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LEFT AT A CROSSROADS: HOW RECENT 10TH CIRCUIT DECISION LEAVES WILD HORSES AT A STAND STILL

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On October 11th, 2016, the United States Court of Appeals for the Tenth Circuit made yet another ruling regarding the treatment and management of the wild horse population under the control of the Bureau of Land Management (BLM).[i]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn1) The court ruled for the BLM after the state of Wyoming alleged the BLM had violated its "discretionary obligations" in its management of the wild horse population in seven herd management areas (HMAs) across the state.[ii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn2) Many see this ruling as a victory but it may instead simply be another roadblock on the way to the effective management of wild horse herds across the country.[iii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn3)

The BLM began managing the wild horse populations across the west under the Wild Free-Roaming Horses and Burros Act of 1971, which declares the horses to be "living symbols of the historic and pioneer spirit of the west." [iv] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn4) This began through an initiative lead by Annie Johnson, affectionately known as "Wild Horse Annie," which sought to end the inhumane slaughter and rapid population decline the wild horse population was experiencing at the time.[v]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn5) Since the adoption of the Act, the BLM has established the Wild Horse and Burro Program, which is aimed at managing and protecting populations from "capture, branding, harassment, or death" while maintaining range health overall.[vi] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn6) However since the establishment of the program the issues have shifted from protection to managing severe overpopulation.[vii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn7) The BLM now works toward healthy public lands through Appropriate Management Levels (AMLs), which establish the point where populations are at a supportable level to thrive while not depleting the range.[viii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn8) Currently, the AML for populations on public lands is 27,000 horses, however the BLM estimates that 67,000 horses

currently occupy public lands.[ix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn9) This 40,000 excess combined with the fact that an unchecked herd will double in size within four years has led to great concern and debate over the future of wild horse management.[x]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn10) These arguments fall into two sides: one focused upon the economics of public lands and one on the fair treatment of herds.

Though not native to the Americas, the wild horses of the west have become symbols of the region's legendary spirit.[xi] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn11) Therefore, many argue the population should be controlled as it is now, through roundup, adoption and relocation to off-range corrals and pastures.[xii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn12) However, this strategy is failing: animal rights groups often file suit to halt roundups for cruelty concerns and even when roundup the supply of wild horses greatly outnumbers the demand.[xiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn13) Many people favor the adoption program currently available from the BLM, however, in the mid-1990s the BLM was able to adopt out nearly 10,000 horses annually, however more recently, in 2015, the BLM adopted out the most horses it had in the past four years and that was only 2,631.[xiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn14) Based on the current population numbers, adoption alone is not a feasible option to reduce the herd to a sustainable size. The BLM has also tried, and continues to research, fertility controls but has been unable to develop a cost effective method.[xv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn15)



The next method used is holding the unadoptable horses in off-range corrals and pastures.[xvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn16)

Currently, these facilities house an additional 46,000 horses that cost the BLM \$49 million annually, with the lifetime cost of caring for one horse being roughly \$48,000.[xvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn17) This astronomical cost has led the BLM to only remove as many horses as can be adopted each year.[xviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn18) However, as adoption numbers have drastically declined the only other management tool available is the "Burns Amendment." [xix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn19) The "Burns Amendment" allows the sale of any animal over the age of ten or which has been passed over for sale three times "without limitation." [xx]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn20) Upon passage of this amendment over 8,000 horses and burros immediately became available for purchase.[xxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn21) Though many animal rights groups were concerned the new law would lead to the sale of horses for slaughter, the BLM has always maintained a policy against that practice and has sold less than 6,000 horses total since the passage of the amendment over twelve years ago.[xxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn22)

Therefore, the BLM is left with a math problem that doesn't add up and as a result its goal is to only remove 3,500 animals from the range this year.[xxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn23)

Enter Wyoming. Wyoming, whose current wild horse population (there are no wild burros in Wyoming) was last estimated to be 6,535 as of March of 2016.[xxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn24) However,

the state's AML is only 3,725 animals, meaning its public lands contain nearly twice the sustainable population recommended by the BLM.[xxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn25) The state argued that since the AMLs determined an overpopulation exists this triggered a non-discretionary duty to remove excess animals from the HMAs.[xxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn26) The language of the statute outlines that the BLM "shall immediately remove excess animals ... only after the BLM determines ... that an overpopulation exists ... and that action is necessary to remove excess animals." [xxvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn27) This wording led the court to disagree and conclude that "a determination that an overpopulation exists in a given HMA is not sufficient, standing alone, to trigger any duty on the part of the BLM." [xxviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn28) Instead, the decision whether action on the matter is necessary is a separate consideration, which is not dependent on population levels. [xxix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn29)

Wyoming and the state's supporters strongly disagree with the court's judgment, citing that although the BLM is overwhelmed with the number of horses, "more than anything the case highlighted a need to reform the Wild Horses Act." [xxx]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn30) Even Wyoming Governor Matt Mead commented the day of the decision that, "The BLM is not managing wild horse populations as required by law." [xxxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn31) Overall, the Wyoming argument is strongly based in economics: the state does believe the wild horses are treasured assets but it is also vitally concerned over the "mismanagement [of the range] adversely affect[ing] all species and the rangelands' ... health and survival". [xxxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn32) After all, the rangelands are not simply a home for the herds, they are also economic enterprises that raise funds for state and local governments and also facilitate cattle and sheep raising in the west. [xxxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn33)

Ranchers, however, argue that the overpopulation of wild horses leads to a negative impact on their herds, in terms of nutrition and reproduction. [xxxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn34)

Additionally, many ranchers support a different management technique for the herds, namely, slaughter. [xxxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn35)

Slaughter, which is allowed to some extent under the Burns Amendment is seen by many as "the only real solution" to the population problem, and has been repeatedly discussed by the BLM advisory board. [xxxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn36) Ranchers argue the establishment of an economic market would be the only feasible way to reduce herd size and keep it at a sustainable level. [xxxvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn37) However, many including the BLM themselves, are strongly against the practice. [xxxviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn38)

Overall, the decision reached last week gives the BLM the authority to control the herds and manage population size, regardless of its sustainability. [xxxix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn39) But it also works to continue to halt a solution for the thousands of horses on the rangelands. If the BLM cannot be forced to act by interested parties, the wild horse population is stuck at a crossroads and just continues to grow as the problem goes unsolved. This growth leads to increased disease and starvation among the overpopulated herds and leads to an interesting debate in the animal welfare argument, which could become whether to favor freedom over health. [xl]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_edn40) In the end, the decision to not require action leaves horse populations well above AMLs and offers no new insight into the future, leaving many questioning both the future of the herds and the Act.

[i]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef1) Wyoming v. United States DOI, No. 15-8041, 2016 U.S. App. LEXIS 18355 at *1 (10th Cir. Oct 11, 2016).

[ii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef2) *Id.* at *2.

[iii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef3) Arno Rosenfeld, *In Major Decision, 10th Circuit Rules Wyoming Can't Force BLM to Remove Wild Horses*, Casper Star Tribune (Oct. 11, 2016), http://trib.com/lifestyles/recreation/in-major-decision-th-circuit-rules-wyoming-can-t-force/article_0a3c5700-e59e-520e-aa91-c053b3c0f7d5.html.

[iv]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef4) *History and Facts*, U.S. Dep't. of the Interior, Bureau of Land Mgmt, http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts.html (last visited Oct. 19, 2016).

[v]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef5) *Id.*

[vi]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef6) *Id.*; Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C.A. § 1331 (West 1971).

[vii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef7) *Rangeland and Herd Management*, U.S. Dep't. of the Interior, Bureau of Land Mgmt, http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management.html (last visited Oct. 19, 2016).

[viii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef8) *Id.*

[ix]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef9) *Wild Horse and Burro Program Infographic*, U.S. Dep't. of the Interior, Bureau of Land Mgmt., http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/wild_horses_and_burros/statistics_and_maps/infographic.Par.82953.File.dat/WHBhandout051216.pdf (last visited Oct. 19, 2016).

[x]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef10) *Id.*

[xi]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef11) Lisa Myers, *Cruel or Necessary? The true cost of wild horse roundups*, NBC News (May 14, 2013), http://investigations.nbcnews.com/_news/2013/05/14/17588942-cruel-or-necessary-the-true-cost-of-wild-horse-roundups.

[xii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef12) *Wild Horse and Burro Program Infographic*, *supra* note ix..

[xiii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef13) *Id.*; Myers, *supra* note xi; Rosenfeld, *supra* note iii..

[xiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef14) *Wild Horse and Burro Program Infographic*, *supra* note ix; *Wild Horse and Burro Quick Facts*, U.S. Dep't. of the Interior, Bureau of Land Mgmt, http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/quick_facts.html (last visited Oct. 19, 2016).

[xv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef15) *Id.*

[xvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef16) *Id.*

[xvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef17) *Id.*

[xviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef18) *Id.*

[xix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef19) *Wild Horse and Burro Quick Facts*, *supra* note xiv.

[xx]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef20) *Id.*

[xxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef21) *Id.*

[xxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef22) *Id.*

[xxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef23) *Id.*

[xxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef24) *Id.*

[xxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef25) *Id.*

[xxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef26) *Wyoming*, 2016 U.S. App. LEXIS 18355, at *5.

[xxvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef27) *Id.* at *14.

[xxviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef28) *Id.*

[xxix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr ef29) *Id.*

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e30) Rosenfeld, *supra* note iii..

[xxxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e31) *Id.*

[xxxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e32) *Id.*

[xxxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e33) *Fact Sheet on the BLM's Management of Livestock Grazing*, U.S. Dep't. of the Interior, Bureau of Land Mgmt., <http://www.blm.gov/wo/st/en/prog/grazing.html> (last visited Oct. 20, 2016).

[xxxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e34) Myers, *supra* note xi.

[xxxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e35) *Id.*

[xxxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e36) *Id.*

[xxxvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e37) *Id.*

[xxxviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e38) *Id.*; *Wild Horse and Burro Quick Facts*, *supra* note xiv.

[xxxix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e39) *Wyoming*, 2016 U.S. App. LEXIS 18355, at *14.

[xl]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/Daunhauer%20Blog.docx#_ednr e40) *Wild Horse and Burro Program Infographic*, *supra* note ix.

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