

IN THE UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

IN DEFENSE OF ANIMALS and)
CRAIG C. DOWNER, and TERRI FARLEY,)

Plaintiffs,)

v.)

KEN SALAZAR, in his official capacity as)
Secretary, United States Department of)
Interior; ROBERT ABBEY, in his official)
capacity as Director, Bureau of Land)
Management; DAVE HAYS, in his official)
capacity as Field Manager, Bureau of Land)
Management; JEROME FOX, in his official)
capacity as Wild Horse and Burro)
Specialist, Bureau of Land Management,)

Defendants.)

Civil Action No. 1:09-cv-02222 (PLF)

Hon. Judge Paul L. Friedman

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Submitted by

Office of the Nevada Attorney General
NHU Q. NGUYEN
Senior Deputy Attorney General
Nevada Bar No. 7844
100 North Carson Street
Carson City, Nevada 89701
Tele: (775) 684-1232; Fax 684-1108
Email: nnguyen@ag.nv.gov
Attorneys for State of Nevada
Department of Wildlife

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. It Is Undisputed the Excess Horses That Were Removed Cannot Be Returned to the Complex Because the Range Cannot Support the Excess Horses 2

B. The Horse Population Needs to Stay Within AML for the Wildlife Species to Thrive 5

C. NDOW Should Be Granted Summary Judgment on Its Request That the Excess Horses Not Be Returned to the Complex 6

III. CONCLUSION..... 7

TABLE OF AUTHORITIES

CASES

<i>Burke v. Gould</i> , 286 F.3d 513, 517 (D.D.C. 2002)	2
<i>Burke</i> , 286 F.3d at 518.....	2
<i>Gardels v. Central Intelligence Agency</i> , 637 F.2d 770, 773 (D.C. Cir. 1980)	2
<i>Securities and Exch. Comm'n v. Banner Fund Int'l</i> , 211 F.3d 602, 616 (D.C. Cir. 2000)	2
<i>Tarpley v. Greene</i> , 684 F.2d 1, 7 (D.C. Cir. 1982)	2

STATUTES

16 U.S.C. § 1333(a)	4, 5
16 U.S.C. § 1333(b)	3

RULES

FED. R. CIV. P. 56	1
LCvR 7(h).....	1, 2

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant-Intervenor, the State of Nevada, Department of Wildlife (NDOW), by and through its counsel, Attorney General of the State of Nevada, and Nhu Q. Nguyen, Senior Deputy Attorney General, hereby submits its reply in support of its cross-motion for summary judgment in favor of Defendants Ken Salazar, Secretary of the Interior; Robert Abbey, Director of the Bureau of Land Management (BLM); Dave Hays, Field Manager of BLM; and Jerome Fox, Wild Horse and Burro Specialist of BLM (collectively “Federal Defendants”). This reply is made and based upon FED. R. CIV. P. 56 and LCvR 7(h).

I. INTRODUCTION

To avoid redundancy, to the extent those arguments are known to NDOW, it joins in the reply arguments made by the Federal Defendants and Intervenor-Defendant Safari Club International. NDOW therefore submits this reply in support of its cross-motion for summary judgment to address the special effects the overpopulation of the horses has had on native Nevadan wildlife and forage, and to address Plaintiffs’ request that the excess horses should be released back to the Calico Mountains Complex (Complex).

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II. ARGUMENT

A. It Is Undisputed the Excess Horses That Were Removed Cannot Be Returned to the Complex Because the Range Cannot Support the Excess Horses

In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion. LCvR 7(h). This District has held that the court should “deem as admitted the moving party’s facts that are uncontroverted” by the nonmoving party. *Securities and Exch. Comm’n v. Banner Fund Int’l*, 211 F.3d 602, 616 (D.C. Cir. 2000). This District has further clarified that “the procedure contemplated by the [local] rule . . . isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record.” *Burke v. Gould*, 286 F.3d 513, 517 (D.D.C. 2002) (quoting *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980)). This Circuit has also affirmed the grant of summary judgment where the nonmoving party failed to cite any evidence in the record, and in the statement of genuine factual issues, “did not set forth specific, material facts, but simply asserted, without citing evidence in the record, that there was a disputed issue[.]” *Burke*, 286 F.3d at 518 (quoting *Tarpley v. Greene*, 684 F.2d 1, 7 (D.C. Cir. 1982)).

In NDOW’s cross-motion for summary judgment, in addition to the arguments made by the Federal Defendants and Defendant-Intervenor Safari Club International, NDOW argued that the excess horses removed from the Complex cannot be returned to

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the Complex. The habitat cannot support the excess horses, and placing the excess horses back on the Complex would have a deleterious effect on the horses, forage, and wildlife species that inhabit the Complex.

Plaintiffs' Opposition to Defendants' and Defendant-Intervenors' Cross-Motions for Summary Judgment and Reply in Support of Plaintiffs' Motions for Summary Judgment (Opposition) does not contain any statement of material fact to controvert NDOW's facts regarding the detrimental effects the excess horses have had on the Complex and the deleterious effects the excess horses will have on themselves, the range, and the wildlife, if they are placed back on the Complex. See Doc. No. 46. It is noteworthy Plaintiffs do not dispute that the Complex cannot support a horse population in excess of 572–952. Plaintiff Craig Downer makes a passing statement that based upon his lay observation of the horses in the Complex, it appears the Federal Defendants' claim that the horses were overpopulating the Complex is unfounded. Declaration of Craig C. Downer (#46-2) at 4, ¶ 24. Other than this lay observation by Mr. Downer, Plaintiffs provide no actual facts to dispute that the appropriate management level (AML) of horses in the Complex is 572–952.

NDOW identified facts to show that extended droughts combined with the overpopulation of the horses have caused many water sources within the Complex to dry up and become unavailable for use by wildlife. Keeping the horse population within AML is critical because the AML is a surrogate for the carrying capacity of a wild horse population. The AML is established in an attempt to provide a thriving, natural ecological balance, and should reflect the balance between wild horse and other

multiple uses of the rangelands. See 16 U.S.C. § 1333(b). Plaintiffs do not dispute these facts.

NDOW also provided an exhaustive Affidavit from the Director citing the significant efforts NDOW has taken to increase the wildlife populations. These efforts include expending significant funds for wildlife projects such as developing water facilities for the wildlife, and removing the wildlife from the Complex and transplanting them to a different mountain range hundreds of miles away. Plaintiffs do not dispute any of these facts.

Plaintiffs also do not dispute that the vegetative resource needed by all ungulates inhabiting the Complex is limited and that allowing the horse population to exceed AML is detrimental to all the animals and ecological systems as a whole. This would also violate the Wild Free-Roaming Horses and Burros Act, which requires that the Federal Defendants manage horses in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands. See 16 U.S.C. § 1333(a).

NDOW identified numerous facts regarding the capacity of the habitat, the aggressive nature of the horses as compared to the wildlife species, and the detrimental effects the excess horses will have on themselves and the wildlife species, if the horses are allowed to overpopulate at the Complex. Plaintiffs do not dispute one single fact. As such, this Court should not order the Federal Defendants to place the excess horses back on the Complex.

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B. The Horse Population Needs to Stay Within AML for the Wildlife Species to Thrive

Plaintiffs make repeated arguments about the heritage of the wild horses at the Complex. These arguments are incomplete. Both the wildlife species and the horses inhabit the Complex historically. Thus, both the horses and wildlife species deserve equal consideration and proper management.

The heritage of the horses cannot trump the heritage of the wildlife species. An overpopulation of the horses at the Complex results in the wildlife species dying off due to lack of sufficient forage and water. The horses cannot be allowed to overpopulate the range to the detriment of the wildlife species. Congress recognized the importance of a thriving natural ecological balance and thus requires the Federal Defendants to manage the horses in consultation with the state wildlife agency to protect the natural ecological balance of all wildlife species. See 16 U.S.C. § 1333(a).

Plaintiffs conveniently ignore all biological data to repeat their arguments that the excess horses are part of the heritage of the Complex. In a declaration, Plaintiff Terri Farley states that she returned to the Complex on March 29, 2010, after the gather and removal of the excess horses, and did not see any horses thereby suggesting that the removed horses were not excess animals. Declaration of Terri Farley (#46-3) at 9, ¶¶ 23-32. Ms. Farley further states that she did not see any wildlife species when she was driving. *Id.* As NDOW pointed out in its motion for summary judgment, Ms. Farley is not a biologist and is not qualified to make any professional assessment of the horses, the wildlife species, or the Complex. Ms. Farley's statements underscore her lay observations and lack of any wildlife or biological qualifications.

The Complex is approximately 550,000 acres and encompasses three mountain ranges and a large amount of sagebrush, steep plateau, and rim rock country typical of the Great Basin ecosystem. Roads are not common in this area and are found primarily in the valley floors. See Affidavit of Kenneth E. Mayer, attached as Exhibit A at 1, ¶ 2. Ms. Farley does not identify how far she drove within the Complex. However, it is not surprising that, as a layperson, Ms. Farley did not observe many wildlife species or horses when driving in the valley floors. Even the seasoned wildlife biologist familiar with the Complex and the most experienced hunter often do not see abundant wildlife when traveling on roads within this area. *Id.* In order to locate animals within this area, NDOW biologists utilize aircraft to overcome the lack of roads and access difficulty to obtain the most accurate data of the wildlife species in the Complex. *Id.* at 1, ¶ 3.

As the Federal Defendants have publicly stated, there are approximately 600 horses in the Complex, post-gather. Doc. No. 40-5. On March 28, 2010, and April 9–10, 2010, NDOW biologists observed between 50–75 horses in two different areas of the Complex. *Id.* at 2, ¶ 5. Thus again, Ms. Farley’s observation and conclusion that there are very few horses within the Complex based upon one drive in the valley floors can best be described as anecdotal.

C. NDOW Should Be Granted Summary Judgment on Its Request That the Excess Horses Not Be Returned to the Complex

In Plaintiffs’ Motion for Summary Judgment, they request that the excess horses “be returned to the Calico Mountains Complex.” Doc. No. 40-1 at 24. However, in their Opposition, Plaintiffs now abandon that request and instead make the request that the

excess horses be placed “somewhere on the 34,441,150 acres of public land currently contemplated for wild horses and burros.” Doc. No. 46 at 24.

Because Plaintiffs have admitted to all the facts NDOW identified regarding the deleterious effects the excess horses will have on themselves, the forage, and wildlife species, it would be disastrous and in contravention of the Wild Free-Roaming Horses and Burros Act to place the excess horses back on the Complex. NDOW should be granted summary judgment on this ground.

III. CONCLUSION

Plaintiffs do not dispute the AML established for the Complex is 572-952 horses, and that the current horse population at the Complex is within AML. Plaintiffs also do not dispute that the Complex cannot support excess horses and that placing the excess horses back on the Complex will result in a population exceeding AML and having deleterious effects on the horses, range, and wildlife species. Plaintiffs have also modified their request that the excess horses be placed not on the Complex specifically, but be placed “somewhere on the 34,441,150 acres of public land.” Although the Complex is part of the public lands contemplated for wild horses and burros, because

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the Complex cannot support the excess horses, this Court should grant NDOW's motion for summary judgment and not order the Federal Defendants place the excess horses on the Complex.

DATED this 14th day of April, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Nhu Q. Nguyen
NHU Q. NGUYEN
Senior Deputy Attorney General
Nevada Bar No. 7844
100 North Carson Street
Carson City, Nevada 89701
Tele: (775) 684-1232; Fax 684-1103
Email: nnguyen@ag.nv.gov
Attorneys for State of Nevada
Department of Wildlife

CERTIFICATE OF MAILING

I, Rosiland M. Hooper, certify that I am an employee of the Office of the Nevada Attorney General and that on this 14th day of April, 2010, a copy of the foregoing **REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**, was filed electronically with the United States District Court, District of Columbia, and therefore the court's computer system has electronically delivered a copy of same to the following:

Erik Edward Petersen
email: erik.petersen@usdoj.gov
John B. Grosko
email: brett.grosko@usdoj.gov
U.S. Department of Justice,
Environmental & Natural Resource
Counsel for: *Defendants*
Salazar, Abbey, Hays, and Fox

Anna Margo Seidman, Esq.
email: aseidman@safariclub.org
Douglas Scott Burdin, Esq.
email: dburdin@safariclub.org
Counsel for:
*Safari Club International and Safari Club
International Foundation*

David Jerome Taylor, Esq.
email: david.taylor@bipc.com
William James Spriggs, Esq.
email: Bill.Spriggs@bipc.com
**BUCHANAN INGERSOLL &
ROONEY, PC**
Counsel for: *Plaintiffs*
*In Defense of Animals, Downer and
Farley*

Sheila D. Jones, Esq.
HOLLAND & HART, LLP
email: sdjones@hollandhart.com
Counsel for:
*Coalition for Nevada's Wildlife, a non-
profit corporation*

/s/ Rosiland M. Hooper
Rosiland M. Hooper, Legal Secretary II
an employee of the Office of the
Nevada Attorney General