Cloud Foundation, Inc. v. Salazar

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Cloud Foundation, Inc., v. Salazar, ___ F. Supp. 2d ___, 2013 WL 6083927, 2013 U.S. Dist. LEXIS 164047 (D.D.C., Nov. 19, 2013).

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I. ABSTRACT

The United States District Court for the District of Columbia found that the BLM and Forest Service did not act arbitrarily and capriciously when they maintained and extended a boundary fence and decided not to expand a wild horse and burro range. The court also held the BLM used reasoned decision making when it determined a target horse and burro population in a herd management plan. Additionally, a National Environmental Policy Act claim was defeated under the "capable of repetition yet evading review" exception to the mootness doctrine.[1]

II. INTRODUCTION

In *Cloud Foundation*,[2] the United States District Court for the District of Columbia granted the government's cross-motion for summary judgment regarding the plaintiffs' challenge to federal management of wild horses in southern Montana and northern Wyoming.[3] The plaintiffs, two environmental groups (collectively "Cloud"), challenged action by the Bureau of Land Management ("BLM") and the U.S. Forest Service ("USFS") (collectively "Government") under the Wild Free Roaming Horses and Burros Act ("Wild Horses Act") and the National Environmental Policy Act ("NEPA").[4] Because neither act creates a private right of action, the court reviewed Government compliance with the Wild Horses Act under the Administrative Procedure Act ("APA").[5]

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[1] *Cloud Foundation, Inc., v. Salazar*, ___ F. Supp. 2d ___, 2013 WL 6083927 (D.D.C., Nov. 19, 2013).

[2] *Id.*

[3] *Id.* at *1.

[4] *Id.* at *2.

[5] *Id.*

The district court addressed two issues raised by the Government and three issues raised by Cloud. The Government stated the issues as: (1) whether Cloud challenged final agency action in their Wild Horse Act claims; and (2) whether Cloud exhausted their administrative remedies.[6] Cloud addressed the issues of: (1) whether a 2009 herd management area plan ("HMAP") established a horse level population that could ensure genetic viability; (2) whether the USFS's decision to repair, maintain, and slightly extend a fence violated the Wild Horses act; and (3) whether the Government ignored NEPA obligations regarding their use of a categorical exclusion in disposing wild horses it removes from the Pryor Mountain Wild Horse Range.[7]

III. FACTUAL AND PROCEDURAL BACKGROUND

The Secretary of the Interior established the Pryor Mountain Wild Horse Range in 1968.[8] The range spans 39,650 acres in Carbon County, Montana, and Big Horn County, Wyoming.[9] Three years after establishment, Congress passed the Wild Horses Act, which assigned the BLM and the USFS duties to care for, and manage wild horses.[10]

In 1984, the Government issued an HMAP that established an appropriate management level ("AML") of 121 wild horses plus or minus five percent.[11] In 1992, the 1984 HMAP was modified as the AML was adjusted to 95 wild horses plus or minus 10 percent, or 85 to 105 wild horses.[12] The 1992 HMAP governed wild horse management in the Pryor Mountain Wild Horse Range until 2009.[13]

In 2009, the HMAP was modified due to the results of a range evaluation conducted by

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[6] *Id.* at *3.
[7] *Cloud Foundation, Inc.*, 2013 WL 6083927 at **4, 5.
[8] *Id.* at *1.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *1.

the BLM, USFS, and National Park Service.[14] The evaluation found that portions of the range

were overused because of grazing and drought.[15] Ultimately, the 2009 HMAP established an

AML of 90-120 horses and provided for the repair, maintenance, and slight extension of the

northern boundary fence.[16] Cloud appealed the BLM's 2009 HMAP to the Interior Board of

Land Appeals ("IBLA") and the USFS.[17]

Following the appeal, Cloud filed a Complaint for Declaratory and Injunctive Relief

challenging a planned gather of wild horses on the range.[18] Additionally, Cloud moved for a

temporary restraining order to enjoin the gather.[19] The court denied the motion and the planned

gather concluded.[20] Almost one year later, Cloud filed a Second Amended Complaint on which

the Government moved for partial judgment.[21] The Government also requested to transfer the

case to the U.S. District Court of Montana.[22] Both motions were denied.[23] Finally, Cloud filed a

motion for summary judgment, and the Government filed a cross-motion for summary

judgment.[24]

IV. ANALYSIS

Before analyzing either party's claims, the court determined the actions taken by the

Government under the Wild Horses Act and NEPA would be reviewed under the APA.[25] Under

the APA, a court can only set aside agency action if it is "arbitrary, capricious, an abuse of

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *2.
[19] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *2.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *2.

discretion, or otherwise not in accordance with law."[26] Review under the arbitrary and capricious

standard is narrow, and courts must be "extremely deferential" to agency decisions and

predictions within their area of expertise.[27]

As to the Government's two claims, the court first agreed that Cloud did not challenge

any final agency action but then disagreed with the Government's argument that Cloud failed to

exhaust their administrative remedies.[28] The court found Cloud did not challenge a final agency

action because they asserted their claims against the 2009 HMAP decision instead of the IBLA

decision,[29] and Department of the Interior regulations make clear that IBLA decisions are final

agency actions.[30] Although Cloud did not challenge the appropriate decision, the court

disallowed them to file leave to amend their complaint because even if they had challenged the

IBLA decision, they still would not have survived summary judgment.[31] Second, the court found

Cloud had sufficiently exhausted their administrative remedies because, during the IBLA and

USFS administrative appeal process, Cloud was consistent and alleged that the 2009 HMAP

violated the Wild Horses Act by incorrectly failing to consider range expansion outside the

boundary of the range.[32]

Regarding Cloud's three claims, the court held that: (1) the Government used reasoned

decision making when determining target horse and burro populations in the HMAP; (2) the

fence repair and extension was not an arbitrary and capricious action; and (3) the use of a

categorical exclusion in the 2009 HMAP was moot and challenges to future categorical

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[26] *Id.* (citing 5 U.S.C. § 706(2)(A)).
[27] *Id.* (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1289 (D.C.Cir. 2004)).
[28] *Id.* at *3.
[29] *Id.*
[30] *Id.*
[31] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *3.
[32] *Id.*

exclusions are not final agency action.[33]

The court noted BLM officials have significant discretion to choose wild horse and burro populations.[34] In setting the target population at 90-120, the BLM considered competing claims for the land and agreed to preserve genetic traits and bloodlines, and to ensure maximum genetic variation while maintaining healthy rangelands.[35] As such, the court found the BLM used reasoned decision-making, and its actions in setting the population objective at 90-120 animals were not arbitrary and capricious.[36]

Second, the court found that the USFS thoroughly explained its decision to repair, maintain, and slightly extend the Northern Boundary Fence.[37] The USFS explained the alterations to the fence would: reduce or halt the need for moving or handling horses; reduce long-term maintenance needs; minimize conflicts with other uses on adjacent National Forest System Land; and would not affect the free roaming ability of the herd within the territory.[38]

Finally, the court found that the Government's use of a categorical exclusion in the 2009 HMAP did not violate NEPA. A categorical exclusion is used when a government agency decides certain conduct does "not individually or cumulatively have a significant effect on the human environment."[39] Because the categorical exclusion in the 2009 gather disposition was complete, Cloud's claim was moot.[40] Also, a challenge to future categorical exclusions was inappropriate because it would not challenge final agency action.[41] Future categorical exclusions

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[33] *Id.* at *4, *5, *6.
[34] *Id.* at *4.
[35] *Id.*
[36] *Id.*
[37] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *5.
[38] *Id.*
[39] *Id.* (citing 40 C.F.R. § 1508.4).
[40] *Id.* at *6.
[41] *Id.*

will be shaped by numerous factors and circumstances unique to a particular horse gather.[42]

Accordingly, a court cannot determine whether an agency violated NEPA when it relies on a

categorical exclusion when making a decision until the court has the ability to review the BLM's

reasoning.[43]

CONCLUSION

In *Cloud Foundation*, the District Court for the District of Columbia made clear that, in

the absence of a private right of action, agency action will be afforded an high degree of

deference. So long as the agency can articulate a basic explanation for its action, courts will not

take issue with agency decisions and predictions.

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[42] *Id.*
[43] *Cloud Foundation, Inc.*, 2013 WL 6083927 at *6.