UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

DEBORAH RUBIN, an individual, and THE HORSE PEOPLE, a California not-for-profit corporation,

Plaintiffs,

v.

KEN SALAZAR, in his capacity as Secretary of the Department of the Interior, and ROBERT ABBEY, in his capacity as the Director of the Bureau of Land Management,

Defendants.

Civil Action No. 09-1968 (SKM)

MEMORANDUM OPINION

INTRODUCTION

Before the Court is Plaintiffs' motion for a preliminary injunction to prevent the Bureau of Land Management ("BLM") from moving forward with a wild horse removal plan. Plaintiffs contend that the removal plan violates both the Wild Free-Roaming Horses and Burros Act ("WFHBA") and the National Environmental Policy Act ("NEPA"). For the reasons discussed below, the Court will DENY Plaintiffs' motion.

FACTUAL BACKGROUND

Plaintiffs are Deborah Rubin and the Horse People. Rubin is president of the Horse People, a California non-profit corporation dedicated to protecting wild animals living on the open range and preventing the extinction of wild horse herds. Plaintiffs' standing to bring this action is well-established and not at issue.

Defendant Ken Salazar is the Secretary of the Interior and is responsible for overseeing the BLM's management of wild horses. Defendant Robert Abbey is the

Director of the BLM and is responsible for implementing management decisions for wild horses in accordance with the WFHBA.

The Rafiki Mountain Wild Horse Range ("RMWHR") is home to one of California's only remaining herds of wild and free-roaming horses. The RMWHR was created by order of the Secretary of the Interior in 1969 in response to public outcry over the BLM's plans to remove wild horses from the Rafiki Mountains and sell them for slaughter. The designation set aside 36,000 acres "to protect this irreplaceable herd of wild horses of Spanish lineage and to protect native wildlife and the local watershed."

In 1992, the BLM determined that the "appropriate management level" ("AML") – the optimal number of horses – for the RMWHR was between 85 and 105 horses. At that time, BLM admits it had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability. In a July 1999 letter, the Field Manager of the BLM's Tatu County Field Office expressed concern for the genetic viability of the Rafiki herd due to "dangerously low numbers" of horses in the range. Today, the Rafiki Mountain herd consists of approximately 190 wild horses.

Since 2004, the BLM has removed a substantial number of wild horses from ten Western states. The BLM's removal projects are ongoing, and it currently keeps more than 30,000 wild horses in short-term and long-term holding facilities. The range suffered from a major drought in recent years, which significantly compromised the herd's food supply security. In response, the BLM determined that 100 of the 190 Rafiki Mountain horses were "excess." In August 2009, the agency devised a plan to round up and remove them from the RMWHR ("the Gather Plan").

The Gather Plan calls for the initial capture of all 190 horses, each of which will then have his or her blood drawn so that the BLM's scientists can determine the horses'

genetic profiles. After conducting these tests, the BLM will, "within a reasonable time," return to the RMWHR ninety horses who have a diverse and healthy range of genetic profiles.[1] According to the BLM, this method will ensure that the healthiest possible herd of horses remains on the range. The ultimate reduction of the herd by 100 horses, however, will result in the most significant decrease in the number of wild horses from this range since before passage of the WFHBA. The horses will be rounded up through the use of Long Range Acoustic Devices ("LRADs"), the Active Denial System ("ADS"), rubber bullets, and helicopter drive-trapping.

As part of the Gather Plan, the BLM drafted and circulated a draft Environmental Assessment, finding that the proposed project would have no significant impact on the natural environment. After thirty days of public comment, including submissions by Plaintiffs, the BLM issued its Decision Record ("DR"), final Environmental Assessment (EA), and Finding of No Significant Impact ("FONSI").

The round-up was scheduled to begin a few days after the issuance of the DR, EA, and FONSI in September 2009, but various budgetary problems later forced the BLM to delay the project until mid-February 2010. Plaintiffs filed this lawsuit immediately after the BLM finalized its plans to round up the horses in September 2009. Plaintiffs argue that the Gather Plan violates the WFHBA and NEPA and is otherwise arbitrary and capricious and therefore violates the Administrative Procedure Act ("APA"). Contemporaneous with the filing of the complaint, Plaintiffs moved for a preliminary injunction to prevent the BLM from implementing the Gather Plan or otherwise removing, selling, adopting, or transferring any horses who are in the RMWHR or who may have been removed from the RMWHR in connection with the challenged

[1] BLM is unable to determine how long it will be between initiation of the Gather Plan and the return of the ninety horses who will ultimately stay on the range.

plan. The parties fully briefed the matter, and the Court held a hearing on the motion.

LEGAL STANDARDS

Neither the WFHBA nor NEPA contains a private right of action or citizen's suit provision. Accordingly, Plaintiffs' claim arises under the APA. The standard of review in an APA case like this one is whether the federal agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C); *Colorado Wild Horse & Burro Coalition, Inc. v. Salazar*, No. 06-1609, --- F. Supp. 2d ----, 2009 WL 2386140, at *2, 2009 U.S. Dist. LEXIS 68301, at *7 (D.D.C. Aug. 5, 2009) (memorandum opinion). This Court cannot second-guess the wisdom of agency actions; rather, it may only determine whether there has been a violation of law or a "clear error in judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43-44 (1983); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216 (D.C. Cir. 1983).

The standard for granting a preliminary injunction is whether the plaintiff has established "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008).

ANALYSIS

I. Likelihood of Success on the Merits

a. Wild Free-Roaming Horses and Burros Act

Congress enacted the WFHBA in 1971 to protect wild horses and burros, which it

deemed "living symbols of the historic and pioneer spirit of the West . . . [who] contribute to the diversity of life forms within the Nation and enrich the lives of the American people." 16 U.S.C. § 1331. Wild horses and burros are "an integral part of the natural system of public lands." *Id*. Congress expressed concern that "these horses and burros are fast disappearing from the American scene." *Id*. Accordingly, the Act protects them "from [unauthorized] capture, branding, harassment, or death." *Id*.

The BLM has exclusive authority under the WFHBA to protect wild horses and burros on the public lands it administers, utilizing "the minimal feasible level" of involvement. 16 U.S.C. § 1333(a).[2] The BLM's mandate is "to protect and manage wild free-roaming horses and burros as components of the public lands" and to ensure their "humane care and treatment." *Id*.; 43 C.F.R. § 4700.0-2. The Secretary of the Interior is authorized to designate a herd of horses' "range," which is "the amount of land necessary to sustain [a herd.]" 16 U.S.C. § 1333(a); *id*. § 1332(c). The range should be "devoted principally but not necessarily exclusively to [the horses'] welfare in keeping with the multiple-use management concept for the public lands." *Id*.

BLM officials are afforded significant discretion to determine their own methods for computing "appropriate management levels" ("AML") for the populations they manage. *See id*. § 1333(b)(1). When wild horse populations exceed the carrying capacity of the range, or when animals begin to live outside of a designated herd area, the BLM is obligated under the Act to remove them. *See* 16 U.S.C. §§ 1331(f), 1333(b)(2); 43 C.F.R. §§ 4710.4 (management of wild horses "shall be undertaken with the objective of limiting the animals' distribution to herd areas"), 4700.0-5.

[2] The WFHBA gives the Secretary of Agriculture authority to implement the Act on lands administered by the United States Forest Service. 16 U.S.C. § 1332(a), (e). The RMWHR, however, is administered exclusively by the Secretary of the Interior through the BLM.

Plaintiffs claim that the BLM's actions violate the WFHBA for a number of reasons. First, Plaintiffs argue that the BLM is "removing" all 190 horses from the range, referring to the preliminary round-up in which the BLM will collect blood samples from all horses to determine which animals to return to the range. Citing Section 1333(b)(2) of the WFHBA and the case of *Colorado Wild Horse & Burro Coalition, Inc. v. Salazar*, Plaintiffs argue that the statute authorizes the Secretary to remove only those horses who are deemed "excess," or in other words, only 100 horses, not 190 horses.

Plaintiffs' argument is unlikely to succeed on the merits, however, because the BLM is not "removing" all 190 horses as the WFHBA uses that term. The fact that ninety horses will be returned to the range after genetic testing means that the BLM is ultimately removing a total of 100 horses. Because the BLM has determined that there are 100 excess horses, the decision to remove 100 horses cannot be considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Second, Plaintiffs challenge the BLM's finding that 100 of the Rafiki Mountain horses are "excess." According to Plaintiffs, this finding is arbitrary and capricious, because it is based on an outdated study and is unsupported by the present condition of the range. Plaintiffs point out that the drought ended three years ago, and Defendants do not dispute that unusually heavy amounts of precipitation have filled the range with significant water stores since 2006, greatly improving vegetation on the range, as well as the stability of the range substrate. In reaching its conclusion that the range was in a deteriorating condition in 2009, the agency relied on a study that was conducted during 2002 and 2003, the worst two years of the entire drought.

Again, Plaintiffs are unlikely to succeed on the merits of this claim. The factual

question of whether 100 horses are "excess" is beyond the expertise of this Court, and the agency deserves deference for scientific conclusions such as this one. As the D.C. Circuit has observed, "BLM's findings of wild horse overpopulations should not be overturned quickly on the ground that they are predicated on insufficient information." *American Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1318 (D.C. Cir. 1982). The BLM's decision was based on valid scientific evidence and a reasoned consideration of the range conditions, as well as the population and distribution of the horse population. The proposed plan aims to provide for a thriving natural ecological balance by reducing range deterioration, improving herd health, and eliminating conflict with other multiple uses.

Third, Plaintiffs argue that the specific round-up methods will expose the horses to unnecessary suffering, inhumane treatment, harassment, and potentially death. They argue that the LRAD, which emits an extremely loud and piercing noise, and the ADS, which emits electromagnetic radiation that induces a temporary searing heat sensation, are experimental weapons that are designed for use in riot control and military combat scenarios. BLM concedes that they have never been used or tested for rounding up horses or for any other form of animal control. Plaintiffs further argue that the use of rubber bullets on horses, while nonlethal, still causes them some pain and potentially extreme fear, and that the use of helicopters to scare them into running in the same direction constitutes psychological harassment and forces the animals to undergo significant stress.

This third challenge includes Plaintiffs' claim that the BLM is also in violation of the WFHBA because of the suffering that horses undergo upon realizing that they have been caught. Wild horses have been known to jump (or attempt to jump) the six-foot

panels of the corrals in which they are held and to throw themselves against the panels out of fear or in a desperate attempt to escape. Some of these horses run headlong into the barriers that restrict their escape, break their necks, and die. Others severely injure themselves in the process or are shot due to their injuries. Still other trapped wild horses suffer from what is called "capture myopathy," in which they become depressed and despondent over the loss of their freedom and separation from their family members. The Field Manager of the RMWHR estimated that up to six horses could die during the capture operation at issue here.

Again, Plaintiffs are unlikely to succeed on the merits of this claim. The use of experimental weapons such as LRADs and the ADS does not necessarily violate humane standards; in fact, one could argue that these methods make more serious, and potentially lethal, weapons unnecessary. The use of rubber bullets and helicopters also do not cause the animals more than momentary distress. We must keep in mind that these are *wild* horses, which simply cannot be herded and captured without *some* degree of discomfort. Plaintiffs' concerns about the horses' reactions to being caught also do not carry much weight. These complaints could apply to every horse captured by the BLM. Certainly Congress did not intend to stop the BLM from *ever* capturing horses. The entire structure of the WFHBA belies such an interpretation. *See, e.g.*, 16 U.S.C. § 1333(b)(2) (requiring the Secretary to "immediately remove excess animals from the range so as to achieve appropriate management levels").

For all of the foregoing reasons, I conclude that Plaintiffs are not likely to succeed on the merits of the claims under the WFHBA.

b. National Environmental Policy Act (NEPA)

Plaintiffs' second cause of action arises under NEPA, arguing that the BLM

violated the law in drafting the EA and FONSI.

NEPA, enacted in 1970, requires federal agencies to prepare an environmental impact statement ("EIS") for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA is aimed at ensuring that agencies apprise themselves of the environmental consequences of their projects and consider a reasonable range of alternatives, including those with fewer adverse environmental impacts than the proposed action. In essence, NEPA serves two purposes: it provides federal agencies with sufficient information to ensure that environmental consequences are considered, and it gives the public the opportunity to participate in the decision-making process.

Agencies embarking on certain actions may begin with an environmental assessment ("EA") to determine whether a full EIS is necessary. 40 C.F.R. § 1501.4(b). The agency's EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If the agency concludes the action is likely to have a significant effect on the environment, it must prepare an EIS. If the EA concludes that no EIS is required, the agency issues a Finding of No Significant Impact ("FONSI"). 40 C.F.R. §§ 1501.4, 1508.13. Although an EA is a "concise, public document," it must include a discussion of the need for, alternatives to, and environmental impacts of the proposed action, as well as a listing of the persons and agencies consulted. 40 C.F.R. § 1508.9(a), (b).

Plaintiffs argue that the BLM violated NEPA by failing to prepare an EIS, because the project will significantly affect the environment. Plaintiffs cite three primary components of the Gather Plan that they contend require the preparation of an EIS rather

than an EA: (1) the removal of 190 horses from the RMWHR; (2) the ultimate reduction in herd size by 100 horses; and (3) the methods used for the round-up.

Plaintiffs' first two concerns, the removal of the horses and the reduction of the herd size, have to do with the ongoing viability and survival of the herd. Plaintiffs argue that the removal of such a large number of horses (even temporarily) is likely to destabilize the population. This argument, however, ignores the fact that the new population will fall squarely in the range deemed appropriate by the BLM's AML. Although the Court has some reservations about the BLM's calculation of the AML, especially given the potentially-stale data it relied upon, I cannot substitute my judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). The BLM determined that the data it collected in 1992, 2002 and 2003 was still relevant, and that expert determination deserves deference.

Plaintiffs' third concern, about the methods used to round up the horses, addresses some acknowledged scientific uncertainty. Plaintiffs argue that the BLM has no idea how its use of LRADs and the ADS will affect the herd. They contend that the loud noises of the LRADs could cause pregnant mares to miscarry and the high heat of the ADS could render stallions sterile. Plaintiffs also argue that these devices could cause the herd stress and unknown psychological problems, which may lead to disruptions in reproductive capabilities. Plaintiffs also strenuously object to shooting the horses with rubber bullets, which they claim are no different than real bullets to the recipient of the shot, in terms of the induction of terror and fear. In combination with the helicopter drive-trapping, and citing the BLM's agreement that wild horses are high-strung and easily excitable animals, Plaintiffs argue that the menu of methods planned for these horses is a great threat to the herd because it will separate family groups and interrupt the

reproductive capacity and number of successful conceptions and live births. Plaintiffs have presented no solid scientific evidence to support these claims. Nor could they: these are experimental weapons that have not been tested on horses before. I do note that the BLM scientists agree that, as a general proposition, stress will reduce the number of live births in any mammalian population.

Accordingly, I find that, as with their WFHBA claims, Plaintiffs are not likely to succeed on the merits of their NEPA claims.

II. Other Preliminary Injunction Factors

Having determined that Plaintiffs are unlikely to succeed on the merits of their claims under the WFHBA and NEPA, I need only determine whether "serious questions going to the merits were raised and the balance of hardships tips sharply in [Plaintiffs'] favor." *Lands Council*, 537 F.3d at 1003 (citations and internal punctuation omitted).

Even assuming that Plaintiffs have raised "serious questions" on the merits, they cannot demonstrate that their purported concerns sharply tip the balance of hardships in their favor. Although there was testimony from the BLM's scientists that there was an "outside chance" that the genetic diversity of the herd could be affected by the gather if a series of other hypothetical events occurred, this is not significant enough to merit an injunction. The Court is sympathetic to Plaintiffs' concern about the well-being of these horses, but Plaintiffs have failed to show that their position is the one most beneficial to the horses. The BLM determined that some of the horses could starve to death if left on the range due to food shortages. The EA details the other risks to the environment posed by an overpopulation of horses, such as overgrazing and soil erosion. It is also significant that the BLM's Gather Plan provides for a scientific assessment that will lead to the healthiest and most vibrant herd of horses being returned to the range. The EA

therefore promises the best of both worlds: the horses best-suited for the range will get to stay there, while the surrounding environment will benefit from the removal of 100 horses who are excess in the agency's informed opinion.

Furthermore, the Court is mindful of the "multiple use" mandate of the BLM with regard to wild horse management; in other words, the public interest demands consideration of the needs of ranchers and farmers, not just horses. *See* 16 U.S.C. § 1332(f) (defining excess animals as those "which must be removed from an area in order to preserve and maintain a . . . multiple-use relationship in that area"); 43 C.F.R. § 4700.0-2 (describing one of the objectives of the WFHBA as "management of wild horses and burros as an integral part of the natural system of the public lands under the principle of multiple use"); *see also* 43 U.S.C. § 1702 (defining "multiple use" under the Federal Land Policy and Management Act to include "the long-term needs of future generations for . . . recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values"). The BLM's interest in preserving the native grasslands and natural environment is strong, as is its obligation to the multiple users of the range and surrounding areas.

The balance of equities and consideration of the overall public interest in this case tips in favor of the BLM. For Plaintiffs, the most serious realistic possible injury would be harm to a relatively small number of the horses. By contrast, forcing the BLM to stand by and let public lands deteriorate (and excess horses starve) jeopardizes far more compelling and complex interests than those of the Plaintiffs.

CONCLUSION

Based on a review of the EA and the FONSI, Plaintiffs have not met their burden and their motion is DENIED.

SO ORDERED.

October 1, 2009

/s/

Judge Sybil K. Mali