant horses and newly born foals. This policy, combined with adverse weather conditions in winter, often limits the capture operations to a period of 5 to 7 months annually.
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> For these reasons, removal actions under appeal have been delayed from 1 to 2 years. These delays allow populations to expand at an annual rate of 15 to 25 percent. The population growth, in turn, exacerbates existing unsatisfactory resource and habitat conditions and increases the cost of reducing the population and placing excess animals in private care when removal decisions are eventually upheld.
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> On several occasions since passage of the Wild Free-Roaming Horse and Burro Act, herds have been endangered by the lack of forage or water caused by drought or other emergency, such as fire or deep snow. To prevent further stress or death, the BLM removed the animals. If an appeal is filed, the present regulations provide no means for removing excess animals when there is an immediate danger to the herd's health and welfare.

BLM, Determination of Effects of Rules, March 1991, at 1-2 [Exhibit B].

In order to comply with the Wild Horse Act mandate that excess wild horses and burros be removed immediately, 16 U.S.C. §

1333(b)(2), the agency charged with implementing the Wild Horse Act, the Bureau of Land Management [BLM], published a proposed revision to 43 C.F.R. § 4770.3(c), on July 2, 1991. 56 Fed. Reg. 30372 [Exhibit A]. Following the notice and comment period, the final rule was promulgated on June 6, 1992. 57 Fed. Reg. 29651 [Exhibit A]. This regulation was issued pursuant to the authority of the Wild Horse Act, which authorizes the Secretary to "issue such regulations as he deems necessary for the furtherance of the purposes of this chapter." 16 U.S.C. § 1336.

The revised 43 C.F.R. § 4770.3(c) provides that:

> (c) The authorized officer may place in full force and effect decisions to remove wild horses and burros from public or private lands if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. Appeals and petitions for stay of decisions shall be filed with the Interior Board of Land Appeals as specified in this part. 43 C.F.R. § 4770.3(c).

The purpose of the revised regulation is to allow an "authorized officer to place in full force and effect decisions to remove animals, while still maintaining the public's right to appeal the decision after it has been implemented." BLM, Determination of Effects, March 1991 [Exhibit B].

B. Issue Presented

Plaintiffs allege that conduct of BLM in carrying out wild horse removals under 43 C.F.R. § 4770.3(c) violates the Wild Horse Act and should be enjoined.

C. Standard of Judicial Review

1. Standards for granting preliminary relief.

In this Circuit, the factors considered in determining whether to grant a preliminary injunction are (1) the likelihood of plaintiffs' success on the merits; (2) the possibility that the plaintiffs will suffer irreparable injury if relief is denied; (3) the extent to which the balance of hardships favors the respective parties; and (4) whether the public interest will be advanced by preliminary relief. National Association of Farmworkers Organizations v. Marshall, 628 F.2d 604, 613 (D.C. Cir. 1980); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

III. ARGUMENT

A. Plaintiffs Are Not Entitled To A Preliminary Injunction

Plaintiffs are not entitled to a preliminary injunction because they cannot show a likelihood of success on the merits, that they will be irreparably injured if an injunction is not granted, that the balance of hardships weighs in their favor, or that the public interest would be served by granting the injunction.

B. Plaintiffs Will Not Suffer Immediate, Irreparable Injury if Injunctive Relief is Not Granted

In their motion, plaintiffs request a total suspension of the full force and effect decisionmaking power. Plaintiffs' Memorandum at p. 1-2. The types of harm, however, that they

actually allege are two-fold. First, that there is not sufficient time between the issuance of the final capture and removal decision and BLM's placement of the decision in full force and effect for immediate implementation. Second, they allege various harms associated with actual removals. With respect to the latter, as discussed in detail below, their claims are based on erroneous facts, are overly broad and generalized, and are not tied to any particular removal action. Plaintiffs offer no evidence to suggest that they will suffer any harm as a result of full force and effect decisions per se, rather, the harm alleged stems from the lack of notice and opportunity to challenge such a decision prior to its implementation. Because federal defendants contest the allegations of harm caused by removals, it follows that no harm results from lack of time to challenge particular removal activities and there is no basis for issuing an injunction. Nevertheless, if the court were to agree with plaintiffs concerns, the alleged harm could be cured by providing sufficient notice to allow plaintiffs to challenge particular roundups.

Though there may be a few wild horse roundups conducted prior to this court's decision on the merits of the validity of 43 C.F.R. 4770.3, the plaintiffs will not suffer irreparable harm because the Wild and Free-Roaming Horses and Burros Act is intended to protect the continued viability of the wild horse

population as a whole, not individual animals.[1] Since the passage of the Wild and Free-Roaming Horses and Burros Act, the population of wild horses and burros has increased nearly five fold. Declaration of Bruce Dawson, at para. 8. Research studies indicate that the genetic diversity of wild horses and burro is highly varied and unaffected by the two decades of management under the Wild and Free-Roaming Horses and Burros Act. Id.

Plaintiffs challenge the accuracy of BLM's census of wild horse population and assert that, because of BLM's overestimate, too many horses may be targeted for removal. Plaintiffs Memo at p. 6, 35, 37-38. Plaintiffs cannot substantiate the population estimates that they offer to rebut BLM's census. They failed to follow the standard guidelines and techniques prescribed by BLM, used improper equipment and inaccurate maps of the herd areas. See declaration of Bruce Dawson, at para. 7. Furthermore, plaintiffs have no experience or training in conducting census of wild horses, which are often difficult to locate in rough terrain. Id. As set forth on Bruce Dawson's declaration, plaintiffs' population estimates severely understate the number

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[1] Plaintiffs' only support for this proposition is a cite to the preamble of the Wild and Free Roaming Horses and Burros Act, 16 U.S.C. 1331. The preamble to the statute, which is entitled "Congressional findings and declaration of policy," does not have the force of binding law and is not mirrored elsewhere in the language of the statute itself. The full quote reads:

> It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands. 16 U.S.C. 1331 (emphasis added).

of wild horses in the herd management areas.[2] Id. In their search for forage, wild horses will stray out of their designated herd management areas onto private or public lands that are outside of BLM's management powers. Id. BLM has a non-discretionary duty to remove these horses because there is no authorization to allow horses to remain outside herd management areas. Id.

The IBLA has not invalidated a BLM wild horse removal decision since 1990. However, as discussed below, in the unlikely event that a removal decision is invalidated, the remedy would be to limit future capture plans in the same area or to move some horses from another area to replenish the herd. Plaintiffs have made no credible arguments that the harm they have alleged would not be adequately remedied in this way.

Plaintiffs' memorandum in support of their motion for a preliminary injunction, at 21-23, makes much of the supposed bias in favor of grazing, to the detriment of wild horses. In support of this contention, they cite 43 C.F.R. 4160.3(3), the regulation governing appeals of decisions on grazing plans. This regulation simply provides that, if appealed, the grazing plan decision is stayed and the permittee is allowed to graze under the plan approved for the previous year. The new decision may be placed

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[2] For example, plaintiffs counted 45 animals in the Paymaster/Lone Mountain herd management area in September of 1992. In October of 1992, BLM gathered 396 animals from the same herd management area, 304 animals were removed and 92 were left within the herd management area. Declaration of Bruce Dawson, at para. 11.

in full force and effect by the authorized officer in an emergency to stop resource deterioration. This policy in no way supports plaintiffs' contention that BLM has created a bias in favor of removing horses, rather than limiting grazing. See declaration of Bruce Dawson, at para. 9 & 10. Also, the number of livestock allowed on the allotments must remain static, the horse population has been allowed to increase nearly five fold since the passage of the Wild and Free-Roaming Horses and Burros Act. Id. It should be noted that many appeals are filed by the permittees themselves, who desire more extensive grazing rights.

Further, when an authorized officer of BLM determines that the range resources need protection, he may make a final decision, pursuant to 43 C.F.R. 4110.3-3(c) and place it in full force and effect, pursuant to 4160.3(c), to remove all or a portion of the livestock from the allotment or to modify authorized grazing use. Id. Plaintiffs cannot complain of a bias against horses, BLM regulations provide that all livestock can be removed in an emergency by a full force and effect decision, by contrast, horses are only removed when there has been a determination that the population exceeds the appropriate management level or the horses are suffering from starvation. Id.

With respect to plaintiffs' allegations that horses are killed and stressed by unnecessary roundups, as set forth in the subsequent section, roundups are only conducted when the herd population exceeds the appropriate management level set for a

particular herd management area. Declaration of Bruce Dawson, at paragraphs 4 & 5. Also, horse mortality caused during or after a capture and removal procedure is extremely low. Less than one percent of the horses gathered and prepared for adoption are injured or die. See declaration of Bruce Dawson, at para. 13. Immediately after the roundup, the horses receive veterinary care and are properly housed until ready to be sent to an adoption facility. Id. at para. 12.[3] All of the horses removed from the range receive adoptive homes. Id. at para. 11. In fact after an adoption session concludes, BLM often receives requests from many people, who were unable to adopt a horse because the lack of animals in the adoption program. Id. After adoptions are concluded, BLM also conducts inspection and monitoring of adopted horses to ensure that the animals are being properly cared for. Id. at para. 12.

If BLM is unable to conduct removal actions, the excess wild horses will be left on the range, with the result that a large number of them may die of starvation during the winter. Id. at para. 5. Last year BLM was forced to conduct emergency removals in two areas because horses were starving to death. Id. The younger wild horses are the first to perish, and these are the

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[3] As noted in the declaration, four horses did die at an adoption in New Jersey earlier this year. A total of eight animal have perished at adoptions in the past two years. In that same time period, however, over 6,000 animals were removed from the range and successfully adopted. Thus, less than one-tenth of one percent of the animals perished and 99.9 percent were transported and adopted without incident. Declaration of Bruce Dawson, at para. 9.

animals that BLM removes for adoption. Id. The older animals are returned to the herd management area. Id.

Thus, plaintiffs have failed to support their allegation that irreparable harm will occur between now and the time when this court rules on the merits of the summary judgment motions.

c. The Balance of Hardships Weighs Against an Injunction and the Public Interest Favors Denial of the Injunction

Plaintiffs should have the burden to challenge each individual decision and to allege with particularity the specific harms that may result from the decision and why that decision should be declared invalid. Without BLM's ability to implement capture and removal decisions through full force and effect, the delays engendered and the inability of BLM to act will jeopardize the wild horse and burro management program. See attached declaration of Bruce Dawson, at paras. 4 & 5.

Wild horses were introduced into North American by humans and have not evolved to exist in total harmony with native wildlife and terrain. Id. at para. 5. These horses will not naturally control their reproduction rate and their population soon exceeds the carrying capacity of the range. Id. Each winter a lack of adequate forage leads to the death of many horses. Id. If BLM is unable to conduct removal actions, wild horses will be left on the range, with the result that a large number of them will die of starvation during the winter. Id. at paras. 4 & 5. Last year BLM was forced to conduct emergency removals in two areas because horses were starving to death. Id.

at para. 5. The wild horses under six years of age are the first to perish, and these are the animals that BLM removes for adoption. Id. at paras. 11 & 4. The older horses are returned to the herd management area. Id. Timely capture and removal operations would prevent this from happening.

Significantly, not only horses perish during harsh winters, but many native species of wildlife as well. Id. at paras. 4 & 5. Horses, being large and aggressive animals, have a competitive advantage over the other game and non-game species of wildlife. Id. Thus, horses are capable of surviving under conditions fatal to the other wildlife species, which are the first to perish. Id. Humans must intercede to remove horses and allow the native wildlife to have adequate forage to survive the winter.

As set forth in Bruce Dawson's declaration, at paragraph 5, the decision to conduct a wild horse or burro capture and removal operation is the result of a long and complex decision-making process. The Wild and Free-Roaming Horses and Burros Act limits the areas that wild horses may occupy to specific herd management areas. As part of a lengthy monitoring and consultation process, BLM issues multiple-use decisions setting forth the population size that the area can support. See declaration of Bruce Dawson, at para. 5. Public notice and comment procedures are followed in the issuance of the multiple-use decisions. Id.

When the wild horse census indicates that the population exceeds the management level set forth in the multiple-use

decision, a draft capture and removal plan is issued for public comment. Id. The final capture and removal plan is then issued full force and effect by an authorized BLM officer, pursuant to 43 C.F.R. § 4770.3. Id.

Wild horses are only removed when BLM has substantiated that there is an overpopulation and that the excess horses are causing or will cause damage to the environment. Id. at para. 4 & 5. When removal operations are delayed or halted entirely, environmental damage increases in the form of range deterioration, erosion of riparian areas, and losses to native wildlife species. Id. at para. 5. If an appeal is filed of a decision that has not been place in full force and effect, the removal is automatically stayed. Id. at para. 4. The IBLA may take more than a year to decide the merits of the appeal, and the actual removal may be delayed for an additional year or two until the plan can be reissued. Id. Often, there is only a limited window of opportunity when a removal can take place. Id. If that time is missed, the removal cannot take place until the next year. Id. Each year of delay means that more horses will be born, additional harm to the environment accrues, and the taxpayers must spend eight hundred dollars, for every additional horse that must be removed. Id.

Thus, if plaintiffs' motion for a preliminary injunction is granted, defendants will suffer irreparable harm and the implementation of the wild horse and burro management program will be severely hindered. Because plaintiffs have failed to

support their allegations of irreparable harm, defendants have offered evidence to demonstrate that the injunction will subject them to irreparable harm, and this matter will soon be resolved on the merits of the pending summary judgment motions, the public interest favors the denial of plaintiffs' requested injunctive relief.

D. Plaintiffs Are Not Likely to Succeed on the Merits

1. Standard for Review of Wild Horse Act Claims

a. Review of Agency Action

Under the Administrative Procedure Act, the standard for judicial review of agency action is whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) (1980). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1220 (D.C. Cir. 1983).

Under the arbitrary and capricious standard, administrative action is upheld if the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Baltimore Gas & Electric v. N.R.D.C., 462 U.S. 87, 105 (1983). The agency's decision need not be ideal, so long as it is not arbitrary and capricious, and

so long as the agency gave at least minimal consideration to relevant facts contained in the record. State of Louisiana, Ex. Rel. Guste v. Verity, 853 F.2d 322, 327 (5th Cir. 1988). The Court has discharged its responsibility by ascertaining whether the agency's choices were reasonable and supported by the record. Lead Industries Association v. EPA, 647 F.2d 1130, 1160 (D.C. Cir. 1980).

Specifically, plaintiffs must show that the government was "arbitrary and capricious." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989). This is an especially deferential standard when reviewing an agency's construction of a statutory scheme that it is required to administer. Chevron U.S.A., Inc. v. Natural Resources Defence Council, 467 U.S. 837, 842, 843 (1984).

Finally, when an agency acts within its own area of expertise, the reviewing court "must generally be at its most deferential." Baltimore Gas & Electric Co. v. N.R.D.C., 462 U.S. 87, 103 (1983). It is well established "that an agency's construction of its own regulations is entitled to substantial deference." Lyng v. Payne, 476 U.S. 926, 939 (1986), quoted in Martin v. Occupational Safety and Health Review Commission et al., 499 U.S. 144, 113 L Ed 2d 117 (1991). Because applying an agency's regulation to changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, courts presume that the power authoritatively to interpret its own regulation is a component of the agency's delegated lawmaking

powers. Martin 113 L.Ed. at 128. An agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, the court might find the contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

b. Review of the Validity of Agency Regulations

Where the agency's construction of a statute is at issue, the court's analysis is guided by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In Chevron, the Supreme Court reviewed the Environmental Protection Agency's interpretation of a statutory term. The Court outlined the tests for reviewing an agency's construction of a statute which it administers:

> First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. 842-43.

In determining whether Congress has so spoken, we must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole," K-Mart v. Cartier, Inc., 486 U.S. 281, 291 (1988), and "we must employ the traditional tools of statutory construction, including, where appropriate, legislative history." Chemical Manufacturers Ass'n v. United States Environmental Protection Agency, 919 F.2d. 158, 162 (D.C. Cir. 1990), citing Ohio v. United States Department of the Interior, 880 F.2d 432, 441 (D.C. Cir. 1989).

Where a statute is silent or ambiguous on a particular issue, courts should defer to administrative interpretations:

> [I]f the statute is silent or ambiguous, with respect to the particular issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.... "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

Chevron, 467 U.S. at 843. A court may not substitute its own construction of a statutory provision if the agency's interpretation is "reasonable." Id. at 844. The Court held that an agency's interpretation of an ambiguous provision should only be overturned if it is contrary to the purposes of the act in question. Chevron, 467 U.S. 843; Continental Air Lines v. Department of Transportation, 843 F.2d 1444, 1452-53 (D.C. Cir. 1988). See California v. Watt, 668 F. 2d 1290, 1317 (D.C.Cir. 1981) (Watt I) (Secretarial discretion in establishing five year oil and gas program through balancing of developmental benefits and environmental and social costs "broad, as a result [in part] of the nature of the task Secretary is asked to perform...").

2. Plaintiffs Have Failed to Prove a Violation of Wild Horse Act or APA

The Wild Horse Act is broad and discretionary, it instructs the Secretary to manage wild horses and burros in a manner that assures a "thriving ecological balance" on public lands. 16 U.S.C. § 1333(a). American Horse Protection Ass'n v. Watt, 694 F.2d at 1316. In pursuit of this goal, the Secretary is directed

to "immediately remove excess animals from the range" to restore the ecological balance and to protect the range from deterioration caused by overpopulation. 16 U.S.C. § 1333(b)(2)

Plaintiffs allege that 43 C.F.R. § 4770.3(c) will result in mismanagement of wild horses due to removal decisions made by BLM officials "more subject to local prejudice than the Secretary of the Interior." Complaint at 10. The Secretary naturally cannot personally oversee every element of every statute that he has the authority to enforce and must delegate responsibility to the agencies charged with the administration of the affected subject matter. See American Horse Protection Ass'n v. Watt, 694 F.2d 1316-18 (discussing how BLM is to implement the 1978 amendment to the Wild Horse Act and the criteria upon which BLM may rest its determination that an overpopulation of wild horses exists in a specific area and the means that may be used to control the horse populations). Plaintiffs claim that the Secretary alone can authorize a wild horse gathering, yet they cite to the definition of "Secretary" at 16 U.S.C. 1332(a) as "Secretary of the Interior when used in connection with public lands **administered by him through the Bureau of Land Management**" (emphasis added). This definition itself states that the BLM is the agent of, and acts for, the Secretary in the administration of public lands. The wild horse program is one of the ways which the Secretary, **through BLM**, administers public lands.

In this case, 43 C.F.R. § 4770.3(c) indicates that a BLM "authorized officer" has the responsibility to make wild horse

removal decisions. As noted in the Supplementary Information accompanying the publication of the final rule in the Federal Register:

> the authority for determining the need for placing a decision in full force and effect should rest with the BLM field official who is accountable for the action and is in the best position to remove excess animals to protect the health of both the removed and remaining animals and to maintain a thriving ecological balance. [57 Fed. Reg. 29651-52 (July 6, 1992) [Exhibit A].]

Additionally, 43 C.F.R. § 4720.1, a regulation dealing with wild horse and burro removal, neither cited nor challenged by plaintiffs, provides that:

> Upon examination of current information and a determination by the authorized officer that an excess of wild horses or burros exists, the authorized officer shall remove the excess animals immediately . . . .

Thus, the authority to make removal decisions had been delegated to BLM officials prior to the promulgation of 43 C.F.R. § 4770.3(c), authorizing full force and effect removal decision.

Further, as indicated in § 4720.1, the removal decision is constrained by the need to examine current information. The Interior Board of Land Appeals, the body charged with hearing and deciding appeals of removal decisions at the administrative level, issued two rulings wherein it set forth the requirements that BLM must satisfy to justify removal decisions. Animal Protection Institute of America, 109 IBLA 112, 115 (1989); Animal Protection Institute of America, 116 IBLA 239, 243 (1990). The requirements outlined in these two rulings have been incorporated in BLM policy and all subsequent BLM decisions have been consistent with this policy. Accordingly, the IBLA has upheld

all of the BLM removal decisions, on which appeals have been filed, since November 1990. These same criteria are applied to all removal decisions regardless of whether or not the decisions are placed in full force and effect.

In addition, BLM issued an Instruction Memorandum No. 92-369 [Exhibit C to Defendants' Motion for Summary Judgment] which set forth the policy on placing removal decisions in full force and effect. The criteria to be considered include the potential for damage to the health of the animals and habitat, the need to comply with other statutes or court orders, and the quality of the data and analysis supporting the planned action. BLM Instruction Memo No. 92-369, at 1-2 [Exhibit C to Defendants' Motion for Summary Judgment]. The authorized officer is instructed to "carefully weigh the need to place a decision to remove animals in full force and effect" and to "document in writing, all considerations and rationale that were used to support the need for placing the decision in full force and effect." Id. at 2. The Instruction Memo further provides that "[t]his documentation will be in addition to the information used to justify removing excess wild horses and burros." Id. The line official at least one level above the authorized officer signing the full force and effect decision must be informed of the decision. Id.

Plaintiffs complain that they have no ability to obtain administrative review prior to the removal of horses. The Wild Horse Act contains no provisions that require that interested

persons be notified of removal decisions. 16 U.S.C. §§ 1331 et seq.. However, BLM policy is to keep a list of all parties that would like to be notified of removal decisions and to notify such persons or organizations.[4] The provisions of 43 C.F.R. § 4770.3 allow any person who is adversely affected by a removal decision to file an appeal.

Prior to the amendment of 43 C.F.R. § 4770.3(c), removal decisions that were appealed were stayed pending the outcome of the appeal before the IBLA. 43 C.F.R. § 4.21(a).[5] As noted previously, under the former rule, up to two years elapsed before a decision on the merits of the appeal and the removal was completed. In the interim, the horse and burro populations expanded and further overburdened the range, leading to increased costs to remove more animals and causing further damage to the range. BLM Determination of Effects, March 1991, Section 4 [Exhibit B to Defendants' Motion for Summary Judgment]. Even if

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[4] Plaintiffs also contend that they have been removed from the mailing list of parties entitled to receive notice of BLM's actions regarding wild horses and burros. That is simply not the case. Some decisions may have been issued before they requested to be placed on the mailing list in October of 1992. Plaintiffs need only request copies of these documents from BLM and they will be promptly provided. Once a party has been placed on the list of interested parties, such party will receive every document issued by BLM on the subject of wild horses. BLM strictly follows this procedure because a failure to send out public notice could result in the decision being overturned by the IBLA and then BLM would be forced to reissue the decision.

[5] 43 C.F.R. 4.21 was amended, effective February 18, 1993, to eliminate the automatic stay provision. Appellants must now file a separate petition for a stay at the time of filing the notice of appeal. The Appeals Board must then rule on whether to grant the stay.

an appeal had been given expedited review, the IBLA usually did not render a decision until six months after the BLM removal decision issued. Thus, another generation of horses or burros could be added before removal took place, increasing the removal costs and causing greater damage to the range. 57 Fed. Reg. 29651, 29652 [Exhibit A to Defendants' Motion for Summary Judgment]. When the public interest required, the decision could be placed in full force and effect immediately by the Director of the Office of Hearings and Appeals or the IBLA, 43 C.F.R. § 4.21(a), but this normally caused a delay of over two months, which also could have resulted in severe and permanent injury to the animals and the habitat. 57 Fed. Reg. 29651 [Exhibit A to Defendants' Motion for Summary Judgment].

Under the new rule, interested persons wishing to appeal a removal decision that is placed in full force and effect may seek a stay of the agency's decision from the IBLA, until the IBLA can make a ruling on the merits of the appeal. 57 Fed. Reg. 29651, 29652 [Exhibit A to Defendants' Motion for Summary Judgment]. Also, a full force and effect decision becomes the final decision of the Secretary and is considered final agency action for the purpose of seeking judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. See 43 C.F.R. § 4.21(c); United States v. Consolidated Mining & Smelting Co., 455 F. 2d 432, 439-40 (9th Cir. 1970); Southern Utah Wilderness Alliance, 123 IBLA

13 (1993).[6] Thus, interested persons may seek an injunction in a

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[6] Plaintiffs argue that a wild horse and burro removal decision that is placed in full force and effect by an authorized officer, pursuant to 43 C.F.R. § 4770.3(c), is not final agency action, subject to judicial review. Plaintiffs' Memorandum of Law in Support of Preliminary Injunction Motion, at 17-18, 28-33. That contention is simply not supportable.

Plaintiffs cite section 4.21(b) of 43 C.F.R, in support of this contention. It reads as follows:

> (b) Exhaustion of administrative remedies. No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section.

The paragraph (a) referred to is section 4.21(a) of 43 C.F.R.. It reads as follows:

> (a) Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. . . . (Emphasis added)

This regulation is a general regulation governing procedure and practice in proceedings before the Office of Hearings and Appeals. As the emphasized language in paragraph (b) indicates, a decision can be considered final reviewable agency action if it is made effective pending appeal pursuant to paragraph (a). 43 C.F.R. § 4.21(b). Further, paragraph (a) expressly indicates that, although decisions will not generally be effective pending appeal, a "law or other pertinent regulation" may provide an alternative mechanism whereby a decision can be placed in full force and effect pending appeal. 43 C.F.R. §4.21(a). Thus, other regulations can override paragraph (a) and provide that a decision be placed in full force and effect by an authorized officer and be considered final agency action subject to judicial review under paragraph (b). 43 C.F.R. § 4.21(a) & (b).

Accordingly, the result of 43 C.F.R. § 4770.3(c) is to place BLM decisions to remove wild horses and burros in full force and

(continued...)

district court.

If the removal is not stayed and the IBLA or the district court ultimately invalidates the removal decision, there are two avenues by which the effects of erroneously removing horses or burros can be mitigated. First, a like number of animals could be removed from another herd area and transplanted to the area from which other horses were previously erroneously removed. And second, the future removal of animals from the area could be delayed to allow the herd to reproduce and to increase until reaching a level consistent with the maintenance of a thriving natural ecological balance. See Animal Protection Institute of America, et al., 118 IBLA 63 (1991). Thus, even if a fully implemented decision is later held invalid, there is a subsequent remedy that can be effectuated. 57 Fed. Reg. 29651, 29652 [Exhibit A to Defendants' Motion for Summary Judgment].

Plaintiffs' memorandum, at page 20, footnote 7, demands that the Secretary engage in "minimum feasible" management activities over wild horses. 16 U.S.C. § 1333(a). Plaintiffs misconstrue

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[6](...continued)
effect and "immediately subject to judicial review without the necessity to exhaust administrative remedies." Southern Utah Wilderness Alliance, 123 IBLA 13, 17 (1993) (copy attached); see Id. at 16-18 & fn.3 ("Where an administrative decision or order is given immediate effect, any party adversely affected thereby has immediate, direct access to the courts, and the Government's affirmative defense of failure to exhaust administrative remedies is waived."); 5 U.S.C. § 704; United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 439-40 (9th Cir. 1970) (appeal to superior agency authority may only be required where the agency has provided, by rule, "that the action meanwhile is inoperative").

the statute. Congress inserted this language, requiring that "[a]ll management activities be at the minimal feasible level," in order to minimize costs, and to prohibit "zoolike" developments, intending that the animals remaining on the range be left to fend for themselves. S. Rep. No. 242, 92nd Cong., 1st. Sess., June 25, 1971, reprinted in [1971] U.S. Code Cong. & Ad. News 2151-52. See also, American Horse Protection Assoc., Inc. v. Frizzell, 403 F. Supp. 1206, 1220-21 (D. Nev. 1976).

Plaintiffs challenge the inventory of wild horses kept by BLM and used in deciding if there is an excess number of wild horses. A reviewing court "may not displace an agency's decision 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Furthermore, a reviewing court may not second guess the way an agency chooses to weigh conflicting evidence presented by a rival party:

> Where the agency presents scientifically respectable evidence which the petitioner can continually dispute with rival, and we will assume, equally respectable evidence, the court must not second-guess the particular way the agency chooses to weigh the conflicting evidence or resolve the dispute.

United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1263 (D.C. Cir. 1981), cert. denied, 453 U.S. 913 (1981); see also Grinspoon v. Drug Enforcement Admin., 828 F.2d 881, 896 (1st Cir. 1987).

The complaint fails to challenge any specific agency action, but rather sets forth the alleged prospective consequences of full force and effect removal decisions that will in the future

be made pursuant to 43 C.F.R. § 4770.3(c). As set forth previously, the statute and BLM guidelines require the consideration of relevant information and the articulation of a rational basis justifying a full force and effect removal decision. Action subject to this scrutiny and analysis could hardly be considered arbitrary and capricious. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989). Where an agency acts, in its area of expertise, on the basis of a consideration of relevant facts and explains the necessity of its actions, a court should not substitute its judgment for that of the agency. Chevron, 467 U.S. 837, 842-43 (1984); Baltimore Gas & Elec. Co. v. N.R.D.C., 462 U.S. 87, 103 (1983); Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983).

b. 43 C.F.R. 4770.3(c) is Consistent with the Wild Horse Act and the APA

Section 553 of the Administrative Procedure Act dictates the proper procedures to be followed in agency rulemaking. 5 U.S.C. § 553. The rulemaking, leading to the promulgation of 43 C.F.R. § 4770.3(c), fully comported with the Administrative Procedure Act. The proposed rule, 56 Fed. Reg. 30373, July 2, 1991, was published in the Federal Register a full year prior to promulgation of the final rule, 57 Fed. Reg. 29651, July 6, 1992 [Exhibit A to Defendants' Motion for Summary Judgment]. The public comments received were responded to in the statement

setting forth the basis and purpose, accompanying the final rule. 57 Fed. Reg. 29651-54 [Exhibit A to Defendants' Motion for Summary Judgment]. Thus, no procedural basis exists to challenge the regulations under 5 U.S.C. § 553.

As, set forth previously, Chevron governs the Court's analysis of the validity of the substance of the regulation. 467 U.S. 837. When Congress speaks directly on an issue, the affected agency and the courts must give effect to Congressional intent. Chevron, 467 U.S. at 843. As noted in the legislative history to the 1978 Amendments to the Wild Horse Act, the statutory changes were necessary to deal expeditiously with the rapidly growing overpopulation of wild horses and burros that had outstripped the carrying capacity of the range and threatened the health of entire ecosystem. H.R. Rep. No. 1122, 95th Cong., 2nd Sess. 9, 21 (1978). Thus, the Wild Horse Act specifically directs the Secretary to "maintain a thriving natural ecological balance on the public lands" and to "immediately remove excess animals" when an overpopulation exists. 16 U.S.C. § 1333(a) & (b)(2). See Kmart v. Cartier, 486 U.S. 281, 291 (1988) (reviewing court must look to language and design of statute as a whole to determine Congressional intent). As discussed in the preceding section, the delay in implementing removal decisions, engendered by the appeals process, greatly impaired his ability to comply with the mandates of the Wild Horse Act. Thus, as the preamble accompanying the proposed rulemaking indicates, the regulation was promulgated specifically to facilitate compliance

with the requirement of the Wild Horse Act that removal of excess wild animals be "immediate." 56 Fed. Reg. 30372, July 2, 1991 [Exhibit A to Defendants' Motion for Summary Judgment].

Accordingly, the statutory language and the legislative history clearly indicate the Congressional intent behind the 1978 Amendments to the Wild Horse Act and the regulation at issue, 43 C.F.R. § 4770.3(c), is in furtherance of and not contrary to that intent and must be upheld on that basis. Chevron, 467 U.S. at 843; Chemical Mfr. Ass'n v. E.P.A., 919 F.3d 158, 162 (D.C. Cir. 1990)

If, however, the Court should decide that the statutory provisions are ambiguous, the Court should defer to the agency and uphold the regulation as a reasonable administrative interpretation of the statute and certainly consistent with the purpose of the statute. Chevron, 467 U.S. at 843; Continental Air Lines v. Department of Transp., 843 F.2d 1444 (D.C. Cir. 1981).

IV. CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

MYLES E. FLINT
Acting Assistant Attorney General
Environmental and Natural Resources Division

JAMES C. KILBOURNE, Attorney
U.S. Department of Justice

J. RAMSEY JOHNSON
Acting United States Attorney

TERI R. THOMSEN, Attorney
United States Department of Justice
Environment and Natural Resources
Division
P.O. Box 7369
Washington, D.C. 20044-7369
Phone (202) 272-8487

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