IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

STATE OF WYOMING

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management

Respondents.

Case No: 14-CV-0248

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

This matter is before the Court on petition by the State of Wyoming (State) to review "final agency inaction" by Respondents United States Department of the Interior, Secretary Jewell, the United States Bureau of Land Management and Director Kornze (collectively, BLM). The State contends BLM failed to manage wild horses in Wyoming in compliance with the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (WHA). More specifically, the State alleges BLM has a non-discretionary duty to remove excess wild horses and maintain the areas to prevent overpopulation. Alternatively, the State argues that if BLM has no such duty, the Court should order removal because of the alleged adverse impacts of wild horses on the range (including

State lands and crucial big game ranges), as well as the impacts on local sage grouse habitats and populations.

BLM and Intervenors[1] seeks dismissal of the State's petition, characterizing it as "legally infirm" and arguing there is no discrete agency action that BLM is required to take under the WHA. Further, even if there were some discrete action required by BLM, the State's over-reaching request is barred by the Administrative Procedure Act as it is a broad programmatic challenge to the wild horse program over which BLM retains significant discretion. The State responds arguing its petition narrowly focuses on Congress's specific requirement that BLM remove excess horses from overpopulated herd management areas and the appropriate relief would be simply for the Court to require removal.[2]

For the reasons that follow, the Court agrees with BLM and Intervenors. At this time there is no discrete action required by BLM and the management of wild horses on

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[1] The Court granted Motions to Intervene by American Wild Horse Preservation Campaign, the Cloud Foundation, Return to Freedom, Carol Walk, Kimerlee Curyl, Friends of Animals, and Protect Mustangs. Doc. 17; Doc. 18. These organizations and individuals entered the case to protect their professional, economic, aesthetic, recreational, educational, conservation and other interests in preserving wild horses on Wyoming public lands and the habitat that supports these wild horses. Doc. 6-1, p. 2; Doc. 9, p. 2.

[2] This argument and others are also advanced by the Wyoming Stock Growers Association by amicus curiae brief filed on April 6, 2015. Doc. 37.

federal land throughout Wyoming is properly left to the sound discretion of BLM without judicial entanglement.

BACKGROUND

The WHA recognizes that "wild free-roaming horses and burros . . . belong to no one individual. They belong to all the American people." S.Rep.No. 242, 92d Cong., 1st Sess. 1 (1971). "In structure and purpose, [the Wild Horses Act] is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife." *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986). Reflecting this, the Wild Horses Act directs the Secretary of the Interior, through the BLM, to provide for the protection and management of these animals.[3] As such, it is "reasonably related to the promotion of the public interest." *Id.* at 1430. On federal lands, the management design is one "to achieve and maintain a thriving nature ecological balance on the public lands." 16 U.S.C. § 1333(a).

Within a few years of the enactment of the WHA, excess numbers of horses began to pose a threat to habitat conditions, leading to amendments in 1978 which afforded the Secretary with more authority and discretion to manage wild horses consistent with

[3]"The principal goal of [the Wild Horses Act] is to provide for the protection of the animals from man. . . ." S.Rep.No. 242, 92nd Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2149, 2151. Further, the protection of the wild horses and burros on public lands was upheld as a proper exercise of Congressional power under the Property Clause in *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

public land management principles of multiple use and sustained yield. 43 U.S.C. § 1732(a). In general, BLM manages wild horses within Herd Management Areas (HMAs) which are designated in Resource Management Plans (RMPs) prepared through a comprehensive land-use planning process, conducted pursuant to the Federal Land Policy and Management Act, 43 U.LS.C. §§ 1701-1787, and in compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA). For each HMA, BLM determines the Appropriate Management Level (AML) that the HMA can sustain without resulting in rangeland damage. BLM is required to maintain a current inventory of wild horses, the purpose of which is to determine "whether and where an overpopulation exists and whether action should be taken to remove excess animals." 16 U.S.C. § 1333(b)(1).

In each HMA, BLM is afforded significant discretion to determine its own methods for computing AMLs for the wild horse populations it manages. 16 U.S.C. § 1333(b)(2)(iv). BLM typically uses an AML range – bounded by a "low AML" and a "high AML" – for each HMA. According to BLM, exceeding the high end of the AML is an insufficient basis for removing wild horses from the range. CM/ECF Document (Doc.) 30, p. 4. Rather, the WHA requires a determination that there are "excess animals" before wild horses may be removed, which are defined as "wild free-roaming horses . . . which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f)(2).

At issue in this case are seven HMAs: Antelope Hills, Crooks Mountain, Green Mountain, Lost Creek, Stewart Creek, Fifteenmile, and Little Colorado. Doc. 1-1, pp. 16

– 22. On August 21, 2014, the State through Governor Mead wrote to Secretary Jewell and Director Kornze claiming these seven HMAs "contain wild horses in excess of AML," and demanding the BLM "comply with [its] non-discretionary duties in the Wild Horse Act." *Id.* at pp. 2-3. BLM does not dispute that its 2014 population estimates indicate that the horse populations on these seven HMAs are greater than the high end of the AMLs.[4]

In response on November 5, 2014, BLM discussed its recent gather in southwestern Wyoming and explained that its gather plans for fiscal year 2015 were being developed and that it would "carefully consider the actions needed in Wyoming along with all wild horse management requirements in 10 western states." Doc. 1-3. In that letter, the BLM contends it faces significant challenges in implementing the WHA, including budgetary constraints, congressional prohibitions against using appropriated funds for the destruction of healthy excess horses, and the cost of holding captured animals that may never be adopted. BLM also identifies ongoing research to suppress

[4] According to the State, BLM's most recent data show the Antelope Hills HMA has at least 122 horses, 22% above the high AML of 82. The Crooks Mountain HMA has at least 175 horses, 106% above the high AML of 85. The Green Mountain HMA has at least 479 horses, 60% above the high AML of 300. The Lost Creek HMA has at least 100 horses, 22% above the high AML of 70. The Stewart Creek HMA has at least 302 horses, 73% above the high AML of 175. The Little Colorado HMA has at least 104 horses, 4% above the high AML of 100. The Fifteenmile HMA has at least 177 horses, 11% above the high AML of 160. Doc. 34, pp. 9-12.

population growth and plans to initiate a national programmatic EIS to evaluate a wide range of management scenarios.

ANALYSIS

A. Legal Standards

Because the WHA does not provide a private right of action, parties challenging agency action under this statute must invoke the judicial review provisions of the Administrative Procedure Act (APA). BLM argues for dismissal of the State's petition under Federal Rule of Civil Procedure 12(b), for failure to state a claim within the court's jurisdiction. *Kane Cnty. Utah v. Salazar*, 562 F.3d 1077, 1086-87 (10th Cir. 2009). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In considering a Rule 12(b)(6) motion, a court "may consider documents referred to in the complaint if the documents are central to the [petitioner's] claim and the parties do not dispute the documents' authenticity" without converting the motion to a motion for summary judgment. *Alvarado v.KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quotation omitted).

B. Is Removal of Wild Horses from the Seven HMAs Required?

BLM and Intervenors argue that exceeding the high end of the AML is an insufficient basis for requiring removal of wild horses from the range. They point to the WHA which speaks of two separate determinations for removal: (1) that an overpopulation exists on a given area of the public lands, **and** (2) that action is necessary

to remove "excess animals." 16 U.S.C. § 1333(b)(2). Because of the definition of "excess animals," they argue the removal decision is more than a numerical calculation, but requires BLM to evaluate whether removal is required to preserve and maintain a thriving and natural ecological balance and multi-use relationship in a particular area. 16 U.S.C. § 1332(f).

When considering removal, BLM relies on *Am. Horse Prot. Ass'n v. Frizzell*, 403 F.Supp. 1206 (D.Nev. 1975) in arguing it has a "high degree of discretionary authority" in making determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals *Id.* at 1217. BLM also references the WHA on factors required to make those overpopulation and excess animal determinations, which include: "(i) the current inventory of lands within [BLM's] jurisdiction; (ii) information contained in any land use planning completed pursuant to [43 U.S.C. §1712]; (iii) information contained in court ordered environmental impact statements . . . . ; and (iv) such additional information as becomes available to BLM from time to time, including that information developed in the research study mandated by [16 U.S.C. §1333(b)(3)], or in the absence of the information contained in (i-iv) above on the basis of all information currently available to [BLM]." 16 U.S.C. 1333(b)(2). Because BLM has not considered these multiple factors nor made any excess determination concerning the seven HMAs, and because it is not required to do so, BLM argues the State's petition must be dismissed because it fails to set forth a discrete agency action that BLM is required to take. *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004).

In response, the State argues the action of removing excess wild horses in seven overpopulated HMAs constitutes "discrete agency action" as that phrase is used in *Norton*. The State characterizes BLM's position as one suggesting it is never required to remove horses until it decides removal is necessary, which would defeat Congress's intent in amending the WHA in 1978 to expedite removals and address problems caused by wild horse overpopulation. The State also argues BLM's position is unsupported by *In Defense of Animals v. Interior*, 751 F.3d 1054 (9th Cir. 2014), which held that BLM "is *required* to remove wild horses . . . from a given area of the public lands when an overpopulation exists." *Id.* at 1062 (emphasis in original). According to the State, BLM's discretion in considering the factors in 16 U.S.C. 1333(b)(2) arises when the agency creates its resource management plans and sets AMLs. But once the AMLs are set, Congress requires BLM to remove all excess wild horses without making any further determinations. The State clarifies its position that BLM need not immediately remove horses, but must immediately initiate the process to remove excess horses in compliance with all applicable laws such as NEPA.

This case focuses on the powers and duties of BLM, as the Secretary of Interior's delegate, under 16 U.S.C. § 1333. This statutory section contains various mandates concerning the protection and management of wild horses as components of a thriving natural ecological balance on the public lands. It also specifies various determinations required by BLM following consideration of numerous factors. Of particular note for this case is the determination of AMLs for HMAs under §1333, and whether AMLs must be achieved by the removal or destruction of excess animals or other options to limit

population levels. The State argues the AMLs control the determination of an overpopulation and excess animals. Thus, once an inventory shows animals in excess of the high AMLs, no further determination is anticipated or allowed by the WHA. In short, the overpopulation (AMLs v. inventory numbers) will trigger required action by BLM to start the removal process. The BLM and Intervenors argue § 1333 affords broad discretion in determining whether action is necessary to remove excess animals, and an overpopulation by itself will not suffice to require any discrete action. The Court agrees with BLM and Intervenors.

First, the State's position rests primarily on *In Defense of Animals*, 751 F.3d 1054. In that case, environmental organizations challenged BLM's decision to conduct a horse gather to reduce horse population to the AMLs. Notably in that case, BLM specifically found the population greatly exceeded the AMLs and had carefully documented concerns about the deterioration of riparian areas and cultural sites caused by overpopulation, as well as the likelihood of insufficient forage to sustain the growing herd. *Id.* at 1062-63. In other words, BLM had made the two required determinations on overpopulation **and** the need for action to remove excess animals to preserve and maintain a thriving natural ecological balance. The environmental organizations challenged the second determination, which the court rejected concluding that the organizations' argument would essentially require prior destruction of what is to be preserved (the thriving natural ecological balance) before removal would be allowed. *Id.* at 1063.

Granted, the case discusses AMLs at length and recognizes that AML "is a vehicle used to move towards a [thriving natural ecological balance], and a trigger by which [ ]

the BLM is alerted to address population imbalance." *Id.* at 1063-64. But while AMLs can function as a necessary and informative "trigger" to alert BLM to a population imbalance, this Court does not agree AMLs alone are sufficient to require BLM initiate the removal process. Such a conclusion is simply not supported by § 1333.

If the inventory and AMLs are sufficient to require action to be taken to remove an overpopulation of animals, there would be no reason for Congress to have included the second determination which speaks to the removal of "excess animals." There would also be no reason for the definition of the phrase "excess animals" and its connection to the preservation and maintenance of "a thriving natural ecological balance and multiple-use relationship" in the HMA. 16 U.S.C. § 1332(f). Further, if wild horse management could be distilled to a numerical calculation, there would be no reason for Congress to have specified the various factors for consideration in the determination that an overpopulation exists and that action is necessary to remove excess animals. 16 U.S.C. § 1333(b)(2). Finally, there would be no reason to require BLM contract for independent research studies to assist in the determination as to what constitutes excess animals. 16 U.S.C. § 1333(b)(3).

The Court understands the State argues all these provisions relate to the determination of AMLs for HMAs and have no further application in the removal decision making process. Such an argument is unpersuasive. The most important determination for removal concerns "excess animals", not AMLs. That phrase is dominant in the WHA, not AMLs or the inventory requirement. Consequently, while action is mandatory if necessary to achieve and maintain a thriving natural ecological

balance on the public lands, BLM is still left with a great deal of discretion in deciding how to achieve this Congressional objective. Therefore, under *Norton*, the State's petition fails to set forth a discrete agency action that BLM is required to take.

C. Is Removal of Wild Horses from the Seven HMAs Necessary?

The State petitions, in the alternative, that if BLM has no duty to remove wild horses, the Court should order removal because of the alleged adverse impacts of wild horses on the range (including State lands and crucial big game ranges), as well as the impacts on local sage grouse habitats and populations. BLM argues this request for relief should be dismissed as it is a broad programmatic challenge to the wild horse program over which BLM retains significant discretion. Again, under the reasoning in *Norton*, the Court agrees with BLM.

As noted above, BLM does have a mandatory duty to act if necessary to achieve and maintain a thriving natural ecological balance on the public lands. However, the State cannot seek wholesale action across seven HMAs without miring this Court in programmatic issues best left to BLM. If *Norton* stands for nothing else, it is a clear admonition against judges issuing directives to federal agencies which result in either undue judicial interference with lawful discretion, judicial entanglement in abstract policy disagreements, or the interjection of a judge into day-to-day agency management in the context of broad statutory mandates. In the context of agency inaction under Section 1333 of the WHA, that section clearly vests significant discretion in BLM. At this time, this Court lacks both expertise and information to resolve whether it is necessary to remove any or all of the wild horses which number above the high AMLs to

preserve and maintain a thriving natural ecological balance and multiple-use relationship in the seven HMAs at issue.

CONCLUSION

IT IS HEREBY ORDERED that BLM's and Intervener's Motions to Dismiss are GRANTED.

IT IS FURTHER ORDERED that the State of Wyoming's petition for review is DISMISSED.

Dated this 21 day of April, 2015.

NANCY D. FREUDENTHAL
CHIEF UNITED STATES DISTRICT JUDGE