Citizen Litigation Against the Wild Horse and Burro Program

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Citizen and nongovernmental organization litigation against government agencies, like the Bureau of Land Management (BLM), is one of the most direct ways for the public to influence public lands management. Even if barriers exist, citizen litigation represents an opportunity for citizens to force government agencies to follow environmental and natural resource law. *See* David E. Adelman & Robert L. Glicksman, *The Limits of Citizen Environmental Litigation*, 33 Nat. Res. & Env't, no. 4, Spring 2019, at 17. Nevertheless, one of the most common critiques of citizen litigation is that it acts as both a procedural and an administrative maneuver to stymie federal agencies' ability to exercise their delegated authority to manage natural resources.

This delay tactic has dominated litigation over the BLM's Wild Horse and Burro (WHB) Program. WHB are protected species, inscribed in law as "living symbols of the historic and pioneer spirit of the West." 16 U.S.C. § 1331. Horses originated as a species in North America but migrated out between three million and 11,500 years ago. They were reintroduced by Spanish colonists in the 16th century in Mexico. Through Indigenous exchange networks, horses found their way north into the Great Plains and northern Rocky Mountains by the 17th century, prior to settler colonization in the same regions. *See* William Timothy Teal Taylor et al., *Early Dispersal of Domestic Horses into the Great Plains and Northern Rockies*, 379 Science 6639 (2023). Since then, horses and later-introduced burros were managed by Indigenous communities and settler ranchers on the American West rangeland for ranch, transportation, resource extraction, U.S. calvary, and meat slaughter.

By the mid-1900s, however, there was a decline in WHB populations, mostly attributed to the slaughter economy. As a result of activism, primarily led by WHB advocate Velma Johnston, in 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act (WFRHBA), 16 U.S.C. §§ 1331–40, tasking the BLM with maintaining healthy WHB herds on public rangelands. This law places WHB management under the jurisdiction of the BLM and the U.S. Forest Service "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id*. § 1333(a).

The BLM's Management of WHB

BLM manages WHB through designated herd management areas (HMAs) on public lands. 43 C.F.R. § 4710.3-1. The BLM establishes the HMAs and their boundaries in resource management plans (RMPs), which the BLM prepares through a land-use planning process conducted pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. §§ 1701–1787. HMA locations were established in the 1970s based on where WHB populations remained after some ranch managers claimed and removed chosen herds, paying a federal trespass fee to do so.

The WFRHBA's protections have worked, and since 1971, WHB populations have rebounded to sizes that the BLM finds to be environmentally unsustainable, over three times their estimated populations in the 1970s. Thus, the BLM has succeeded in increasing WHB population numbers to levels that the Act refers to as "excess animals." 16 U.S.C. § 1332(f)(2). In many HMAs, an excess WHB population results in denuded forage, trampled riparian areas, and die-offs. The BLM's WHB management seeks to improve WHB welfare and reduce WHB impacts to rangeland and riparian areas, pursuing these goals with measures designed to maintain stable population sizes. As a result, the BLM has repeatedly deemed population control measures such as "gathers" and sterilization necessary to keep both the animals and the rangeland healthy.

While the BLM has considered a range of management tactics, it predominately relies on helicopter removals, or "gathers." In a gather, the BLM contracts helicopter and corral crews to

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remove WHB from the range. Captured WHBs receive a health inspection and are transported to BLM corrals for off-range holding or adoption. As of 2024, there are estimated 73,520 WHB living on-range and an unadopted 66,236 that the government is subsidizing to live off-range.

Both the gathers and the presence of WHB—particularly when they stray onto private property—can be controversial. Gathers, however, generate the most citizen litigation. Delay in WHB management can result in fatalities on-range for overcrowding herds in places without adequate water or forage. These necessary resources decrease under climate change drought conditions. However, WHB removal through helicopter gathers also results in WHB fatalities during the gather and post-gather process. Essentially, "each side contends that its approach will protect the horses and that the horses will suffer (and die) unnecessarily if the opposing side prevails." *Friends of Animals v. U.S. Bureau of Land Mgmt.*, 548 F. Supp. 3d 39, 46 (D.D.C. 2021).

This article reviews key lawsuits filed over the first 50 years of the program (1971–2021). Although a few cases have been effective in influencing or affirming the BLM's management policies and practices, most have been unsuccessful. We found a total of 31 court cases, most of which either received summary judgment in favor of the agency or were dismissed. Plaintiffs won only seven of the 31 cases, suggesting that the "success" of these cases often lies in their ability to delay BLM management actions.

Private Property and Range Health Citizen Litigation

These cases typically involve ranchers and private property owners suing the BLM or other government entities to assert constitutional takings claims after WHB damage their private property. For instance, in *Bench Creek Ranch, LLC v. United States*, 149 Fed. Cl. 222, 223 (2020), plaintiffs claimed that, after a wildfire, hundreds of wild horses from BLM land came to Bench Creek Ranch and drank water owned by the ranch, constituting a taking of private property without just compensation in violation of the Fifth Amendment. The U.S. Court of Federal Claims dismissed the complaint, and the U.S. Court of Appeals for the Federal Circuit affirmed, noting that "Bench Creek's complaint rests on allegations that government *inaction*—i.e., the Bureau's '*failure* to manage the wild horses occupying the Plaintiffs['] lands'—resulted in a taking of its water rights." *Bench Creek Ranch, LLC v. United States*, 855 F. App'x 726, 728 (Fed. Cir. 2021). The Federal Circuit determined that even though the animals used the plaintiffs' water, "the government cannot be liable for failure to act, but only for affirmative acts by the government." *Id.* As a result, it upheld the case's dismissal for failure to state a claim.

The only private property case that favored the plaintiffs was *Rock Springs Grazing Association (RSGA) v. Salazar*, 935 F. Supp. 2d 1179, 1181 (D. Wyo. 2013). The Wyoming Checkerboard is a series of one-mile plots alternating between public land and private land. No fences border each plot because of the Unlawful Inclosures [*sic*] Act of 1885. 43 U.S.C. §§ 1061–1066. As a result, wild horses move freely throughout the area, without regard to land ownership. *RSGA*, 935 F. Supp. 2d at 1182. As the U.S. District Court for the District of Nevada explained, however, private landowners do not have to put up with wild horses:

> Section 4 of the Wild Horses Act, 16 U.S.C. § 1334 (Section 4), entitles landowners to enjoy the use of their property unencumbered by wild horses, and provides them a specific remedy to remove the animals. If wild horses "stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall [*sic*] or agent of the Secretary, who shall arrange to have the animals removed."

Id. at 1181–82. However, the BLM failed to remove a sufficient number of horses to minimize their intrusion onto private land. After deliberation, the parties entered into a consent decree to resolve the claims. The BLM "agree[d] to remove all wild horses located on RSGA's private lands, including Wyoming Checkerboard lands, with the exception of those wild horses found within the White Mountain Herd Management Area[.]" *Id*. at 1192. Despite this resolution, the management of the Wyoming Checkerboard is an ongoing conversation that is still being debated and litigated more than a decade after this decree.

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There is only one case of a plaintiff suing over rangeland deterioration. In *Dahl v. Clark*, 600 F. Supp. 585 (D. Nev. 1984), private landowners sued the BLM seeking a writ of mandamus ordering the agency to reduce herd populations on three allotments to the pre-1971 population levels. Since Congress enacted the WFRHBA in 1971, the WHB population in this region had increased by 956%, from 62 horses in 1971 to 655 horses in 1984. However, the BLM argued that "the laws require them to remove wild horses only if actual ongoing substantial damage to the range is occurring because of an excess number of wild horses using it." *Id.* at 586. The plaintiffs lost this case, but it became the foundation for determination of "excess" WHB in BLM's management. The Nevada District Court relied on the definition of "excess" in the WFRHBA, which provides that "horses are in 'excess' if they have been removed or 'must be removed from an area in order to preserve and maintain a

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thriving natural ecological balance and multiple-use relationship in that area.'" *Id.* at 588 (quoting 16 U.S.C. § 1332(f)).

WHB Welfare Advocate Citizen Litigation

WHB welfare advocate's citizen litigation falls into three categories: cases seeking access to BLM management operations, challenges to the BLM's procedures, and arguments that the BLM failed to comply with various relevant statutes. In most WHB welfare advocate citizen litigation, plaintiffs seek preliminary (or permanent) injunctions to stop the BLM's management activities, based on the allegation that the BLM is acting arbitrarily and capriciously or abusing its discretion. *See Colorado Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 209 (D.D.C. 2015).

The most widely used citizen litigation approach focuses on administrative law claims, with Wild Horse and Burro Program advocates arguing that the BLM did not follow the APA, NEPA, the WFRHBA, or other statutes in its decision-making, rendering the decision itself illegal.

ACCESS CASE

One access case has influenced the public's ability to view BLM management operations. In *Leigh v. Salazar*, a WHB photographer challenged the BLM's decision to restrict her access to a helicopter gather as a violation of her First Amendment rights. 2011 WL 1399845, at *1 (D. Nev. Apr. 13, 2011), *rev'd*, 668 F.3d 1126 (9th Cir. 2012). The Nevada District Court found her motion for a preliminary injunction and temporary restraining order to be moot because the management action had already occurred. The U.S. Court of Appeals for the Ninth Circuit reversed, finding that the case was not moot because the request for access was not limited to the 2010 gather, but also applied to all future gathers. Ultimately, the district court still denied the injunction on remand, finding that although there is a public right to access the BLM's gathers on public lands, the BLM implemented proper restrictions. *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1100–04 (D. Nev. 2013) (basing its analysis on *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 3 (1986)).

PROCEDURAL CASES

Citizen plaintiffs also have challenged WHB management procedures, arguing the BLM's actions are not justified in environmental assessments (EAs) or defended by science. These cases typically challenge fertility control procedures, procedures for counting "excess" WHB, and procedures for considering environmental impacts from cattle grazing.

One such summary judgment in the plaintiff's favor related to how fertility control approaches—specifically, the sterilization of mares—were evaluated in a NEPA EA. *See Kathrens v. Bernhardt*, 505 F. Supp. 3d 1085, 1089 (D. Or. 2020) (noting the Nov. 2, 2018, hearing granting a preliminary injunction). This case became moot because the BLM decided not to pursue the spaying option as a result of the litigation.

In *American Wild Horse Campaign (AWHC) v. Zinke*, 353 F. Supp. 3d 971, 977 (D. Nev. 2018), the plaintiff raised concerns about the sterilization of stallions that are removed in a gather and are returned to the range as nonreproducing. Plaintiff also was concerned about the use of GonaCon in gathered mares. GonaCon is a temporary hormonal fertility control substance that can become permanent after a second dose. The plaintiff sought to limit or control the types of fertility control procedures that the BLM can administer. Here, the Nevada District Court ruled in the BLM's favor because these concerns were not raised during the public comment period. *Id.* at 981. On appeal, the Ninth Circuit affirmed because the BLM has authority to use population control methods such as sterilization to avoid overpopulation. 16 U.S.C. § 1333(b)(1); *see also In Def. of Animals v. U.S. Dep't of the Interior*, 751 F.3d 1054, 1065 & n.16 (9th Cir. 2014).

Other cases target the process for counting excess WHB. The traditional processes included a census count and multiplier to include foals expected to be born between release of the EA and planned gather activity. In one EA, expected foal births were not included in the excess determination but were still anticipated to be gathered. *AWHC v. Zinke*, No. 2:17-cv-170 (D. Wyo. Jan. 9, 2019). The court sided with plaintiffs and vacated the excess horse determination and remanded the EA to the BLM as arbitrary and capricious.

In one case relating to procedures for considering multiple-use impacts, the BLM was previously permanently enjoined from removing horses in a particular HMA without court approval. The BLM sought to remove additional populations of horses without considering whether limiting cattle grazing was a better solution. In *American Horse Protection Ass'n, Inc v. Watt*, the U.S. Court of Appeals for the D.C. Circuit found that the BLM failed to give serious, detailed consideration to the possibility of protecting the horses' winter range by restricting cattle grazing to keep a "thriving natural ecological balance" and horse presence. 694 F.2d 1310, 1311 (D.C. Cir. 1982). The D.C. Circuit remanded the decision because "BLM's failure to study the 'winter range' alternative in full detail no longer supplies a basis for enjoining the removal of horses from the Challis range." *Id.* at 1319.

LEGAL STATUTE CASES

The last and most widely used citizen litigation approach

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focuses on administrative law claims, with WHB advocates arguing that the BLM did not follow the Administrative Procedure Act (APA), NEPA, the WFRHBA, or other statutes in its decision-making, rendering the decision itself illegal. These cases all challenge EAs that evaluate helicopter WHB management tactics.

Some cases brought on administrative law grounds have been successful. *AWHC v. Jewell*, 847 F.3d 1174, 1177 (10th Cir. 2016), followed the Rock Springs Grazing Association's 2013 Consent Decree that required the BLM to gather all horses from private property within the Wyoming Checkerboard region (discussed above). Although the gather adhered to section 4 of the WFRHBA (16 U.S.C. § 1334), the plaintiffs argued that it violated section 3 of the WFRHBA (*id*. § 1333) in not "satisfying any of the statutory prerequisites that apply to the removal of wild horses from public land" for the part of the gather that removed horses from the public land sections of the mixed ownership checkerboard. *AWHC*, 847 F.3d at 1186. The U.S. Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the plaintiff's claims, finding instead that the BLM had violated the WFRHBA as well as FLPMA.

In the other two cases that plaintiffs won, similar arguments were made. For NEPA claims, the BLM was found to have failed to consider impacts of the action alternative chosen or possible alternatives and failed to provide for meaningful public engagement. *See AWHC v. Zinke*, 2017 WL 4349012, at *1 (D. Idaho Sept. 29, 2017); *AWHC v. Zinke & Steed*, 442 F. Supp. 3d 127, 137 (D.D.C. 2020), *aff'd sub nom. W. Watersheds Project v. Haaland*, 850 F. App'x 14 (D.C. Cir. 2021). For WFRHBA claims, the BLM did not follow the WFRHBA in proposing a non-self-sustaining herd. *See Zinke*, 2017 WL 4349012, at *1. In the second case, neither assessment of private livestock grazing nor monitoring data and land health assessments were conducted. *See Zinke & Steed*, 442 F. Supp. 3d at 137.

Although the BLM was found to have acted arbitrarily and capriciously in these cases, the BLM has won most of the citizen litigation challenging its implementation of the WHB Program. Typically, the plaintiffs fail to meet the test for a preliminary injunction. For example, in *Habitat for Horses v. Salazar*, plaintiffs argued that the BLM's decision to remove 60 horses from the North Piceance HMA in Colorado violates the WFRHBA, the Information Quality Act (IQA, Pub. L. No. 106-554 § 515, 114 Stat. 2763), NEPA, and FLPMA. 745 F. Supp. 2d 438, 442 (S.D.N.Y. 2010). The U.S. District Court for the Southern District of New York denied the requested preliminary junction. While the court did find a showing of irreparable harm, it concluded that plaintiffs failed to demonstrate a likelihood of success on the merits and that the balance of hardships weighed in favor of denying the preliminary injunction. *Id.* at 455–57. It also found that injunctive relief was not in the public interest, which was instead better served by implementing the "well-considered decision of the BLM." *Id.* at 458. *See also AWHC v. Zinke*, 2018 WL 9874029, at *1 (D. Wyo. June 28, 2018); *Downer v. BLM*, 2020 WL 13049422, at *1 (D. Wyo. Nov. 2, 2020).

Some administrative claims cases occur years after the BLM has decided on a management plan, again resulting in BLM victories. These cases tend to arise when the BLM engages in several gathers with large temporal gaps between them. *See Western Watersheds Project v. Haaland*, 850 F. App'x 14, 15 (D.C. Cir. 2021) (holding that a challenge in 2018 to a second horse removal from areas of Nevada that could not support them was barred by the six-year statute of limitations because the BLM had made the removal decision in 2008 and began implementing it in 2009); *AWHC v. Bernhardt*, 442 F. Supp. 3d 127, 137 (D.D.C. 2020) (under the same facts, holding that the 2018 gather decision was an independent final agency action that could be challenged but concluding that the BLM had complied with all statutory requirements, including its rejection of the alternative of limiting cattle grazing).

Bucking this trend of defeats, in one case, plaintiffs argued that the BLM violated the WFRHBA when it concluded that rangeland was so imperiled that the relevant HMA could not support *any* horses and hence that all horses there are "excess."

Within NEPA claims, plaintiffs have requested that the BLM produce an Environmental Impact Statement instead of an EA, but courts have generally found the longer analysis to be unnecessary. *See Def. of Animals v. Dep't of the Interior*, 737 F. Supp. 2d 1125, 1136 (E.D. Cal. 2010); *FOA v. Silvey*, 353 F. Supp. 3d 991, 1000 (D. Nev. 2018), *aff'd*, 820 F. App'x 513 (9th Cir. 2020). Similarly, arguments that the BLM must undertake a new EA when conditions were the same have failed. *See FOA v. BLM*, 232 F. Supp. 3d 53, 56 (D.D.C. 2017). Other NEPA claimants argued that the BLM did not take a "hard look" at conditions or undertake a site-specific analysis, but the court found that the agency had complied with these requirements. *See FOA v. BLM*, 548 F. Supp. 3d 39 (D.D.C. 2021). Some courts have found plaintiffs lacked subject matter jurisdiction to bring specific claims that did not fall under the APA. *See Tillet v. BLM*, 2016 WL 1312014, at *7 (D. Mont. Apr. 4, 2016) (concluding that the court "lacks subject matter jurisdiction to entertain Tillett's claims for restitution or for the ordering of an investigation. Tillett has failed to provide any legal authority or jurisdictional basis for either remedy."), *report and recommendation adopted*, 2016 WL 2917309 (D. Mont. May 18, 2016), *aff'd*, 696 F. App'x 264 (9th Cir. 2017).

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The stymying effect of litigation has the potential to reduce progress toward the goal that most parties actually want: healthy populations of wild horses and burros on healthy public rangelands, with minimal interference with private property.

Bucking this trend of defeats, in one case, plaintiffs argued that the BLM violated the WFRHBA when it concluded that rangeland was so imperiled that the relevant HMA could not support *any* horses and hence that all horses there are "excess." *E.g.*, *Colo. Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 208 (D.D.C. 2015). The U.S. District Court for the District of Montana sided with plaintiffs, finding the BLM arbitrary and capricious when it relied on outdated calculations of "appropriate management levels." *See FOA v. Sparks*, 200 F. Supp. 3d 1114, 1117, 1125–26 (D. Mont. 2016).

Discussion

Tensions among stakeholders and between stakeholders and the BLM regarding how to best manage WHB populations are real. Litigation against the BLM is successful at mediating these tensions only for claims relating to (some) private property rights, requiring the BLM to consider cattle-grazing reductions in EAs, and clarifying procedures for counting "excess" populations. However, most management tactics that plaintiffs litigate are legally defendable.

As a result, most citizen litigation against BLM's WHB Program serves the practical function of stalling management actions. Notably, both the BLM and the WHB stakeholders are aware of this fact. Based on approval from both the University of Oregon and BLM WHB Headquarters, between 2021 and 2023 the lead author interviewed both BLM WHB employees and WHB stakeholders. These groups agree that citizen litigation stymies federal agency management of WHB. One BLM WHB specialist put this bluntly, saying that litigation is used "to slow us up or shut us down." Another BLM WHB specialist stated, "other projects were delayed and monitoring was not completed due to [litigation]." But the litigation also frustrates stakeholders. For example, a rancher stakeholder who lives near and operates a ranch where WHBs are managed was frustrated by what felt like a circular process. "Because of lawsuits, they find some little i that wasn't dotted or t, crossed. And so we're in litigation over something ridiculous, and it just drags it out, on and on and on." Even WHB advocacy groups spoke to the relevance of litigation as a tactic to meet their mission. One stated, "we use litigation . . . like a firewall of protection [for WHBs]."

The stymying effect of litigation has the potential to reduce progress toward the goal that most parties actually want: healthy populations of WHB on healthy public rangelands, with minimal interference with private property. Outside of plaintiff claims with defendable case law, we argue that stakeholder engagement could be better used for supporting shared management goals, such as fertility control application and rangeland conservation.

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