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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LAURA LEIGH,

Plaintiff,

v.

KEN SALAZAR, et al.,

Defendants.

Case No. 3:13-cv-00006-MMD-VPC

ORDER REGARDING TEMPORARY
RESTRAINING ORDER

I. SUMMARY

On January 4, 2013, Plaintiff filed an Emergency Motion for Temporary Restraining Order (“TRO”) in this case, asking the Court to cease and halt the wild horse gather on the Owyhee heard management area (“HMA”). (Dkt. no. 2.) The Court granted the Motion, and halted the Owyhee HMA horse gather until the Court had an opportunity to hear the matter. (Dkt. no. 7.) Defendant filed an Opposition to the TRO Motion. (Dkt. no. 11.) Plaintiff filed a Supplement to her TRO Motion, attaching declarations from experts regarding the treatment of the horses during the Owyhee roundup. (Dkt. no. 10.) The Court held a hearing on the TRO on January 10, 2013. Because Plaintiff offered evidence of inhumane treatment in her Supplement, which Defendant did not have an opportunity to respond to, at the hearing the Court allowed the government to call their witness, Alan Shepphard, to put on evidence regarding the scope and nature of the roundup.

1 **II. BACKGROUND**

2 Plaintiff sought an emergency injunction to halt the gather and removal of 39 wild
3 horses from an HMA in northern Nevada, known as the Owyhee Complex. In her TRO
4 Motion, Plaintiff challenges the Bureau of Land Management’s (“BLM”) authority to
5 conduct such a roundup. In her Complaint and Supplement to the TRO Motion, Plaintiff
6 also alleges that the manner in which BLM and its contractor are conducting the roundup
7 is inhumane and in violation of federal regulations dictating that wild horse roundups
8 must be conducted in a humane fashion. See 16 U.S.C. § 1333 (b)(2)(iv)(B); 43 C.F.R.
9 § 4700.0-5(e)-(f) (*infra*).

10 **III. LEGAL STANDARD**

11 **A. Temporary Restraining Order**

12 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary
13 restraining orders, and requires that a motion for temporary restraining order include
14 “specific facts in an affidavit or a verified complaint [that] clearly show that immediate
15 and irreparable injury, loss, or damage will result to the movant before the adverse party
16 can be heard in opposition,” as well as written certification from the movant’s attorney
17 stating “any efforts made to give notice and the reasons why it should not be required.”
18 Fed. R. Civ. P. 65(b).

19 Temporary restraining orders are governed by the same standard applicable to
20 preliminary injunctions. See *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F. 3d
21 832 n.7 (9th Cir. 2001). Further, a temporary restraining order “should be restricted to
22 serving [its] underlying purpose of preserving the status quo and preventing irreparable
23 harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose*
24 *Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439
25 (1974).

26 A temporary restraining order may be issued if a plaintiff establishes: (1) likelihood
27 of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary
28 relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the

1 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Injunctive
2 relief [is] an extraordinary remedy that may only be awarded upon a clear showing that
3 the plaintiff is entitled to such relief.” *Id.* at 22. The Ninth Circuit has held that “ ‘serious
4 questions going to the merits’ and a hardship balance that tips sharply toward the
5 plaintiff can support issuance of an injunction, assuming the other two elements of the
6 *Winter* test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132
7 (9th Cir. 2011).

8 **B. Applicable Law**

9 Plaintiff brings her claims under the Administrative Procedure Act (“APA”), 5
10 U.S.C. §§ 701 *et seq.* Judicial review of plaintiff’s claims is governed by 5 U.S.C. § 706.

11 Under 5 U.S.C. § 706(2), the court must set aside agency decisions that are
12 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or
13 “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A),(D). Although
14 the review of an agency decision is “searching and careful,” the “arbitrary and capricious
15 standard is narrow” and the court cannot substitute its judgment for the agency. *Ocean*
16 *Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 858 (9th Cir. 2005) (internal
17 quotation marks omitted). “This deferential standard is designed to ‘ensure that the
18 agency considered all of the relevant factors and that its decision contained no ‘clear
19 error of judgment.’” *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine*
20 *Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). In deciding whether an agency
21 violated the arbitrary and capricious standard, the court must ask whether the agency
22 “articulated a rational connection between the facts found and the choice made.” *Ariz.*
23 *Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). A
24 decision that is “inconsistent with a statutory mandate or that frustrate[s] the
25 congressional policy underlying a statute” cannot be upheld. *Ocean Advocates*, 402
26 F.3d at 859. Under § 706(2), the court has the authority to enjoin agency action that is
27 not in accordance with law.

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1 Under the Wild Free-Roaming Horse and Burros Act (“Wild Horse Act”), 16 U.S.C.
2 §§ 1331 *et seq.*, the Bureau of Land Management must immediately remove “excess”
3 wild horses, which are those that “must be removed from an area in order to preserve
4 and maintain a thriving natural ecological balance and multiple-use relationship in that
5 area.” 16 U.S.C. §§ 1332(f), 1333(b)(2). Excess horses must be “humanely captured
6 and removed.” 16 U.S.C. § 1333 (b)(2)(iv)(B) “[H]umane treatment” is defined as
7 “handling compatible with animal husbandry practices accepted in the veterinary
8 community, without causing unnecessary stress or suffering to a wild horse or burro.” 43
9 C.F.R. § 4700.0-5(e). Inhumane treatment is defined as “any intentional or negligent
10 action or failure to act that causes stress, injury, or undue suffering to a wild horse or
11 burro and is not compatible with animal husbandry practices accepted in the veterinary
12 community.” *Id.* § 4700.0-5(f).

13 **IV. FINDINGS AND CONCLUSIONS**

14 The Court has considered the TRO Motion and Supplement, the Opposition, the
15 accompanying declarations and affidavits, as well as the parties’ arguments at the
16 January 10, 2013, hearing and the evidentiary portion of that hearing. The Court hereby
17 makes the following findings and conclusions:

- 18 1. Plaintiff is unlikely to succeed on the merits of her claim that the BLM lacks
19 authority to conduct the Owyhee HMA gather and transport of the 39
20 horses at issue. Defendant is likely to succeed in its argument that the
21 gather and transport are within the BLM’s statutory authority. See 16
22 U.S.C.A. § 1333(a) (“The Secretary shall manage wild free-roaming horses
23 and burros in a manner that is designed to achieve and maintain a thriving
24 natural ecological balance on the public lands.”).
- 25 2. Plaintiff has failed to demonstrate that she will suffer irreparable harm
26 should the TRO be lifted. Defendant has demonstrated that the gather is
27 designed to promote the health of the wild horses in the Owyhee Complex,
28 and to ensure the continued existence of free-ranging herds on the range.

1 3. The potential harm to defendants if a TRO is issued is the temporary
2 suspension of gather activities, which costs the federal government roughly
3 \$18,000-20,000 each day. (Dkt. no. 11-6 at ¶ 18.) Plaintiff will not suffer
4 harm should the TRO be lifted with the Court ordering BLM to conduct the
5 gather in a humane fashion, as set forth below.

6 4. The public interest is served when actions are taken to achieve and
7 maintain a thriving natural ecological balance on the public lands.
8 Defendant's roundup of excess horses helps achieve this goal.

9 **V. TEMPORARY RESTRAINING ORDER**

10 The Injunction issued by this Court on January 4, 2013, IS HEREBY LIFTED, in
11 accordance with the following terms:

- 12 1. Defendant may conduct the planned wild horse gather and transport at the
13 Owyhee HMA.
- 14 2. Defendant must conduct the gather and transport in a humane fashion
15 pursuant to 16 U.S.C. § 1333 (b)(2)(iv)(B) and 43 C.F.R. § 4700.0-5(e)-(f).
- 16 3. Defendant cannot use "hot shot"/electric prod treatment on the
17 weanlings it plans to transport.
- 18 4. Defendant cannot routinely use "hot shot"/electric prod treatment during the
19 planned gather and transport of the adult horses. Defendant may only use
20 such treatment as necessary to ensure the safety and security of the
21 horses and handlers.
- 22 5. Defendant cannot conduct the gather or transport in a manner where the
23 horses are driven through barbed wire fences.
- 24 6. Defendant must conduct the gather and transport in a manner ensuring
25 that all foals are able to keep up with the drive, and none are left behind
26 from the herd.

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7. To the extent Defendant uses such methods, Defendant cannot conduct the gather or transport in a manner where the horses are treated with rushed and aggressive loading tactics from the trap sites into the trucks.

8. To the extent Defendant uses such methods, Defendant cannot conduct the gather or transport in a manner where the horses are rounded up from unsafe trap locations.

IT IS SO ORDERED.

DATED THIS 10th day of January 2013.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE