

Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
208.350.6426 (Direct Dial)
208.724.9780 (Cell)
Clay.Smith@cwagweb.org

American Wild Horse Campaign v. Bernhardt—NEPA challenge to BLM’s “geld and release” program to control wild horse population rejected

Congress adopted the Wild Free-Roaming Horses and Burros Act in 1971(16 U.S.C. §§ 1331 to 1340) in response the animals’ imminent disappearance and amended the law seven years later in response to the Bureau of Land Management’s success in reviving the population. The amendments’ “main purpose … was ‘to cut back on the protection the Act affords wild horses, and to reemphasize other uses of the natural resources wild horses consume.’” *Id.* § 1333(a). Because adoption proved an insufficient instrument to control the animal numbers and euthanization funding does not exist, BLM has established long-term holding facilities for the excess population. BLM began a five-year Gelding Study in 2016 to “evaluate whether gelding is ‘an effective approach to slowing the annual population growth rate,’ the effects ‘of maintaining a population of gelded males on the behavior and spatial ecology of the overall population,’ and the ‘health and short-term survival’ of the geldings.” A National Academy of Sciences report issued in 2013 had examined, *inter alia*, the potential methods of controlling horse populations and concluded that “[a]s for gelding some males in a herd, … the effects on reproduction and behavior ‘could not be predicted at the time [the] report was prepared.’”

In 2017, BLM developed the Antelope and Triple B Complexes Gather Plan to address severe horse over-population in a 2.8 million-acre area in northeast Utah. One component of Gather Plan involved “an effort to reduce the number of horses that need to be removed permanently from public lands and kept in long-term holding facilities” by gelding “some male horses and releas[ing] them back onto the range ‘where they can engage in free-roaming behaviors’”—thereby reducing “the *breeding* population to the low end of the appropriate management level, but keep[ing] the *total* population of horses at mid-range.” BLM determined that the Plan’s implementation would not significantly affect the human environment, negating the need for an environmental impact statement under the National Environment Policy Act. A non-profit organization and an individual challenged the agency’s finding of no significant impact with respect to the Plan’s “geld and release” component as arbitrary and capricious. The district court rejected the challenge. *American Wild Horse Campaign v. Zinke*, 353 F. Supp. 3d 971 (D. Nev. 2018). The Ninth Circuit affirmed. *American Wild Horse Campaign v. Bernhardt*, No. 18-17403, 2020 WL 3581733 (9th Cir. July 2, 2020).

The plaintiffs raised two NEPA claims on appeal. They first argued that “five [NEPA] intensity factors demonstrate that the Gather Plan may have a significant impact: (1) the Plan has highly uncertain effects; (2) the Plan has highly controversial effects; (3) the area has unique characteristics; (4) the decision establishes a precedent; and (5) the decision threatens a violation of the Wild Free-Roaming Horses and Burros Act.” The panel rejected each in order.

- Highly Uncertain Effects. Beginning with the principle that “NEPA ‘regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the

project are “highly” uncertain[,]” the panel reasoned in part that “[g]elding horses is not a new practice, and its effects are well understood. The environmental assessment thoroughly reviewed the research on the surgical procedure, on the effects of gelding on domesticated and semi-feral horses, on the effects of castration on other species, and on the natural social behavior of wild horses.” It added that “BLM did not have to conclude that its project would have *no* effect, but only that there were not substantial questions as to whether gelding and release would have a *significant* effect on the environment.” Here, BLM not only “reasonably concluded that there was no reason to expect any behavioral change in individual geldings to be significant” but also “considered the effects on family structures among wild horses and reasonably concluded that there would be no significant effects.”

- Highly Controversial. The plaintiffs failed to identify any evidence that “cast[] serious doubt upon the reasonableness of [the] agency’s conclusions.” In that regard, “[t]he NAS Report was inconclusive and reported no findings that conflict directly with those in the environmental assessment. The expert opinions that Plaintiffs cite were not based on studies that those experts had conducted, and no existing research supported their speculation. Mere opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations.”

- Unique Characteristics. “Wild horses are not a cultural resource for purposes of NEPA. Congress, through the Wild Free-Roaming Horses and Burros Act, decided how wild horses should be managed and how the effects of agency actions on those horses should be evaluated. ... A specific statute, such as the Act’s directive as to how to manage wild horses, governs over a general provision, such as NEPA.” Under these circumstances, “BLM’s determination that the gather area is not in close ‘proximity to historic or cultural resources’ was not arbitrary or capricious.”

- Precedent. “The Gather Plan does not establish ‘a precedent for future actions with significant effects,’ nor does it represent ‘a decision in principle about a future consideration.’” The environmental assessment instead was, “[l]ike most environmental assessments, ... ‘highly specific to the project and the locale.’”

- Threatens a Violation of Law. “[B]ecause BLM has followed the mandates of the Wild Free-Roaming Horses and Burros Act, its decision to geld and release does not threaten a violation of federal law.”

The plaintiffs next argued that “BLM acted arbitrarily and capriciously because it did not address the Gelding Study, did not consider the expert opinions that Plaintiffs highlighted in their public comments, and did not consider adequately the NAS Report.” As to the Study, the panel held that “BLM adequately considered the effect of releasing geldings back to the range both on the geldings themselves and on the rest of the wild-horse population. Because the Gelding Study has not yet provided any new information on the factor, it was reasonable for BLM not to mention that study in the preliminary environmental assessment.” As to expert opinions generally, it stated that, aside from the fact that “[t]he Wild Free-Roaming Horses and Burros Act does not require BLM to discuss explicitly all expert opinions submitted during the public-comment period[,]” the agency did respond to public comments and “provided reasons for not relying on those experts’ opinions and referred to portions of the environmental assessment that addressed those experts’ substantive concerns.” Lastly, as to the NAS Report, the panel pointed out that “[t]he only concern that BLM did not address expressly was the NAS Report’s discussion of vasectomy as an alternative to gelding.” But “BLM’s guidebook, which was included in the record, states that vasectomies are not widely performed on stallions and that additional research is needed to ‘perfect a safe technique’ and [to] ‘demonstrate whether this approach will reduce population growth rates’—reflecting a similar level of uncertainty as with gelding.” Thus, “[b]ecause evidence in the

record supports BLM's choice of gelding, and because we can discern the reasons for BLM's rejection of the alternative of surgical vasectomy, ... BLM's failure to respond explicitly to the comments about vasectomies was not arbitrary or capricious."

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/02/18-17403.pdf>