

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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 FEDERAL DISTRICT COURT
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 DISTRICT OF UTAH
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UINTAH COUNTY, a political subdivision)
 of the State of Utah, UTE INDIAN TRIBE,)
 a federally recognized Indian Tribe, LYNN)
 I. SIDDOWNAY, DEAN CHEW,)
 ALAMEDA CORPORATION, a Delaware)
 corporation, and MORAPAS CREEK)
 SHEEP COMPANY, a sole proprietorship)
 owned by Oscar S. Wyatt, Jr.,)

Civil No. 2:00-CV-0482J

MEMORANDUM OPINION

Plaintiffs,)

vs.)

GALE NORTON, in her capacity as)
 Secretary of the Interior, NINA HATFIELD,)
 Acting Director of the Bureau of Land)
 Management, SALLY WISELY, State)
 Director, Bureau of Land Management,)
 DAVID E. HOWELL, Field Manager,)
 Vernal Field Office, Bureau of Land)
 Management, in their official capacities, and)
 the UNITED STATES DEPARTMENT OF)
 THE INTERIOR, and the BUREAU OF)
 LAND MANAGEMENT,)

Defendants,)

ANIMAL LEGAL DEFENSE FUND,)

Amicus Curiae.)

The above-entitled proceeding involves an appellate review of the Administrative Record supporting the defendants' *Decision Record and Finding of No Significant Impact* (EA No. UT-080-2000-097), dated June, 2000 (the "Decision"). The Decision called for the release of eighty wild horses onto the Bonanza Herd Area in Uintah County, Utah.

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Plaintiffs originally sought extraordinary relief by injunction and writ of mandamus to prevent the contemplated release of the horses. The court heard plaintiffs' application for a temporary restraining order on June 23, 2000, and after considering the evidence received and the arguments presented, denied that application. (*See* Order, filed July 5, 2000 (dkt. no. 19).) The court calendared plaintiffs' Motion for Injunctive Relief and Writ of Mandamus for a hearing on the merits on October 23, 2000, but on September 15, the parties filed their Joint Motion to Strike Trial Date (dkt. no. 24), stipulating that the matter proceed as an appeal pursuant to the Administrative Procedure Act, 5 U.S.C.A. § 706 (1996) ("APA"), as this action also seeks an order declaring the Decision invalid under § 706(2). *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). Besides overturning the Decision, the plaintiffs seek relief under § 706(1) compelling the defendants to comply with the existing Book Cliffs Resource Management Plan by immediately and permanently removing all wild horses from the Bonanza Herd Area.

The Administrative Record was filed with the court on September 27, 2000, and supplemented on December 15, 2000. At the October 13, 2000 status conference, the court set a hearing on the merits for March 9, 2001 and a corresponding briefing schedule. (*See* Scheduling Order, filed December 12, 2000 (dkt. no. 32).)

On January 5, 2001, the court heard, considered and denied the motion of the Animal Legal Defense Fund to intervene in this action, instead granting it leave to participate as an amicus curiae.¹ The court reset the matter for hearing on the merits on April 3, 2001, and set a revised briefing schedule. (*See* Order, filed January 24, 2001 (dkt. no. 39).) The parties and

¹On March 8, 2001, the Animal Legal Defense Fund filed a renewed motion to intervene, which was heard at the April 3 hearing, and was also denied. The Fund appealed.

amicus prepared and filed briefs. The matter was heard on April 3, 2001, and taken under advisement. On May 17, 2001, the court heard the defendants' motion to strike portions of the written materials submitted by plaintiffs, and took that motion under advisement as well.

Plaintiffs' Claims

Plaintiffs contend that the Decision violates the existing Book Cliffs Resource Management Plan ("BCRMP") adopted in 1985 and encompassing 1,455,880 acres of federal, state and private lands located within the Uintah and Ouray Indian Reservation. (The Bonanza Area includes 142,000 acres bordering in tribal trust lands, or about 10% of the reservation area covered by the BCRMP.) Plaintiffs assert that the BCRMP specifically found that the Bonanza Area was not a viable range for a herd of wild horses, and that any wild horses found there should be removed to a more suitable management area, such as Hill Creek. The BLM is now bound to follow the BCRMP, plaintiffs urge, and the Wild Free-Roaming Horses and Burros Act does not require that the horses be returned to or maintained in the Bonanza Area. Moreover, plaintiffs assert, the Decision is not supported by evidence in the administrative record concerning range conditions, equine infectious anemia ("EIA"), or the suitability of the Area as a viable Herd Area.

The Ute Indian Tribe further contends that the BLM failed to consult with the Tribe concerning any change to the BCRMP allowing wild horses in the Bonanza Area, contrary to its own rules concerning coordination, consultation, and consistency review. Such action, the Tribe argues, is both "arbitrary and capricious," 5 U.S.C.A. § 706(2)(A) (1996), and without observance of procedures required by law, 5 U.S.C.A. § 706(2)(D) (1996), and the Decision should be set aside until the BLM complies with governing procedural law.

The defendants challenge the plaintiffs' standing to seek any relief under the APA

because they allege no concrete injury-in-fact. They assert that the June 2000 Environmental Assessment upon which the Decision relies is reasonable and is adequately supported by the administrative record, and that the record reflects adequate consultation with the Ute Indian Tribe. The defendants characterize the return of the horses as merely “an interim step” in amending the BCRMP, and insist that consultation and coordination with the Ute Indian Tribe did take place. Return of the horses, the defendants suggest, serves to satisfy the “more binding Congressional direction” expressed in the Wild Free-Roaming Horses and Burros Act, 16 U.S.C.A. §§ 1331-1340 (2000). They also respond that the plaintiffs have not demonstrated that removal of the eighty horses from the Bonanza Herd Area is justified or proper.

The amicus Animal Legal Defense Fund (“ALDF”) submits that release of wild horses into the Bonanza Area is consistent with the mandate of the Wild Free-Roaming Horses and Burros Act of 1971, and that the removal of wild horses from the Bonanza Area sought by plaintiffs would violate that Act absent a finding by the BLM that the horses were “excess,” that is, 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.A. § 1332(f) (2000). Such a conclusion must be based on current ecological data, not a fifteen-year-old management plan. The Decision with its resulting release was only a “temporary and interim action” that preserved the status quo while the BLM finalizes its amendment to the BCRMP. ALDF joins the defendants in arguing that plaintiffs have not suffered any cognizable injury flowing from the Decision and therefore lack standing to challenge the Decision under the APA.

The court concludes that Uintah County and the Ute Indian Tribe have standing to bring this action. Further, the Court declares that the Decision is invalid and orders that the eighty wild horses be removed from the Bonanza Herd Area forthwith.

I. BACKGROUND

A. Federal Land Management

Management of wild horses and the grazing of livestock on the public lands goes on against the larger backdrop of the federal land use planning laws and regulations.

The Federal Land Policy And Management Act of 1976, 43 U.S.C.A. §§ 1701 *et seq.* (1986) (“FLPMA”), consolidated numerous federal land laws and repealed hundreds of others,² updating and streamlining the law governing the public lands. FLPMA directs that the BLM manage the public lands in a manner “that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values,” recognizing at the same time “the Nation’s need for domestic sources of minerals, food, timber and fiber from the public lands.” 43 U.S.C.A. § 1701(a)(8), (12) (1986). Congress determined that “the national interest will be best realized” if the present and future use of the public lands “is projected through a land use planning process coordinated with other Federal and State planning efforts.” 43 U.S.C.A. § 1701(a)(2) (1986). “In the development and revision of land use plans,” FLPMA requires federal land managers to “use and observe the principles of multiple use and sustained yield,” and to coordinate their land use planning activities with “the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, . . . and of or for Indian tribes” 43 U.S.C.A. § 1712(c)(1), (9) (1986).

²“Prior to the FLPMA, the BLM and its predecessor agencies managed the public lands under some 3,000 public land laws, *e.g.*, the General Mining Law of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.), and the various homestead laws. Sections 702-706 of the FLPMA explicitly repealed or amended many of those older laws, *see* Pub. L. No. 94-579, §§ 702-706, 90 Stat. 2743, 2787-94 (1976) (list of laws repealed and amended).” *Rocky Mountain Oil and Gas Ass’n v. Watt*, 696 F.2d 734, 738 n.2 (10th Cir.1982).

FLPMA requires the BLM to “prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values,” 43 U.S.C.A. § 1711(a), and to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C.A. §§ 1712(a) (1986). Section 1610.4-1 of the BLM management regulations requires that the BLM work with other government entities to identify issues for consideration in the preparation of the land use plans. 43 C.F.R. § 1610.4-1 (2000).

The land use plans are generally known as *resource management plans* (“RMP”). 43 C.F.R. § 1601.0-5(k) (2000). When creating an RMP, the BLM must involve the public, 43 U.S.C.A. § 1712(a), must use a “systematic interdisciplinary approach,” *id.* § 1712(c)(2), and must coordinate, to the extent possible, with federal, State, local, and Indian tribal land use plans. *Id.* § 1712(c)(9). Indeed, FLPMA directs that land use plans “shall be consistent with State and local plans to the maximum extent . . . consistent with Federal law and the purposes of the Act.” *Id.*

FLPMA mandates that the Secretary of the Interior, and by extension the BLM, “shall manage the public lands under principles of multiple use and sustained yield, *in accordance with the land use plans developed*” pursuant to the Act. 43 U.S.C.A. § 1732(a) (1986) (emphasis added).³ Thus, once an RMP is created, the BLM is required to comply with the RMP; the regulations require that “[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a) (2000). The BLM must also “take appropriate measures” to ensure that activities of other users of public lands under permits,

³While the BLM’s land use plans may incorporate a variety of competing uses for the same area, consistent with the “multiple use” concept, FLPMA does not require that all land be available for all uses. 43 U.S.C.A. § 1702(c) (1986) (“multiple use” defined).

contracts and agreements also conform to the RMP. *Id.* § 1610.5-3(b). The RMPs thus limit the range of options that federal land managers would otherwise have discretionary authority to pursue. Often RMPs contain specific direction for particularized management actions and impose restrictions on land uses that violate the RMP. If a change in the RMP is warranted by a change in circumstances, BLM must formally amend or revise it. *See* 43 C.F.R. § 1610.5-5 (2000) (amendment); *id.* § 1610.5-6 (revision).

FLPMA land use planning requirements affect the two particular areas of land management that are at issue in this case: BLM's management of wild horses and grazing rights.

Prior to FLPMA, wild horse management was governed by the Wild Free-Roaming Horses and Burros Act of 1971 ("WHA"), 16 U.S.C.A. §§ 1331-1340 (2000). Under the WHA, the BLM was to manage wild horses as a component of public lands "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* § 1333(a).

Congress enacted FLPMA in 1976 and amended the WHA in 1978, recognizing the change in wild horse circumstances and range conditions. The Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1804 (1978) ("PRIA"), "establishes and reaffirms a national policy and commitment" to "manage, maintain, and improve the condition of public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives and the land use planning process established" by FLPMA, while continuing "the policy of protecting free-roaming horses and burros from capture, branding, harassment, or death. . . ." 43 U.S.C.A. § 1901(b) (1986). Through its own range inventory process, WHA (as amended by PRIA) requires the BLM to "determine appropriate management

levels of wild free roaming horses and burros” on areas of the public lands,⁴ and to “determine whether appropriate management levels should be achieved by the removal or destruction of excess animals” 16 U.S.C.A. § 1333(b)(1) (2000).⁵

In its regulations implementing the WHA as amended, the BLM requires that “[w]ild horses and burros shall be considered comparably with other resource values in the formulation of land use plans,” 43 C.F.R. § 4700.0-6 (2000), but once such plans are formulated under FLPMA, “[m]anagement activities affecting wild horses and burros, including the establishment of herd management areas, *shall be in accordance with approved land use plans*” *Id.* § 4710.1 (emphasis added). Under the PRIA, wild horse management became integrated with the FLPMA land use planning process. Thus, any wild horse management decisions for an area remain subject to the existing RMP, as do other range management activities under FLPMA.

FLPMA’s consultation requirements likewise govern the BLM’s management of wild horses under the WHA. The BLM’s own regulations require that BLM administrators “shall consult with Federal and State wildlife agencies and all other affected interests, to involve them in the planning for and management of wild horses and burros on the public lands.” 43 C.F.R. § 4700.0-6(d) (2000).

Wild horses and wild horse herd areas are not managed in a vacuum. FLPMA’s policies of consultation, coordination and consistency embrace wild horse management along with the

⁴In *Dahl v. Clark*, 600 F.Supp. 585, 593 (D. Nev. 1984), the court considered statutory and regulatory language concerning wild horse population levels, determining that the benchmark test is to find a thriving ecological balance. This test does not necessarily require the agency to conclude that the 1971 levels of wild horse management are the only acceptable levels.

⁵PRIA specifically authorizes the BLM to adopt out or dispose of “excess” wild free-roaming horses and burros “which pose a threat to their own habitat and other rangeland values because they exceed the carrying capacity of the range.” 43 U.S.C.A. § 1901(a) (1986); *see* 16 U.S.C.A. § 1333(b)(2) (2000) (removal of excess animals).

many other uses affecting the public lands. The FLPMA land use planning process proves no less mandatory where wild horses are concerned.

FLPMA also reiterated the agency's power and discretion in managing public land grazing rights. The Taylor Grazing Act, 43 U.S.C.A. §§ 315a-315r (1986), grants the Secretary of the Interior authority to divide public range lands into grazing districts, to specify the amount of grazing permitted in each district, and to issue leases or permits. Additionally, it specifies the preferences and other rights that exist with respect to grazing permits. 43 U.S.C.A. § 315b (1986), *upheld by* 43 U.S.C.A. § 1752(c) (1986).

FLPMA maintains the agency's authority to manage grazing in accordance with a land use plan. 43 U.S.C.A. § 1712 (1986). Moreover, § 1752(c) affords existing permit holders first priority for receipt of the new permits or leases, so long as the lands remain available for domestic livestock grazing. 43 U.S.C.A. § 1752(c) (1986).

B. Land Management in the Bonanza Area

In May 1985, the BLM issued the *Record of Decision and Rangeland Program Summary for the Book Cliffs Resource Management Plan* ("BCRMP"). This range management plan was based on the final environmental impact statement ("EIS") for the area, released in November 1984. The BCRMP covers the Book Cliffs Resource Area, about 10% of which is known as the Bonanza Herd Area. (AR 2271.) The BCRMP directs that any wild horses in the Bonanza Area should be removed and placed in the Hill Creek Herd, or adopted. (AR 1078.) To that end, the BCRMP allots no animal unit months ("AUMs")⁶ for wild horses. (*Id.*) Additionally, it requires

⁶An Animal Unit Month (AUM) is the amount of forage needed to feed one cow or its equivalent, one horse or five sheep, for one month. As a quantitative measure of carrying capacity, the AUM is further described as 750 pounds of air dry forage (2.5% of body weight x 1000 pounds x 30 days).

a gathering plan for the horses, establishing a two-year period for their removal. (AR 1080.)

In the ensuing years, the BLM maintained a herd of horses in the Bonanza Herd Area, despite the clear mandate of the BCRMP. In 1986, the BLM attempted to gather the horses from the Bonanza Herd Area. However, the Ute Indian Tribe and others sued the BLM, arguing that the horses belonged to them. Additionally, WHOA (a wild horse advocacy group) threatened to sue the BLM, alleging that the BCRMP was illegal. Eventually, the BLM and the Ute Tribe entered into a consent decree by which the BLM turned over all of the captured horses to the Tribe and the Tribe agreed to relinquish claims to thirteen horses still in the Bonanza Herd Area. The Tribe also provided the BLM with twenty wild horses from a reservation in Nevada, which were placed in the Bonanza Herd Area.

Beginning in November 1999, after an outbreak of equine infectious anemia (EIA), the BLM gathered and tested nearly 250 wild horses for the disease. (AR 1981.) This was the first time since 1985 that the BLM complied with the BCRMP directive to remove all wild horses from the Bonanza Herd Area. The BLM euthanised the test-positive horses, and continued to hold the test-negative horses. (*Id.*)

The agency's original decision was to remove all test-negative horses from the Bonanza Herd Area. (AR 1802.) However, due to the high number of test-positive horses, the BLM amended its decision, determining to return all test-negative horses to the Bonanza Herd Area. (AR 1980.) After placing the horses under quarantine on November 23, 1999, the Utah State Veterinarian lifted the quarantine on April 4, 2000. (AR 2267.) In June 2000, the BLM issued Environmental Assessment UT-080-2000-97, proposing to release eighty test-negative horses into the Bonanza Herd Area. (AR 2266.) It is this decision that the plaintiffs challenge as a violation of the 1985 Book Cliffs Resource Management Plan.

II. PLAINTIFFS' STANDING

A. Standing Requirements

Defendants challenge the plaintiffs' standing to bring this case. Prudential limitations on the exercise of this Court's jurisdiction require that, in an action brought under the APA, the plaintiff's interest be within the zone of interest sought to be protected by the statute under which the agency proceeded. *See, e.g., Baca v. King*, 92 F.3d 1031, 1035-36 (10th Cir. 1996).

Plaintiffs must show that there has been some "final agency action" and must "demonstrate that [their] claims fall within the zone of interest protected by the statute forming the basis of the [their] claims." *State of Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) (citing *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996)).

There is no dispute that the Decision was a final agency action. In accordance with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C.A. 4321-4370d (1994), and with 43 C.F.R. 4700.0-6(a) (2000), David Howell, the BLM Vernal Field Manager, issued EA No. UT-080-2000-097, along with the Decision directing the release of wild horses back into the Bonanza Herd Area. It is this final agency action that the plaintiffs challenge.

The plaintiffs' interests also fall within the zone of interests protected under NEPA and FLPMA. The plaintiffs have interests in property within or adjacent to the Bonanza Herd Area; consequentially, they have an interest in the proper governance and land use planning of the area. Their claims fall within the zone of interests protected by the statutes, and the plaintiffs meet the statutory requirements for standing.

Beyond meeting the statutory requirements for standing, the plaintiffs must also meet three constitutional requirements under Article III. Plaintiffs must demonstrate that they have

suffered an injury-in-fact, that is, actual or imminent invasion of a judicially cognizable interest, rather than conjectural or hypothetical invasion. The injury must be fairly traceable to the challenged action of a defendant; and it must be likely that the injury will be redressed by a favorable decision. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992)).

B. Plaintiffs' Standing to Challenge the Decision

Defendants argue that the plaintiffs lack Article III standing because they cannot show an injury-in-fact flowing from the decision to release wild horses onto the Bonanza Herd Area.

1. Uintah County

Uintah County alleges that the BLM has failed to address its procedural rights under FLPMA, including consistency review requirements under 43 U.S.C.A. § 1712(c)(9) (1986) and 43 C.F.R. §1610.3-2 (2000), causing direct injury to their various interests. Among those interests is the county's interest in the implementation of its own land management plan. The County relies on a Ninth Circuit case to establish standing based on such an injury. In *American Motorcyclist Assoc. v. Watt*, 714 F.2d 962 (9th Cir. 1983), the court recognized that the county had standing to bring an action against the BLM based on its allegations of injury concerning inconsistencies between the resource management plan and the Inyo County plan. *Id.* at 965.

Similar to the differences in plans in *American Motorcyclist*, the Decision is not consistent with the Uintah County Plan, which states in relevant part:

Wild horse habitat will be managed to support desired population levels in the Hill Creek Wild Horse Management Area (WHHMA) and the Bonanza WHHMA, and the management plans will be prepared for all other wild horse populations, and those gathering and removal plans will be implemented.

(*Uintah County Plan for Management of the Book Cliffs Resource Area* 39, AR 1208.)

Uintah County has stated on the record that its "desired population level" for the Bonanza Area is

zero. (*See, e.g.*, AR 1248, 1947, 1965.) One week before the BLM issued the Decision, the County again stated in a letter to the BLM that its desired population level is zero. (AR 2202.)

The County has also raised valid health, safety, and environmental concerns: the Decision is not only inconsistent with the County plan, it adds a threat of EIA infection in private horses and limits the amount of available forage. The County points to the defendants' own expert, who opines that a number of reservoirs of EIA infection are still present in the area, and that the threat of infection of the wild horses persists. (AR 3779.) This threat in turn poses an imminent risk of harm to the wild horses, and to the health and welfare of livestock within the County's jurisdiction.

The Decision is the cause of the County's alleged injury because it led to the release of wild horses in the Bonanza Herd Area, and the County's requested relief--vacating the Decision and requiring removal of the horses--would redress that injury. The court finds, therefore, that the County has standing to challenge the Decision.

2. Private Plaintiffs

It is necessary that the court also consider the standing for the private plaintiffs. The private plaintiffs also allege that the Decision has caused them "injury-in-fact." Each of the private plaintiffs has significant interests in grazing allotments either wholly or partially within the Bonanza Area or in the immediately surrounding area. Morapas has an allotment within the Bonanza Area. (Howell Decl. ¶ 44.) A small portion of Mr. Siddoway's allotment falls within the Bonanza Area, as does a small portion of Mr. Chew's allotment. (AR 0001, 0369, and 1703.) Alameda's allotment is less than one mile to the west of the Bonanza Herd Area. (County Reply Br., App. D.) Except for the boundary fence between the Ute Tribe and BLM-administered public lands, the area is not closed off. The Bonanza Herd moves off the Bonanza

Area and occupies the surrounding areas. (Howell Decl. ¶¶ 50-51).

The private plaintiffs claim that their interests are and will be substantially impaired by the damage to the range caused by the wild horses consuming forage and the increased threat of EIA. Additionally, they allege that the BLM advised them by letter during Spring 2000 that their active grazing preferences may be curtailed, as the lower-than-normal precipitation is likely to limit the carrying capacity of the range. The private plaintiffs allege that the limited capacity is even more limited by the presence of wild horses. If the wild horses were removed from the area, the private plaintiffs argue, they would not suffer any injury from the diminished AUM preferences.

However, in order to have standing, the plaintiffs must show an injury-in-fact *resulting from the Decision*. The private plaintiffs claim to have lost grazing rights. The Record before us indicates otherwise. In the past, neither Morapas nor Mr. Siddoway has used their full permitted active AUMs. (Howell Decl. ¶ 48, Def. App. 72). The August 1999 EA indicates 17,800 AUMs of available forage, with total permitted grazing use at 16,053 AUMs. (AR 1670.) For one year, 960 AUMs are required to sustain 80 horses. (AR 0838.) Thus, even if the private plaintiffs were using all of their allotted AUMs in the Bonanza Herd Area as the BLM prepared the Decision, there would still have been adequate forage for all permitted uses and the wild horses.

The private plaintiffs rely upon letters sent to them by the BLM to demonstrate that they have suffered injury caused by the Decision. The letters, stating the BLM's refusal to authorize suspended grazing preferences in the Bonanza Area, do indicate that the BLM is concerned about drought conditions in the area. (See County Reply Br., App. C.) They do not, however, indicate that the private plaintiffs will suffer an injury sufficient to maintain standing.

The private plaintiffs allege that the BLM's refusal to reactivate their suspended grazing

preferences is sufficient to show that they have been injured by the Decision. However, a “preference” means only “a superior or priority position against others for the purpose of receiving a grazing permit or lease.” 43 C.F.R. § 4100.0-5 (1999). Hence, a preference gives the permittee the use of the AUMs that may become available. It is not an entitlement to AUMs to the exclusion of other land uses, *e.g.*, wildlife or wild horses. The determination of whether to renew grazing permits and to what extent public lands should be designated for grazing purposes is wholly within the discretion of the BLM. *Baca*, 92 F.3d at 1037. In this case, the area has been approved for grazing purposes. However, it is left to the BLM’s discretion to control the grazing permits. *Id.*

The court recognizes that the private plaintiffs have legitimate concerns about the management and use of the Bonanza Herd Area, but legitimate concerns alone do not confer standing. The private plaintiffs fail to show sufficient injury-in-fact caused by the Decision to maintain standing in this case.

3. The Ute Indian Tribe

The Tribe argues that the Decision should be set aside because the BLM failed to consult adequately with the Tribe before implementing the Decision, and because the BLM failed to review the Decision for consistency with tribal and local land management plans. The BLM responds that failure to consult with the Tribe is not sufficient to afford the Tribe standing to challenge the Decision.

In compliance with statute and its own regulations, the BLM is required to coordinate its land use inventory, planning, and management activities with the land use planning and management programs of Indian tribes located within the land at issue. *See* 43 U.S.C.A. § 1712 (c)(9) (1986) and 43 C.F.R. § 1610.3-1 (a) & (b) (2000).

Defendants rely on a Tenth Circuit case, *State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998), to argue that government entities lack standing to challenge BLM actions. In that case, the Tenth Circuit found that the government entities lacked standing to challenge the re-inventory of public lands conducted under 43 U.S.C.A. § 1711 (1986). *Babbitt*, 137 F.3d at 1215. The defendants' reliance on this case is misplaced. The Tenth Circuit concluded that 43 U.S.C.A. § 1711 does not require public participation, while 43 U.S.C.A. § 1712 does require participation. *Id.* "The public participation requirements of [§1712] apply only when the Secretary is making decision regarding land use plans, i.e., when the Secretary is making decisions directly affecting the actual management of the public lands." *Id.* at 1208. But FLPMA "provides for public participation throughout the land use planning process, including amendments to land use plans." *Id.* at 1215. The court of appeals did grant standing to those seeking to participate the agency decision to impose a de facto wilderness management standard. *Id.* at 1216.

Under FLPMA, any revision to the RMP, by amendment, or by a decision to change or modify management practices, must be coordinated with the Tribe and other government entities. The decision to release wild horses into the Bonanza HA directly affects the management of the public lands, and FLPMA requires public participation and intergovernmental coordination.

For the Tribe to have standing, however, the BLM's alleged failure to fulfill these statutory requirements as to process must create an increased risk of threatened and imminent harm to the Tribe's land and resources sufficient to meet the injury-in-fact requirements for standing. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with [the] law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Babbitt*, 137 F.3d at 1205 (citing *Allen v. Wright*, 468 U.S. 737, 754 (1984))

(holding plaintiffs lacked constitutional standing to challenge government action that allegedly violated the law)). Plaintiffs establish standing only when the defendants' unlawful acts lead to or cause an injury-in-fact. *Id.* Moreover, "a plaintiff must not only show that the agency's disregard of a procedural requirement results in an increased risk of . . . harm, but a plaintiff must also show the increased risk is to the litigant's concrete and particularized interests."

Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 573).

Here, the plaintiff's "geographical nexus" to the site where the agency has taken action establishes the concrete interest necessary to confer standing. *Rio Hondo*, 102 F.3d at 449. With tribal lands adjacent to the Bonanza Herd Area, the Tribe has a geographical nexus to the site. Numerous times, the Tribe and the BLM have discussed various management issues relating to wild horses in the area. (*See, e.g.*, Howell Decl. ¶ 7, 22, 34; AR 1134-38, 3958, 4196-4202.) The Tribe has a direct interest in the BLM's management of the Bonanza Herd Area and therefore has standing to challenge the Decision.

In addition to showing that the Decision increases the risk of harm to the Tribe, the Tribe must also show that the increase in risk is "fairly traceable" to the Decision and will be redressed by a favorable court decision. *See, e.g., Rio Hondo*, 102 F.3d at 451-52. The increased threat of injury to the Tribe's land and resources is directly traceable to the Decision. Further, as the BLM failed to coordinate with the Tribe, there is an increased risk of inconsistency between the federal and non-federal management plans. The inconsistency is traceable to the BLM's failure to conduct a consistency review.

Moreover, in evaluating the redressability standards where the plaintiffs allege procedural violations, the Supreme Court has noted that a person can assert his procedural right without

meeting all of the normal standards for redressability and immediacy. *Defenders of Wildlife*, 504 U.S. at 572. It is not imperative that the plaintiffs establish with any certainty that the result will be different when the defendants follow the required procedure. *Id.* The plaintiff whose procedural rights have been denied has standing to challenge the action although the problem may not be immediately redressed. *Id.* Thus, the Tribe has standing to challenge the BLM's asserted failure to comply with FLPMA planning requirements without demonstrating that following the proper procedure (*i.e.*, consultation and coordination between the parties and participation in the decision making process) would result in an actual change in the BLM's decision to maintain wild horses in the Bonanza Herd Area. *State of Utah v. Babbitt*, 137 F.3d at 1215-16.

III. Review of the Record and Decision

As the court has determined that Uintah County and the Ute Indian Tribe have standing, we now turn to the merits of their case. The parties have agreed that the Decision be reviewed under the Administrative Procedure Act, 5 U.S.C.A. § 706 (1996). In *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994), the court of appeals outlined the essential functions of judicial review under § 706 of the APA: to determine “(1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion.” It is therefore necessary to consider both the procedural matters raised by the Tribe and the substantive matters raised by the County.

A. Procedural Requirements

Pursuant to 43 U.S.C. § 1712(c)(9) (1986), the BLM is required to “coordinate the land use inventory, planning, and management activities of or for such lands with the land use

planning and management programs . . . of or for Indian Tribes by, among other things, considering the policies of approved State and tribal land resource management programs.” The implementing regulations require the BLM to accomplish coordination with other federal agencies, State and local governments and Indian tribes in order to “assure that consideration is given to” non-BLM land use plans, to “assure that consideration is given to those plans that are germane to the development of resource management plans for public use,” to “assist in resolving . . . inconsistencies” between BLM and other plans, and to “provide for meaningful public involvement of . . . Indian tribes in the development of resource management plans,” including early notice “of proposed decisions which may have a significant impact on non-Federal lands.” 43 C.F.R. § 1610.3-1(a) (2000).

Section 1610.3-1(b) requires that BLM managers provide federal agencies, State and local governments, and Indian tribes the “opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs.” *Id.* § 1610.3-1(b). Section 1610.3-1(e) assures that “Federal agencies, state and local governments and Indian tribes shall have the time period prescribed under § 1610.2 of this title for review and comment on resource management plan proposals.” *Id.* § 1610.3-1(e). Should they notify the BLM in writing of perceived inconsistencies with their own land use plans, “the resource management plan documentation shall show how these inconsistencies were addressed and, if possible, resolved.” *Id.* Inconsistencies between proposed BLM plans or plan amendments and State, local or tribal land use plans are to be resolved if possible by seeking consistency: “resource management plans and amendments to management framework plans *shall be consistent with* official approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and *local governments and Indian tribes*, so

long as the . . . resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands . . .” *Id.* § 1610.3-2(a) (emphasis added).

The defendants suggest that this statute requires coordination only when revising land use plans or amending or developing resource management plans. As the Decision does not concern a land use plan, and is not a formal amendment to the existing RMP, the defendants contend that they were under no obligation to consult with the Tribe. However, FLPMA's coordination and consistency review requirements apply “when the Secretary is making decisions directly affecting the actual management of the public lands,” whether formally characterized as “resource management plan” activity or not. *Babbitt*, 137 F.3d at 1208.

The Decision directly affects the management of public lands. Further, the BLM itself categorizes the Decision as an “interim step” in amending the RMP (AR 2273), which certainly makes the Decision germane to the development of the RMP. The BLM thus was obligated to consult with the Tribe, and other local governments while making this Decision.

As the BLM was obligated to coordinate with the Tribe, we must determine to what extent they were required to communicate. Coordination and consultation require that the BLM have a narrowly focused discussion with the Tribe concerning the proposed agency action. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995) (holding that a detailed and lengthy consultation was required to assure the Pueblo’s full participation in the decision making process). Further, the Department of the Interior’s Manual requires that coordination include “a specific description of the places and/or values at issue.” *BLM Manual Handbook*, H-8160-1, Chp. III-11 § D.

The Tribe’s Minutes from the April 25, 2000, meeting between the State BLM Director,

BLM Field Manager, and the Ute Tribal Business Committee reflect only a general discussion of wild horses. (AR 3951.) They do not reflect that the BLM representatives gave a specified description of their proposed actions. Nor do they reflect that the members or representatives of the Tribe were given an opportunity to participate in the decision making process.

By his own admission BLM Field Manager Mr. David Howell regards the November 12, 1999 decision to remove all test-negative horses from the Bonanza Herd Area a major action concerning the disposition of the herd. (Howell Decl. ¶ 12). Subsequently, Mr. Howell amended that decision. (Id. ¶ 14). The BLM had an obligation to coordinate these decisions with the Tribe's resource management programs. However, the BLM did not specifically refer to any of these decisions during the April 2000 meeting. The Tribe was not advised of any of the specifics of the BLM's plans, and was not able to consult with the BLM about the plans.

The BLM issued the Decision without meeting the procedural requirements of 43 U.S.C.A. § 1712(c)(9) (1986) and 43 C.F.R. § 1610.1-1610.2 (2000). Therefore, under 5 U.S.C.A. § 706(2)(D) (1996), the Decision must be set aside.

B. Substantive Review of the Decision

Although the defendants' failure to consult and coordinate with the Tribe is sufficient to justify setting the Decision aside under the APA, the court will also address the other issues raised by the plaintiffs. Beyond failure to coordinate with the Tribe and other government entities, the plaintiffs argue that the Decision fails to conform with the BCRMP. The BCRMP calls for no horses in the Bonanza Herd Area, and accordingly allots no AUMs to wild horses. (AR 1078.) If, as the defendants suggest, the language of the RMP restricts wild horse AUMs in the Bonanza Herd Area ("HA") only for the first three years of monitoring, then the Decision does not violate procedure, for the three-year monitoring period has passed.

Yet the BLM has long recognized that the BCRMP prohibits wild horses in the Bonanza Herd Area. (*See, e.g.*, AR 1662, 2118, 2267.) For example, the Decision text states that although two alternatives would be in conformance with BCRMP, “the BLM proposed action of partial removal of the wild horses from the HA (Alternative A) or the no action alternative of not removing any of the captured horses from the HA (Alternative C) *would not be in conformance with the 1985 RMP.*” (AR 2273) (emphasis added). Further, as noted above, the BLM characterizes the Decision as an interim step in amending the 1985 BCRMP. (*Id.*) If the three-year monitoring period was an integral part of the BCRMP limiting its exclusion of wild horses, as Defendants now suggest, all of the alternatives would conform to the management plan. Moreover, if its new reading is accurate, the BLM likely would not feel obligated to amend the number of wild horse AUMs allocated in the BCRMP, or to speak of the Decision as an “interim step” in the amendment process.⁷

The BLM has no discretion to operate outside of the directives laid out in the BCRMP. Pursuant to 43 C.F.R. § 1610.5-3 (2000), BLM actions must conform to the approved plan.⁸ As the Decision does not conform with the BCRMP, the Court cannot sustain its validity.

When an agency action is challenged through a judicial review, and is determined to be

⁷In *Olenhouse*, the Tenth Circuit counseled against adopting the government’s post-hoc rationalization for the challenged agency action, and rejected the information set forth in an affidavit that the government relied on only after the plaintiffs sought judicial review of the action. *Olenhouse*, 42 F.3d at 1577. Similarly, the court does not now adopt the BLM’s *post hoc* reading of the BCRMP as a justifying rationale for the BLM’s Decision.

⁸*Amicus* Animal Legal Defense Fund argues that the BCRMP cannot control what it envisions as an ongoing decision making process under the Wild Free-Roaming Horses and Burros Act because a range management plan “is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.” 43 C.F.R. § 1610.0-5(k) (2000). (*See* Brief of Amicus Curiae Animal Legal Defense Fund, filed March 8, 2001 (dkt. no. 44), at 23.) This argument apparently overlooks the BLM’s WHA regulations, which provide that “[m]anagement activities affecting wild horses and burros, including the establishment of herd management areas, shall be in accordance with approved land use plans” *Id.* § 4710.1 (emphasis added); *see id.* § 4710.4 (“**Constraints on Management.** Management of wild horses and burros shall be . . . at the minimum level necessary to attain the objectives identified in *approved land use plans* and herd management area plans.”) (emphasis added).

arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law, the reviewing court should set the action aside. 5 U.S.C.A. § 706(2) (1996); *Olenhouse*, 42 F.3d at 1574.

The court in reviewing an agency action may review the record to determine whether the decision is supported by substantial evidence. *Id.* at 1580. The June 2000 EA, on which the BLM based the Decision, was issued in context of an ongoing review of how to respond to the continual wild horse presence in the area, and the more current problems with EIA. In November 1999, the BLM undertook EA UT-080-1999-36; the agency gathered 210 wild horses from the area and tested them for EIA. (AR 1981.) Thirty-one of the horses tested positive. (*Id.*) The original decision based upon this EA was to remove all horses from the Bonanza Herd Area. (AR 1802.) However, in December 1999, the BLM issued an amended decision, which declared that all test-negative horses should be released back into the Bonanza Herd Area. (AR 1980.)

The record indicates that the wild horse advocacy groups were in favor of the release,⁹ while EIA experts had expressed reservations about releasing the horses back to the area from whence the infection came. (AR 1937-1942, 2356-2358, 3779). The BLM's oscillating preferences among competing viewpoints lacks a clearly reasoned basis in the factual materials found in the record.

III. DEFENDANTS' MOTION TO STRIKE

At this time, it is appropriate to consider the defendants' motion to strike from the record

⁹To the extent that *amicus* Animal Legal Defense Fund or others argue that the BCRMP's exclusion of wild horses from the Bonanza Herd Area does not comply with the Wild Free-Roaming Horses and Burros Act, but the Decision does, they certainly may press that view before any public proceeding involving proposed amendments to the BCRMP. They did not bring their own APA challenge to the BCRMP, and the validity of that agency action is not now before the court.

those documents submitted by plaintiffs with their Reply Brief and at oral arguments—documents which the defendants argue go beyond the record properly before the court. Specifically, they have moved to strike Appendix E of the Uintah County Reply Brief, and the portion of the material under the “Other” index tab in the notebook provided by the Plaintiffs at oral arguments which is not a copy of documents already in the Administrative Record. Fed. R. App. P. 10, 30, and 32(a)(7) set out specific requirements for, respectively, the composition of the record on appeal, the contents of an appendix to be filed, and the permitted length of the briefs. Defendants argue that plaintiffs, in an attempt to get around the brief limitations set in Fed. R. App. P. 32(a)(7), included additional legal arguments in Appendix E. Additionally, defendants argue that the material included in the section marked “Other” constitutes factual material and legal argument improperly added to the record.

Under *Olenhouse*, this proceeding is governed by the Federal Rules of Appellate Procedure. Rule 28 delineates the permissible content of briefs, while Rule 32(a)(7) limits the length of the briefs. Rule 30 provides for an appendix to include, *inter alia*, “parts of the record to which the parties wish to direct the Court’s attention.” Fed. R. App. P. 30(a)(1)(D). As the plaintiffs must demonstrate that the Decision is arbitrary, capricious, or an abuse of discretion, they wish to draw attention to parts of the record which they believe show that the Decision was arbitrary and capricious. Appendix E is an effort to glean from the long and complex record various documents and statements in the Record, which Plaintiffs believe do not support the Decision. Rule 30 provides both parties the opportunity to do this in an appendix. Therefore, the motion to strike Appendix E is denied.

Defendants also object to the material under the tab titled “Other” in the notebook presented to the court at oral arguments. These materials include the affidavit of Wayne

Burkhardt, as well as summaries from the record describing range conditions and trends.

Generally, judicial review of an agency action is limited to review of the record on which the administrative decision was based. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). However, where technical data are difficult to understand or voluminous in an administrative record, the court can receive affidavits that (to the extent they do not add factual material) assist the court in assimilating and understanding such technical or voluminous data. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Love v. Thomas*, 838 F.2d 1059, 1067 (9th Cir. 1988). The court may find it necessary, or at least helpful, to review additional material to explain the basis of the agency's action and the factors the agency considered. *Love*, 838 F.2d at 1067.

Mr. Burkhardt is familiar with the Bonanza Herd Area, as well as the implications of differing range conditions. His affidavit does not provide additional factual material concerning Bonanza, or the Decision; rather, it offers some general understanding of the effects of wild horses on the range conditions. The defendants considered the Bonanza Herd Area range conditions, as well as the effects of wild horses, when making their Decision. Therefore, the affidavit represents an appropriate elaboration upon the record contemplated by the *Overton* rule, and the motion to strike is denied as to the Burkhardt Affidavit.

Apart from the Burkhardt Affidavit, the defendants would exclude the material in the section marked "Other" which does not come directly from the Record, insisting that it amounts to additional factual material and legal arguments. Plaintiffs respond that the material in the notebook is proffered to demonstrate injury-in-fact, an element of standing. They cite a district court decision to argue that this court can utilize materials from outside the Administrative Record when considering injury-in-fact and other elements of standing. However, *Strategic*

Analysis Inc. v. U.S. Dept. of Navy, 939 F. Supp. 18 (D.D.C. 1996), which the plaintiffs cite, is distinguishable from this situation. In that case, the court accepted an affidavit from a company executive who was complaining of prejudice during the award process for a Navy contract. The test for prejudice is distinct from the test for standing and requires a different showing of facts. Compare *Strategic Analysis*, 939 F. Supp. at 23 (stating the test for prejudice in government contracting), with *Babbitt*, 137 F.3d at 1202 (outlining the requirements for standing under the APA and Article III). Thus, plaintiffs mistakenly rely on that court's decision as authority for admitting additional factual material into the record. The material marked "Other" in the plaintiffs' notebook, save the Burkhardt Affidavit and copies of documents from the Administrative Record, consist of legal arguments and asserted facts concerning the plaintiffs' injury-in-fact. According to Fed. R. App. P. 28 and 30, such material should have been advanced in a brief, so as to permit a reasoned response by the Defendants. Inclusion of the same in the present submission did not afford that opportunity. Therefore, as to the materials in the section marked "Other," with the noted exceptions, the motion to strike should be granted.

IV. AFFIRMATIVE RELIEF UNDER THE EXISTING BCRMP

Beyond requesting that this Court set aside the Decision, the Plaintiffs seek an order compelling the BLM to conform with the existing BCRMP. Section 706(1) of the APA provides that the "reviewing court should compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.A. § 706(1) (1996). The Tenth Circuit has clarified the meaning of the two phrases, "unlawfully withheld" and "unreasonably delayed." In *Forest Guardians v. Babbitt*, 164 F.3d 1261, *amended at* 174 F.3d 1178 (10th Cir. 1999), the court of appeals distinguishes between agency actions that fall under the APA admonition that are to be concluded within a reasonable time, and those actions which have a statutorily imposed deadline. 174 F.3d at 1190.

Further, the court of appeals quotes from the *Attorney General's Manual on the Administrative Procedure Act* to explain that the authority to compel applies only to agency actions which are ministerial or non-discretionary. *Id.* Once a court deems an action unreasonably delayed, it must compel agency action. *Id.* at 1191.

The BLM does not have discretion in deciding whether to comply with the management directives set forth in an established RMP. 43 C.F.R. § 1610.5-3, 5-5 (2000). Therefore, its actions are subject to § 706(1). The BLM has had over fifteen years to comply with the BCRMP. Although the timetable is not governed by statute, the BCRMP called for removal of the horses to be completed in two years. (AR 1080.) Since the BLM has gathered the horses on occasion, it cannot argue that the two-year time period was insufficient. The reasons the BLM offers for not complying with the BCRMP are unavailing (*viz.*, conditions have changed, the Decision is an interim step in an amendment process).

The BLM has unreasonably delayed compliance with the BCRMP and should be ordered to remove all wild horses from the Bonanza Herd Area.

III. CONCLUSION

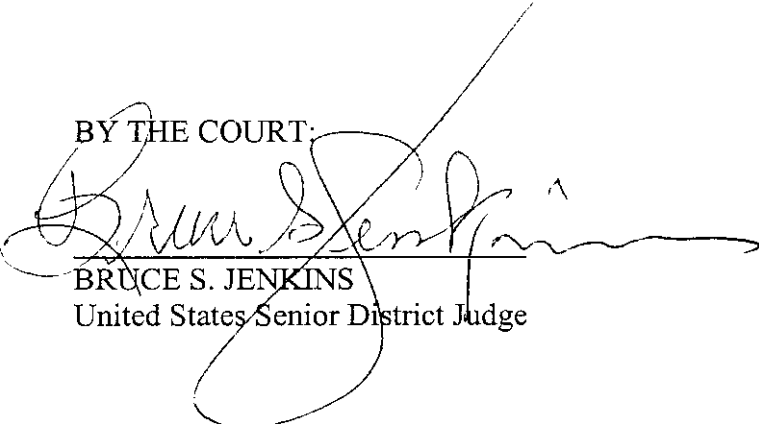
This court concludes that both Uintah County and the Ute Indian Tribe have standing to challenge the June 2000 Decision. Further, the County and the Tribe are entitled to consultation and coordination with the BLM, plus the required consistency review. It is important that the land and resource management plans effectively protect the interests of all of the involved parties. Certainly, not all of the interested parties are in agreement as to how the area should be managed, or as to the disposition of the wild horses. Therefore, it is important that all parties conform with the established plan, and make changes only through the formal amendment process. That process provides ample opportunity to all who wish to participate.

Although there is no doubt that the area is dynamic and subject to changing needs, the BLM must address those need in a reasonable, unbiased, and conforming way. The BLM failed to reach its June 2000 Decision in accordance with law. The Decision, EA No. UT-080-2000-97, is set aside, and Defendants are ordered to comply with the BCRMP by immediately and permanently removing all wild horses from the Bonanza Area pending any formal amendment to the BCRMP.

Plaintiffs' counsel shall prepare and submit a proposed form of Judgment in accordance herewith.

DATED this 21 day of September, 2001.

BY THE COURT:



BRUCE S. JENKINS
United States Senior District Judge

United States District Court
for the
District of Utah
September 24, 2001

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:00-cv-00482

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