United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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January 15, 2010

IBLA 2009-246	)	MT-C010-2009-0001
	)	
THE CLOUD FOUNDATION, INC., *ET AL.*	)	Wild Horses & Burros
	)	
	)	Decision Affirmed

ORDER

The Cloud Foundation, Inc. (TCF), Front Range Equine Rescue, Inc. (FRER), and Ginger Kathrens have appealed from and petitioned for a stay of the effect of a May 22, 2009, decision of the Field Manager, Billings (Montana) Field Office, Bureau of Land Management (BLM), approving a Herd Management Area Plan (Plan or HMAP) for the Pryor Mountain Wild Horse Range (Range or PMWHR). The challenged Finding of No Significant Impact/Decision Record (FONSI/DR) is based on a May 2009 Environmental Assessment (EA) (MT-010-08-24) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). It is designed to manage wild horses and resources within the Range, and authorizes an increase in the appropriate management level (AML) of wild horses,[1] development of additional water sources, and habitat and rangeland improvements. FONSI/DR at 1.

Appellants contend that BLM's decision violates section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (2006), and section 102(2)(C) of NEPA, alleging that adoption of a new HMAP must await land use plan revisions, and that BLM failed adequately to consider Pryor Mountain wild horse herd genetic viability studies. By order dated November 3, 2009, we denied appellants' petition for stay, finding they failed to show immediate and irreparable harm as required under 43 C.F.R. § 4.21(b).

Appellants have the burden of demonstrating, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or failed to give

[1] The AML is the optimum number of wild horses that can graze a particular area of the public lands while maintaining a thriving natural ecological balance and avoiding a deterioration of the range associated with an overpopulation of wild horses. *Animal Protection Institute of America*, 109 IBLA 112, 119 (1989).

due consideration to all relevant factors, or that there is no rational connection between the facts found and the choices made. *Wild Horse Organized Assistance*, 172 IBLA 128, 135-36 (2007). Because we find appellants failed to satisfy their burden, we affirm BLM's decision.

BACKGROUND

The 39,651-acre area of Federal lands in the Pryor Mountain Wild Horse Range is situated in Carbon County, Montana, and Big Horn County, Wyoming. Created by the Secretary of the Interior in 1968, this was the first designated Wild Horse Range in the United States. EA at 3; *American Horse Protection [Association], Inc.*, 134 IBLA 24, 25 (1995). It has since been expanded to include lands within the Custer National Forest, administered by the Forest Service (FS), U.S. Department of Agriculture, and the Bighorn Canyon National Recreation Area (NRA), administered by the National Park Service (NPS), U.S. Department of the Interior.[2]

BLM initially set the AML for the Pryor Mountain Wild Horse Range at 121 wild horses (plus or minus 5 percent) in a 1984 HMAP adopted by BLM in its September 1984 Billings Resource Management Plan (RMP). In Revised HMAP (MT-025-2-18) dated July 1992, BLM reduced the AML to 95 wild horses (plus or minus 10 percent), or 85 to 105 wild horses, which we affirmed in *American Horse Protection [Association], Inc.*, 134 IBLA at 24-25. Actual use has ranged from 118 to 188 wild horses from 1993 through 2009, with an average of 159. *See* EA at 9 (Table 1 (Past Inventory Information)).

BLM, assisted by FS and NPS, evaluated the Range to determine if management objectives were being met. "Pryor Mountain Wild Horse Range Evaluation" (BLM Evaluation) (Feb. 2008). This study determined that, as a consequence of grazing and drought, certain areas, particularly at lower elevations, experienced severe to heavy utilization of grasses and forbs during each year of the 12-year evaluation period, resulting in a downward trend in rangeland conditions. BLM Evaluation at 17, 18, 19-20, 28, 43-44, 46; *see* Answer at 3. Given the estimated carrying capacity of the Range, the study recommended that BLM manage the Range for 92 to 117 wild horses. BLM Evaluation at 17.

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[2] BLM is the lead agency for wild horse management on the Pryor Mountain Wild Horse Range and has authority for population management on the Range, establishing the AML, habitat conditions, and monitoring. FS and NPS have authority for management decisions (*e.g.*, fencing and water development) on their portions of the Range.

Thereafter, BLM, again with the assistance of FS and NPS, prepared a draft HMAP and preliminary EA, which primarily proposed increasing the AML from 85 to 105 wild horses to 90 to 120 wild horses (excluding the current year's foal crop). BLM considered the proposed HMAP (Alternative B), a No Action alternative (Alternative A), under which BLM would manage the wild horses under the current HMAP and its AML of 85 to 105 wild horses, and a continuation of existing management alternative (Alternative C). FONSI/DR at 8; *see* EA at 19, 43, 53-55. BLM issued the draft HMAP and preliminary EA on June 6, 2008, affording the public a 30-day period of time to submit comments, relevant information, and recommendations.

After reviewing the public comments, including those submitted by appellants and others, the Field Manager issued the FONSI/DR, adopting the proposed AML (90 to 120 wild horses) and approving the proposed HMAP, which also authorized actions to develop several water sources, construct range improvements, protect and develop riparian areas, enhance wildlife habitat, reduce wildfire fuels, and control noxious weeds.[3] *See* FONSI/DR at 7-8. The Field Manager explained that the approved actions would

> increase the number of wild horses that can be managed; provide additional water sources allowing wild horses and wildlife to better use areas that are less susceptible to grazing pressure; maximize genetic interchange and diversity within the wild horse population; retain Spanish characteristics unique to this herd; maintain multiple use relationships for the area . . .; and prevent unnecessary or undue degradation of public land resources.

FONSI/DR at 2. He further noted that such actions would preserve and maintain a thriving natural ecological balance and protect the Range from deterioration associated with an overpopulation of wild horses, by maximizing the number of wild

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[3] Appellants have separately appealed the FS Decision Notice/FONSI, dated May 22, 2009, approving extension, partial realignment, and repair/maintenance of a fence on National Forest lands along the northern boundary of the Range, and the improvement of one water source on National Forest lands. However, as part of the present appeal, they challenge "BLM's and the FS's decision to construct a North Boundary Fence." *See* Notice of Appeal/Statement of Reasons (NA/SOR) at 8. Because FS, not BLM, issued the decision regarding the fence, that issue is not before the Board. Our jurisdiction is limited to actions authorized by BLM on public lands administered by BLM. *See Missouri Coalition for the Environment*, 172 IBLA 226, 237 (2007).

horses on the Range consistent with preventing a further degradation, and even promoting a limited recovery, of rangeland conditions and herd health. *Id.* at 1, 3. Finally, the Field Manager determined the approved HMAP conforms to the Billings RMP. FONSI/DR at 1. Focusing on BLM's monitoring plans and intent to revise that RMP,[4] the Field Manager stated that the AML would be recalculated, based on additional monitoring data, following a revision of the RMP or within 5 years, whichever came first. *Id.* at 8.

Appellants appealed timely.

APPLICABLE LAW AND STANDARD OF REVIEW

Under section 3(a) of the Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. § 1333(a) (2006), the Secretary of the Interior is responsible for managing wild horses, "at the minimal feasible level," as components of the public lands and "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." The implementing regulations express the objective to manage wild horses "as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat." 43 C.F.R. § 4700.0-6(a). *See Fund for Animals, Inc. v. BLM,* 460 F.3d 13, 15-16 (D.C. Cir. 2006). BLM is afforded a high degree of discretion in exercising its delegated authority under the WFHBA. *American Horse Protection Association, Inc. v. Frizzell,* 403 F. Supp. 1206, 1217 (D. Nev. 1975) (*citing* Conf. Rep. No. 92-681, 92nd Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2149, 2160); *Redwings Horse Sanctuary*, 148 IBLA 61, 63-64 (1999); *American Horse Protection [Association], Inc.*, 134 IBLA at 26.

In performing its statutory obligations, BLM is required by section 3(b)(1) of the WFHBA, 16 U.S.C. § 1333(b)(1) (2006), to maintain a "current inventory" of wild horses "on given areas of the public lands," for the purpose of determining, *inter alia*, AML's, whether and where overpopulations of wild horses exist, and "whether action should be taken to remove excess animals" or to control their populations by other means. *See* 43 C.F.R. § 4720.1; *e.g.*, *American Horse Protection Association, Inc. v. Watt*, 694 F.2d 1310, 1316-18, 1319 n.41 (D.C. Cir. 1982) ("While the 1971 Act appeared to require minimum interference with wild horses, the amended Act, though it still contains the 'minimal feasible' language, emphasizes multiple use of the habitat, even at the expense of more interference with the horses"); *Thomas M.*

[4] Appellants note that BLM published a Notice of Intent to revise its RMP in the *Federal Register* on May 15, 2008 (73 Fed. Reg. 28150), and expects to issue the revised RMP "during the summer of 2011." NA/SOR at 2.

Berry, 162 IBLA 221, 224 (2004); *Animal Protection Institute of America*, 118 IBLA 20, 22-23, 27, 29 (1991) (citing *Dahl v. Clark*, 600 F. Supp. 585, 594 (D. Nev. 1984)).

The AML thus represents the optimum number of wild horses that may be maintained on the Federal range, ensuring that the AML is consistent with a thriving natural ecological balance between wild horses and burros, wildlife, livestock, and vegetation.[5] The AML set by BLM is not static, and may change over time, depending on changes in the populations of wild horses and burros, wildlife, and livestock, climate, water sources, forage, and other factors affecting rangeland conditions. EA at 17 ("The establishment of AML is not intended to be a onetime determination but rather a fluid process where adjustments are made based upon environmental changes and management needs"); *e.g.*, *American Horse Protection [Association], Inc.*, 134 IBLA at 26-27.

Central to this appeal are various professional judgments regarding technical issues of genetic viability. The well established principle of deference to expert opinions is, therefore, of particular relevance here. We have long held that BLM is entitled to rely on the professional opinion of its experts, where it concerns matters within the realm of their expertise and is both reasonable and supported by record evidence. *Fred E. Payne*, 159 IBLA 69, 77-78 (2003); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998). An appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert, that is, an appellant must show that "BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different course of action or interpretation is available and supported by the evidence." *American Mustang & Burro Association, Inc.*, 144 IBLA 148, 150 (1998); *West Cow Creek Permittees v. BLM*, 142 IBLA at 238. A mere difference of professional opinion will not suffice to show that BLM erred in its determination. *Id.* Above all, the party "must show not just that the results of [BLM's] study *could be* in error, but that they *are* erroneous." *American Mustang & Burro Association, Inc.*, 144 IBLA at 150; *see also Wild Horse Organized Assistance*, 172 IBLA at 135-36.

[5] It is important to note that the AML is "somewhat less" than the number that would actually result in a deterioration of the range, since BLM may manage the range to avoid any such deterioration. *Michael Blake*, 135 IBLA 9, 15 (1996).

ANALYSIS

BLM is required to ensure that its AML determination, authorized by the HMAP at issue, like all management activities affecting wild horses and burros, is consistent with established land use plans (43 C.F.R. § 4710.1). Appellants argue that BLM also is required to defer any determination regarding the proper AML for the Pryor Mountain Wild Horse Range until it revises the Billings RMP in 2011. *See* NA/SOR at 3.[6] This argument is unavailing, as BLM is not required by section 202 of FLPMA or its implementing regulations to defer the HMAP decision until completion of a revised RMP. *Oregon Natural Resources Council v. BLM*, 150 F.3d 1132, 1139 (9th Cir. 1998) ("The language of [43 U.S.C. §] 1712 [(2006)] does not . . . establish a clear duty of when to revise the [land use] plans, nor does it create a duty to cease actions during such revisions"); *see also Colorado Environmental Coalition*, 161 IBLA 386, 396 (2004) (addressing appellant's allegation that BLM violated the multiple use mandate of FLPMA, "[A]lternative uses of the land 'need not be considered anew each time BLM decides to . . . grant leave to undertake an activity,'" *quoting Southern Utah Wilderness Alliance*, 122 IBLA 165, 173 (1992)).

Further, no provision in NEPA or its implementing regulations "requires BLM to postpone or deny a proposed action that is covered by the EIS [Environmental Impact Statement] for the current land use plan, in order to preserve alternatives during the course of preparing a new land use plan and EIS." *Colorado Environmental Coalition*, 169 IBLA 137, 144 (2006).

The record shows that in 2007, BLM, together with FS and NPS, initiated the process of determining whether the AML for wild horses for the Pryor Mountain Wild Horse Range had changed since adoption of the revised HMAP in 1992. It did so by assessing forage and other rangeland conditions and all of the other factors influencing the proper management of the Range for wild horse use. BLM concluded, based on such analysis, that, pursuant to the WFHBA, revision of the AML was called for in order to meet the statutory goal of establishing a wild horse herd that would result in a thriving natural ecological balance on the Federal range. *See* EA at 1-2, 16-17, 54; FONSI/DR at 1, 3. BLM properly described the purpose and need for the HMAP revision, and its conformance to the RMP. EA at 1-2, 10. Moreover, by requiring that monitoring data "will continue to be collected and the AML will be re-calculated within five years or after the revision to the Billings RMP whichever comes first," BLM has taken steps to ensure that its management of the Range will conform to any future land use plan. FONSI/DR at 8. Appellants have failed to show that

[6] We note that deferring such action would keep the AML at a level lower than that set by the decision under appeal.

BLM violated any provision of FLPMA or NEPA or their implementing regulations in issuing the HMAP decision prior to completion of a revised RMP.

Appellants also argue that BLM failed, in establishing a new AML, to consider data to ensure that the Pryor Mountain wild horse herd remains a self-sustaining and viable herd, and thus violated section 102(2)(C) of NEPA. They assert that BLM has long been in possession of "credible" scientific research establishing that the minimum population needed to ensure genetic viability is 150 wild horses, with 50 active breeders, and claim that the new AML will not ensure the viability of the herd. NA/SOR at 7.

Appellants refer to a 2004 study entitled "An Animal Location-Based Habitat Suitability Model for Bighorn Sheep and Wild Horses in Bighorn Canyon National Recreation Area and the Pryor Mountain Wild Horse Range, Montana, and Wyoming" (Wild Horse Study), by Gary Wockner, Francis J. Singer, and Kathryn A. Schoenecker,[7] which reported that the "'minimum goals for genetic viability in the Pryor Mountain wild horses ($Ne \geq 50$)[8] require that at least 160 animals be present on the range[.]'" NA/SOR at 8 (*quoting* Wild Horse Study at 168); *see* Petition at 11. Appellants also refer to three letters, dated July 2, 1992 (Ex. 4 attached to NA/SOR), April 2005 (Ex. 4 attached to NA/SOR), and July 16, 2009 (Ex. 2 attached to Reply), in which Dr. E. Gus Cothran informed BLM that he had estimated that the absolute minimum genetically viable population was 50 successful breeding adult wild horses, which would entail a census population size of 150 to 200 wild horses.[9] *See* Petition at 11; Reply at 3.

The Wild Horse Study and Cothran letters concluded that to have 50 active breeders in the herd, which is necessary to maintain the genetic viability of the herd, the total number of wild horses must be 150 or 160. *See* Reply at 7 ("[A] genetic effective population of 50 active breeding adult wild horses translates roughly into an overall minimum wild horse population size of 150").

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[7] The Wild Horse Study appears at pages 167 to 202 of a larger report, entitled "Bighorn Sheep Habitat Studies, Population Dynamics, and Population Modeling in Bighorn Canyon National Recreation Area, 2000-2003," (Open-File Report-1337), compiled by Schoenecker for the U.S. Geological Survey (USGS), U.S. Department of the Interior. We cite to the Wild Horse Study, using the pagination of the larger report.

[8] "Ne" refers to the Genetic Effective Number, which represents the number of active breeders in the wild horse population. *See* EA at 122.

[9] Cothran is reported to be an equine geneticist, and is currently a clinical professor in veterinary medicine and biomedical sciences.

BLM responds that it considered genetic diversity and other aspects of the health of the wild horse population in setting the AML and adopting management objectives and methods, in the new HMAP.[10] Answer at 8. It recognized that the "true Ne" is "the total [number of] animals actually breeding," which is not necessarily one third (or any other set percentage) "of individuals within a given population." EA at 17. BLM further acknowledged that research had shown that "reduced genetic diversity and inbreeding may result when less than 50 breeding adults are contributing to the next generation," thus agreeing, in part, with Cothran and the other scientists cited by appellants. *Id.* at 18; *see Wild Horse Organized Assistance*, 172 IBLA at 134. BLM did not, however, agree that it was necessary to have a total population of 150, 160, or 200 wild horses or that one of these was the critical number for the Pryor Mountain herd in order to have 50 active, successful breeding adult wild horses, and to ensure the genetic viability of the herd. EA at 18; *see id.* at 9 (Table 1).

BLM avers that it adopted a wild horse management objective which provided for maintaining a population of "'healthy horses in a healthy body condition with a high level of genetic variation within the population to prevent inbreeding depression or genetic drift.'" Answer at 9 (*quoting* EA at 28). It cites the EA, in explaining that, in addition to establishing the AML, other authorized wild horse management actions would preserve genetic traits and blood lines and ensure maximum genetic variation within a small population while managing for healthy rangelands: "The wild horses would be managed for an even sex ratio as well as age classes. Emphasis would be placed on retention and increasing the number of 5-10 year old animals as the core breeding population." EA at 53; *see id.* at 27-28. And BLM notes that the population would not be taken to the low range of the AML when fertility control is utilized. Answer at 9 (citing FONSI/DR at 7).

> Pointing to the record, BLM explains that the measures it adopted comport with the studies of genetic conservation in the Pryor Mountain wild horse herd. *See* Administrative Record at Tab GG ("Managers' Summary - Ecological Studies of the Pryor Mountain Wild Horse Range, 1992-1997" [compiled by Singer and Schoenecker]), Section II [(Conservation Genetics of the Pryor Mountain Wild Horses)] at 86-87; 116-118. Those studies recommend management actions that BLM adopted, *e.g.*, maintaining an even sex ratio, removing only young animals, relocating horses from other similar horse populations, focusing removal or contraceptive strategies on young animals, and managing undesired changes in sex ratio or age structure.

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[10] BLM stated that the average herd size would, in fact, remain steady at 134, since the foal crop would roughly equal the loss from death. *See* EA at 53-54.

Id. at 9-10.

BLM's decision provides for monitoring the wild horse herd, including genetics, blood lines, and other wild horse herd characteristics, and for taking appropriate measures to address any failure to achieve the HMAP objective of maintaining a healthy herd, while also managing for healthy rangelands. *See* FONSI/DR at 8; EA at 28, 86-87. If necessary, the herd will be augmented by relocating Pryor Mountain herd mares, or (if unavailable) other mares of similar genetic stock, to the Range, in order to restore the herd to a self-sustaining size, with sufficient genetic variability. *See* EA at 28, 86; Answer at 9.

Appellants cite Cothran to demonstrate that BLM erred in its analysis and decision, but they have failed to show that "BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different course of action or interpretation is available and supported by the evidence."[11] *West Cow Creek Permittees v. BLM*, 142 IBLA at 238. Moreover, even Cothran acknowledged that, given the vagaries of climate, predation, and other real world conditions, "[i]t is not possible to accurately determine the real effective population size of a wild population such as the PMWH [Pryor Mountain wild horses] so estimates . . . must be used." Letter to BLM, dated July 16, 2009; *see* Letter to BLM from Cothran, dated Apr. 2005 ("[T]here will always be great uncertainty in translating census size to effective size"). We further note that, in his Apr. 2005 letter, Cothran emphasized the need for BLM to maintain a core population of active breeding wild horses, by focusing on the removal of younger horses and older horses likely to be past their reproductive capacity: "If the reproductive core is maintained this will retain most of the genetic variation." BLM's decision similarly focuses on maintaining such a reproductive core, in undertaking any future gathering/removal implementing the HMAP. *See* EA at 27-28, 53, 107.

Appellants have not shown by a preponderance of the evidence that BLM committed a material error in its factual analysis, or, in setting the AML and adopting other management measures, failed to properly take into account the potential effect of such actions on the genetic diversity and other aspects of the health of the Pryor Mountain herd. *See West Cow Creek Permittees v. BLM*, 142 IBLA at 238. We find that the EA and record before us are sufficiently detailed with data and expert analysis to demonstrate a reasonable basis for BLM's decision. *See Wild Horse Organized Assistance*, 172 IBLA at 135-36; *Commission for the Preservation of Wild*

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[11] Importantly, appellants do not demonstrate how establishing a higher AML can be reconciled with BLM's obligation to limit wild horse use to a level that would prevent deterioration of the range. *See* 16 U.S.C. § 1333(a) (2006); *Dahl v. Clark*, 600 F. Supp. at 594; *Cloud Foundation, Inc., v. Kempthorne*, 2008 WL 2794741, at *9.

Horses, 145 IBLA 343, 346-47 (1998); *American Horse Protection [Association], Inc.*, 134 IBLA at 33-34. While appellants have demonstrated a difference of opinion with BLM concerning the AML determination, they have failed to show error in BLM's decision. *See Commission for the Preservation of Wild Horses*, 145 IBLA at 347.

To the extent appellants have raised other arguments not explicitly addressed here, they have been considered and rejected as contrary to the facts or law or as immaterial to the resolution of this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Christina S. Kalavritinos
Administrative Judge

I concur:

James K. Jackson
Administrative Judge