

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

ROCK SPRINGS GRAZING)
ASSOCIATION, a Wyoming Corporation;)
))
Petitioner,)
))
v.)
))
KEN SALAZAR, in his official capacity as)
Secretary of the Department of the Interior;)
et al.)
))
Respondents;)
))
and)
))
AMERICAN WILD HORSE)
PRESERVATION CAMPAIGN, *et al.*)
))
Respondent-Intervenors.)

Civ. No. 2:11-CV-00263-NDF

CONSENT DECREE AND JOINT STIPULATION FOR DISMISSAL

The parties to this Consent Decree are the Petitioner Rock Springs Grazing Association (RSGA) and Respondents, including Department of the Interior, Ken Salazar, Secretary, and the Bureau of Land Management (BLM), *et al.*

WHEREAS, the RSGA filed suit to compel the removal of wild horses from the private lands which the RSGA owns and leases within the Wyoming Checkerboard;

WHEREAS, the alternating public land sections within the Wyoming Checkerboard are owned by the United States and administered by the BLM;

WHEREAS, the RSGA was incorporated in 1909 to manage livestock grazing and to conserve the range resources in the high desert environment, and since that time has done so continuously;

WHEREAS, the RSGA holds a grazing permit from the BLM for the alternating sections of the public lands within the Wyoming Checkerboard;

WHEREAS, the RSGA conservation plan limited livestock grazing, primarily by sheep, to the winter months to provide sufficient winter forage;

WHEREAS, since 1971, when Congress enacted the Wild Free-Roaming Horses and Burros Act (WHA), 16 U.S.C. §§ 1331-1340, wild horse numbers within the Wyoming Checkerboard and elsewhere have proven difficult to control;

WHEREAS, RSGA reached an agreement with wild horse advocacy groups to tolerate 500 wild horses on the Checkerboard in January 1979, once “BLM has proven that they are capable of managing the wild horses with respect to numbers of horses to be allowed in the Rock Spring District”;

WHEREAS, in 1979, RSGA sued BLM to compel removal of the wild horses from the private lands and the Wyoming District Court directed BLM to “remove all wild horses from the checkerboard grazing lands in the Rock Springs District except that number which the RSGA voluntarily agrees to leave in said area;”

WHEREAS, the wild horses utilize all of the land within the Checkerboard without regard to land ownership and fencing the private lands may violate the Unlawful

Inclosures Act, 43 U.S.C. §§ 1061-1066, may disrupt wildlife movement and migration, may increase predation of birds, particularly sage grouse, and may be costly;

WHEREAS, the BLM efforts to substitute fertility control for wild horse gathers remains experimental;

WHEREAS, the State of Wyoming big game population objectives have increased significantly since the RSGA and wild horse groups initially agreed to specific numbers of wild horses, the increased big game numbers also utilize the rangeland resources and, in many cases, directly compete with wild horses for water and forage;

WHEREAS, in 1995, the BLM adopted regulations governing standards for rangeland resources, including managing for the health of native vegetation and riparian areas, 43 C.F.R. Part 4180;

WHEREAS, the wild horses utilize the range year round and, due to greater availability of water on the Checkerboard and topography, the wild horses spend much of each year on the Checkerboard;

WHEREAS, due to the Checkerboard landownership pattern, RSGA and BLM have enjoyed and continue to work in partnership on a broad range of land issues and intend that this settlement facilitate this decades old partnership;

WHEREAS, management of wild horses on the Checkerboard must also conform to the rights of private landowners under Section 4 of the WHA;

WHEREAS, the parties have concluded their discussions and the parties agree that it is in the public interest to resolve this controversy and enter into a stipulation with respect to the wild horses located on private RSGA land and to initiate a process to better manage wild horses on the adjacent public lands, and further that the parties have engaged in arm's length negotiations, and that it is in the interest of the public, the parties, and judicial economy to resolve this action through settlement.

THEREFORE, without admission or adjudication of any question of fact or law, the parties agree as follows:

1. Pursuant to 16 U.S.C. §1334, BLM agrees to remove all wild horses located on RSGA's private lands, including Wyoming Checkerboard lands, with the exception of those wild horses found within the White Mountain Herd Management Area (HMA), in accordance with the schedule set forth in paragraph 5. RSGA agrees to allow the current Appropriate Management Level (AML) of 205-300 wild horses on the White Mountain HMA, which includes the Checkerboard lands within the White Mountain HMA. Pending further review and analysis of the White Mountain HMA in accordance with Paragraph 6 *infra*, the White Mountain HMA will be maintained at 205-300 wild horses. When it is necessary to conduct a gather to maintain horse numbers within the range of 205 to 300, BLM agrees to gather and remove down to the low end of AML (205) in the White Mountain HMA and use fertility control or other population control methods to reduce annual population growth pursuant to its existing authority. Water

developments may be considered within the Checkerboard lands within the White Mountain HMA to facilitate public viewing of wild horses.

2. BLM retains discretion to implement all available fertility control methods pursuant to existing authority, such as PZP, SpayVac, and the discretion to consider the spaying of mares and gelding of stallions in the Adobe Town and the White Mountain HMAs in an attempt to achieve low end of AML within these respective HMAs. Initially, BLM will consider use of SpayVac on the White Mountain HMA mares.

3. No later than November 30 of each year, for the duration of this decree, the BLM will report to RSGA representatives on the results of the wild horse census results for Salt Wells / Adobe Town, Divide Basin, and White Mountain areas. RSGA will sign and return a copy of the report to the Field Manager to document the communication.

Consistent with the historically close cooperation between BLM and RSGA, the parties may also meet to discuss the results. The BLM will also provide RSGA notice on when the gathers will occur to remove wild horses as provided in paragraph 4.

4. If BLM determines, based on the results of any census and on projected reproduction rates, that the wild horse population in the Adobe Town or White Mountain HMAs is likely to exceed the respective AML, the BLM shall adjust its annual work plan to gather and remove excess wild horses from the HMA(s) so that the population is reduced to the low end of AML. If BLM determines, based on the results of any census and on projected reproduction rates, that the population in the Checkerboard lands is

likely to exceed 200 wild horses for Salt Wells/Adobe Town Areas combined or 100 wild horses for Divide Basin, the BLM shall prepare to remove the wild horses from Checkerboard lands within the respective area. Absent census data that determine population numbers, the parties agree that until otherwise established and agreed, the population levels in the future will be estimated by assuming a projected reproduction rate of 20% annual increase in herd size. The census conducted by BLM will also be adjusted to account for undercounting consistent with the principles discussed in Instruction Memorandum 2010-57. A different adjustment may be used if so agreed by the parties.

5. BLM will commit to gather and remove wild horses from Checkerboard lands within Salt Wells and Adobe Town HMAs in 2013, Divide Basin HMA in 2014, and White Mountain HMA in 2015, with the exception of those wild horses that are allowed to remain as identified in paragraphs 1 and 4. BLM will also commit to an additional gather and removal in the above areas in 2016, if necessary to achieve the numbers identified in paragraphs 1 and 4.

6. No later than 180 days after this Consent Decree is approved by the Court, BLM will submit to the Federal Register for publication a notice[s] of scoping under NEPA to consider the environmental effects of revising the respective Resource Management Plans for the Rock Springs and Rawlins Field Offices by considering proposed actions that would:

- a. Change the Salt Wells HMA to a Herd Area, which would be managed for zero wild horses, and if BLM determines there are more than 200 wild horses within the Herd Area, the area will be re-gathered to zero wild horses.
 - b. Change the Divide Basin HMA to a Herd Area, which would be managed for zero wild horses, and if BLM determines there are more than 100 wild horses within the Herd Area, the area will be re-gathered to zero wild horses.
 - c. Change the Adobe Town HMA AML to 225-450 wild horses or lower, and that gathered wild horses will not be returned to the Salt Wells area.
 - d. Manage the White Mountain HMA as a non-reproducing herd by utilizing fertility control and sterilization methods to maintain a population of 205 wild horses and to initiate gathers if the population exceeds 205 wild horses.
7. Nothing in this agreement allows wild horses on RSGA lands outside of the historical HMAs or areas and except as agreed above nothing in this agreement constitutes a waiver of RSGA's right to notify BLM to remove all of the wild horses from its private lands pursuant to Section 4 of the WHA.

CONTINUING JURISDICTION, ENFORCEMENT and DISPUTE RESOLUTION

8. This Court shall have continuing jurisdiction over this matter with respect to any dispute arising under this Consent Decree and any alleged violation of this Consent Decree. This Court may issue such further orders or directions as may be necessary or appropriate to construe, implement, or enforce the terms of this Consent Decree.

Petitioner agrees that if a violation of this Consent Decree occurs, it shall not seek to have Respondents or any officials of the Department of the Interior or the BLM, including but not limited to the Secretary of the Interior, the Director of the BLM, or officials of the BLM's Wyoming State Office held in contempt of court for failure to comply with the terms of this Consent Decree. The Petitioners will seek enforcement against the Department of the Interior and/or the BLM and not against the Secretary of Interior or officials of the BLM in their individual capacities.

9. In the event of a disagreement between the Parties concerning the interpretation or performance of any provision in this Consent Decree, a Party shall invoke the dispute resolution procedures of this Section by notifying the other Parties in writing of the matter(s) in dispute and of the Party's intention to resolve the dispute under this Section. The Parties shall then attempt to resolve the dispute informally for a period of thirty (30) calendar days from the date of the notice. If the Parties cannot resolve a dispute by the end of the period of informal negotiations, the Party seeking interpretation or performance may file a motion for relief or enforcement with this Court. If the Party prevails, then it may request fees and costs. The other Party retains all defenses and objections, including those relating to fees and costs.

AGENCY DISCRETION

10. Nothing in this Consent Decree shall be construed to limit or modify the discretion accorded to BLM by the applicable federal law and regulations, including but

not limited to the WHA; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq.; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.; the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.; or general principles of administrative law with respect to the procedures to be followed in carrying out any of the activities required herein, or as to the implementation or conduct of any of the activities required herein.

MODIFICATION and TERMINATION

11. Any party may file a motion with the Court to modify or terminate its agreement for good cause shown. In any event, this Consent Decree shall terminate no later than 10 years after entry of the decree, subject to the right of the parties to negotiate an extension.

12. Any dates or time frames set forth in this Consent Decree may be extended by written agreement of the Parties and notice to the Court. To the extent the Parties are not able to agree to an extension, the Respondents may seek a modification of this Consent Decree. The Respondents shall be deemed to be in compliance with this Consent Decree pending resolution by the Court of any motion by the Respondents to modify a date established by this Consent Decree. If the Court denies a motion by the BLM to modify a date established by this Consent Decree, then the date for performance for which modification has been requested shall be such date as the Court may specify.

FORCE MAJEURE

13. For purposes of this Consent Decree, a Force Majeure event is any occurrence (including, but not limited to, wildfire and drought) outside the control of the Respondents, or of any entity employed by the Respondents that delays or prevents compliance with this Consent Decree despite the Respondents' best efforts to comply. The Respondents' "best efforts" include using best efforts to anticipate, avoid, and mitigate any potential Force Majeure event (1) as it is occurring and (2) following the potential Force Majeure event, such that delay is minimized to the greatest extent possible.

14. When a Force Majeure event is occurring or has occurred which may delay the completion of any requirement of this Consent Decree, the Department of the Interior and/or the BLM shall notify the RSGA, in writing, within fifteen (15) days after learning of the event. The notice shall describe the basis for the Force Majeure delay, the anticipated length of the delay, and the revised timetable for completing the requirements of this Consent Decree. In proceeding on any dispute regarding a delay in performance, the dispute resolution provisions of Paragraph 9 shall apply.

15. In the event that performance of any provision or term of this Consent Decree conflicts with an order issued by any other federal court, the Respondents shall be entitled to a show cause hearing before this Court takes any action to enforce the provisions or terms of this Consent Decree.

APPLICABLE LAW

16. This Consent Decree shall be governed by and construed under the laws of the United States.

COMPLIANCE WITH OTHER LAWS

17. The RSGA recognizes that the Respondents are required to comply with other federal laws in conjunction with undertaking the required actions herein. No provision of this Consent Decree shall be interpreted or constitute a commitment or requirement that the Respondents take actions in contravention of the WHA, FLPMA, NEPA, the APA, the Endangered Species Act, or any other law or regulation, either substantive or procedural. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the United States Department of the Interior and/or the BLM obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation. Nothing in this Decree infringes on RSGA rights under Section 4 of the WHA, 16 U.S.C. §1334.

NO ADMISSION OF LIABILITY

18. This Consent Decree was negotiated, mutually drafted, and executed by the Parties in good faith to avoid further litigation and is a settlement of claims which were contested, denied and disputed in part. Neither the execution of this Consent Decree nor any action taken hereunder is an admission of any fact, liability or wrongdoing of

any kind regarding any of the matters addressed in the Consent Decree. Accordingly, with the exception of this proceeding, this Consent Decree shall not be admissible in any judicial or administrative proceeding for use against any Settling Party over the objection of that Settling Party.

DISMISSAL WITH PREJUDICE

19. Subject to the provisions herein, the RSGA petition is dismissed with prejudice upon entry of an order by the Court ratifying and approving this Consent Decree. RSGA reserves all rights to bring an action for alleged future violations by Respondents of the WHA. Respondents reserve any and all defenses to such future actions.

SEVERABILITY

20. In the event that any provision or term of this Consent Decree is deemed unlawful; the balance of the Decree shall remain in force and effect.

FEES and COSTS

21. Each party will bear their own attorneys' fees and costs. If a dispute arises under the terms of this Consent Decree, the Parties do not waive any right or defense to claim or contest fees and costs, including the hourly rate, in any future litigation or in any future proceedings in the present action.

Dated: February 12, 2013

Respectfully submitted:

/s/ Constance E. Brooks

Constance E. Brooks
connie@cebrooms.com
Michael B. Marinovich
mike@cebrooms.com
C.E. Brooks & Associates, P.C.
303 East 17th Avenue, Suite 650
Denver, CO 80203
(303) 297-9100 fax: (303) 297-9101

IGNACIA S. MORENO, Assistant
Attorney General
SETH M. BARSKY, Section Chief

By Permission: /s/ Coby Howell
COBY HOWELL, Wy. Bar No. 6-3589
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources
Division
Wildlife & Marine Resources Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1000
(503) 727-1117 (fax)
coby.howell@usdoj.gov
Attorneys for Federal Respondents

/s/ Galen West

L. Galen West
galen.west@bwtpc.com
West Law Office, P.C.
409 Broadway, Suite A
Rock Springs, Wyoming 82902
(307) 362-3300 fax: (307) 362-3309

Counsel for Plaintiffs