

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COLORADO WILD HORSE AND BURRO)
COALITION, INC., et al.,)
)
Plaintiffs,)
)
v.)
)
KEN SALAZAR, Secretary, U.S. Dep't of)
the Interior, et al.,)
)
Defendants.)

Civil Action No. 06-1609 (RMC)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINDING OF CONTEMPT AND SANCTIONS AND
ORDER SHORTENING TIME FOR BRIEFING AND HEARING ON THE MOTION

I. INTRODUCTION

On August 5, 2009, this Court issued a Memorandum Opinion, Dkt. 105, and an Order (1) prohibiting the Bureau of Land Management (BLM) from engaging in the illegal removal of wild horses in the West Douglas Herd Area in Colorado; (2) rejecting BLM's claim of discretion to remove wild horses without a determination that they were "excess"; (3) invalidating the BLM's 2008 Gather Plan to the extent it authorized the removal of wild horses¹; and (4) finding illegal the BLM's decision to manage these horses off the public lands. Dkt. 105, 106. Defendants have now announced they are going to do just what this Court said they could not. As if the Order was never entered, and relying on the very same rationale as set forth in the 2008 Gather Plan and other documents this Court previously ruled inadequate, the BLM has again declared it will undertake the *exact same actions* that the Court's Order prohibited. The BLM's decision violates the Court's Order in multiple ways, and Plaintiffs therefore seek an order finding Defendants in contempt and prohibiting them from carrying out their asserted intentions.

¹ The 2008 Gather Plan, officially titled the "2008 West Douglas Herd Area Wild Horse Removal Final Decision Record and Environmental Assessment," is the culmination of several efforts by the Bureau of Land Management (BLM) to remove every single horse in the West Douglas Herd.

Because Defendants' planned removal of wild horses will happen before the Court could hear this motion based on the normal timeframe for responding to and hearing motions, Plaintiffs additionally seek an Order shortening the time for briefing and hearing on this motion,

II. PROCEDURAL/FACTUAL SUMMARY

Plaintiffs initially instituted this action in order to invalidate and enjoin the BLM's intended plan to remove all of the wild horses in the West Douglas Herd, pursuant to its 2006 Gather Plan and earlier-issued documents. By the time cross-motions for summary judgment were decided, the BLM had issued a 2008 Gather Plan and announced its decision to eradicate this herd. The Court rejected this plan, ruled for Plaintiffs, and held that the BLM's intended action under the 2008 Gather Plan violated the Wild Free-Roaming Horses and Burros Act ("Wild Horses Act"), 16 U.S.C. section 1331 *et seq.* Dkt. 105, 106.² The BLM appealed the Court's decision, Dkt. 108, then withdrew its appeal of that decision. Dkt. 109.

The Court's Memorandum Opinion of eighteen pages was very explicit when it held that Defendants' conduct, including the proposal presented in the 2008 Gather Plan, violated the Wild Horses Act. Dkt. 105. Specifically, this Court found that the BLM's plan to remove all of the horses in the West Douglas Herd Area was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C)." Dkt. 105, at 17. Before removing the West Douglas Herd, this Court held that BLM must "first determine that an overpopulation exists and that the wild free-roaming horses and burros slated for removal are 'excess animals.' BLM concededly has not made such a determination with respect to the horses in the West Douglas Herd Area." Dkt. 105, at 17-18.

On September 3, 2010, the BLM issued a new Decision Record ("DR") for the West Douglas Herd, in which it once more declared that "all wild horses within and adjacent to the West Douglas Herd Area are excess animals and require immediate removal." DR, attached as

² Copies of the Court's Memorandum Opinion and Order are attached as Exhibits 1 and 2 to the Declaration of Valerie Stanley ("Stanley Decl.").

Exhibit 3 to the Stanley Decl., p. 1. But it presented no new facts to support its decision. The BLM determined that its proposal “will best implement the planning decisions” included in the two documents that were *already before this Court* when it issued its summary judgment ruling.³ The identical documents are referenced in the Court’s Order at pages 2-3 – an order which found that those documents had *not* established that the targeted horses were “excess”. Same documents, no new facts, and the same decision – to eliminate all of the horses in the area.

That is, the “new plan” has the same effect as the old plan, recycling the same arguments that this Court already rejected, without any new evidence. BLM unconvincingly attempts to distinguish the current EA and DR for the removal of the entire West Douglas Herd from the virtually identical 2008 plan, which the Court ruled to be unlawful. All that BLM has done in its new EA and DR is to assert (without basis in law or fact) that the documents that the Court already reviewed implicitly found the entire West Douglas Herd to be excess. EA, Stanley Decl., Ex. 4, p. 2. However, as Defendant BLM itself admitted to this Court, no such determination was made.

Indeed, when questioned by this Court, Defendants expressly stated that BLM *had not* determined the entire herd to be excess. The Court’s Memorandum Opinion makes this crystal clear. Dkt. 105, at 12 (“Defendants conceded at oral argument BLM has not determined [the West Douglas Herd] to be ‘excess animals.’”); *see also id.* (BLM directly responding “no” to Court’s inquiry if West Douglas horses were excess); *id.* at 12, n. 15 (“[G]razing patterns, likely caused by human development, and not overpopulation, [] formed the basis for BLM’s decision to remove the West Douglas Herd.”). Nevertheless, this is the basis for the current plan. Defendants propose once again to decimate the West Douglas Herd – the very conduct this Court barred.

³ Those documents are “the White River Record of Decision and Approved Resource Management Plan dated July 1, 1997 and the West Douglas Herd Area Amendment to the White River Resource Management Plan, Environmental Assessment CO-WRFO-05-083-EA dated October 10, 2007.” Decision Record, Stanley Decl., Ex. 1, at 1; *see also* Environmental Assessment, Stanley Decl., Ex. 2, p. 7.

The DR does not mention this Court's Order, and Defendants have not made any obvious new determinations to support that decision. Despite the Court's earlier finding that the BLM had admitted that it had not previously made an overpopulation finding, the DR states that "[t]hrough all of the analysis completed by the BLM on the West Douglas Herd Area, the BLM has consistently determined that the wild horses are excess animals that need to be removed. . . ." DR, Stanley Decl., Ex. 3, p. 4. But this analysis does not rely on new facts – just a re-examination of the documents that did not satisfy the statutory standard for a finding that the horses to be removed are "excess".

BLM plans to engage in the very same prohibited conduct, relying on the very same documents that the Court found insufficient. And rather than address the significant question of whether the BLM can simply eliminate a herd without some detailed analysis, it states that such a question is "outside the scope of this analysis." EA, Stanley Decl., Ex. 4, p. 7. The BLM is in direct violation of the substance and spirit of the Court's Order.

Plaintiffs have made no prior request for this specific relief, and provided Defendants with notice of this motion. Stanley Decl., ¶¶ 6-7.

III. APPLICABLE LAW

Rule 70 of the Federal Rules of Civil Procedure allows a court to hold a party in contempt for failure to comply with a judgment. Pursuant to Rule 70, federal courts may review disobedience of final judgments to issue contempt orders. *See, e.g., Washington Metropolitan Transit Area v. Holiday Tours, Inc.*, 487 F. Supp. 516, 519 (D.D.C. 1980) (contempt for violating permanent injunction); *Filmvideo Releasing Corp. v. Hastings*, 517 F. Supp. 66, 67 (S.D.N.Y. 1981) (violation of judgment). The Court also has inherent contempt powers under 18 U.S.C. § 401(3) which should be utilized here.

Contempt lies where a party has directly violated an order of which it has knowledge and with which it has the ability to comply. *See WMATA v. Amalgamated Transit Union*, 531 F.2d 617, 621 (D.C. Cir. 1976); *Natural Resources Defense Council v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692, 713 (D.C. Cir. 1975); *International Longshoremen's Association v.*

Philadelphia Marine Trade Association, 389 U.S. 64, 76 (1967). Cf. *Terminal Railroad Association of Saint Louis v. United States*, 266 U.S. 17, 29 (1924) (contempt limited to violations within “implication or intendment” of order). Contempt is available against state actors. *Petties v. District of Columbia*, 897 F. Supp. 2d 626, 630 (D.D.C. 1995).

IV. DEFENDANTS’ 2010 GATHER PLAN AND INTENDED REMOVAL OF THE WEST DOUGLAS HERD IS IN CONTEMPT OF THIS COURT’S ORDER

The case is very clear here. This Court told Defendants they could not remove all the wild horses from the West Douglas Herd Area without a determination that all the horses were excess. Now comes BLM with a “new” removal plan based on a “new” EA that claims that BLM actually did find the entire herd to be excess back in 1980, directly contradicting its representations to this Court. This is a disingenuous attempt by BLM to circumvent proper judicial review of its actions, and a direct violation of this Court’s ruling.

Without doing anything more than writing a new document, the BLM points to the very documents the Court found unsatisfactory before. Then, as if by magic, the BLM somehow has discovered the basis for removal that this Court found (and BLM agreed) was absent, in the very same documents examined by this Court. This proposed wild horse removal is a blatant flouting of the Court’s authority and breach of BLM’s obligation to this Court and under the Wild Horses Act. It is sanctionable as contempt, and the only just remedy is to stop Defendants from moving forward with the exact conduct this Court prohibited already.

Defendants are also in contempt of this Court’s order that found that Defendants could not manage the West Douglas Herd “by corralling them for private maintenance or long-term care as *non-wild* free-roaming animals *off* of the public lands.” Dkt. 105, p. 14.

This Court issued an Opinion and Order which Defendants violated. The Court ordered defendants to both set aside the 2008 gather and to withhold any removal of the West Douglas herd without a determination that every horse in the herd was “excess.” Defendants are now intending to remove the same horses without that determination. Their contempt of Court is clear.

The Court's Order was "clear, definite, and unambiguous." *See Utica College v. Gordon*, 2010 U.S. App. Lexis 16830, at *3 (2d Cir. Aug. 11, 2010) (contempt lies for failure to comply with a lawful, clear, definite, and unambiguous order). Moreover, without an immediate order, BLM's contempt will increase in both severity and intensity, and will cause further harm to Plaintiffs. That is, BLM is poised within a week to begin this judicially-forbidden conduct. Without a finding of contempt and appropriate sanctions, Defendants' plan will begin.

Thus, this Court should (1) find Defendants in contempt of this Court's August 5, 2009 Order; (2) order defendants to set aside the proposed 2010 gather plan; (3) impose monetary fines on defendants; and (4) provide such other and different relief as this Court deems just.

V. PLAINTIFFS SEEK AN ORDER SHORTENING TIME FOR BRIEFING AND HEARING ON THE MOTION.

Defendants are planning to undertake the proposed removal of wild horses within one week. For good cause, Plaintiffs hereby request that the Court set an expedited briefing and hearing schedule in Plaintiffs' motion for contempt and sanctions. Stanley Decl., ¶ 7.

If Defendants are allowed to respond to Plaintiffs' Motion for Contempt under the schedule set forth in the local rules, *i.e.*, fourteen days after it is filed, Defendants will be able to commence and accomplish the removal of the West Douglas wild horse herd before responding to Plaintiffs' Motion. For this reason, Plaintiffs request that that the Court enter an Order shortening time for Defendants to respond to Plaintiffs' motion.

Dated: September 27, 2010

Respectfully submitted,

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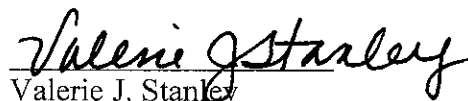
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