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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF ANIMALS, *Plaintiff*, v. UNITED STATES BUREAU OF LAND MANAGEMENT, *Defendant*, and STATE OF UTAH, *Proposed Defendant-Intervenor*.	**PROPOSED INTERVENOR-DEFENDANT STATE OF UTAH'S REPLY MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION TO INTERVENE** Case No. 1:18-cv-02029-RDM

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INTRODUCTION

Plaintiff Friends of Animals ("FOA") fundamentally misapprehends the sources and natures of the State of Utah's ("State") protectable interests in the wildlife within its borders. As a result, FOA's arguments regarding the injuries to those interests are misplaced. Also, FOA's characterizations of its objectives in this case as is reflected in the allegations and requested relief of the Third Amended Complaint are less than candid. This case is about what is happening on the ground: to wild horses, to cattle, and yes, to the wildlife that must compete for the limited forage and water. FOA advocates for the wild horses, the cattle industry for the cattle, but who advocates for the other wildlife that competes for sustenance if not the State that has the statutory and public trust duty to preserve, protect and conserve wildlife?

This Renewed Motion to Intervene is premised for purposes of both standing and intervention upon the State's protectable sovereign and quasi–sovereign interests in the preservation, conservation, and management of wildlife on the Onaqui and Muddy Creek HMAs.

ARGUMENT

I. BOTH THE STATE'S STATUTORY AND PUBLIC TRUST INTERESTS ARE DIRECTED TO ITS SOVEREIGN AND QUASI-SOVEREIGN DUTIES TO PROTECT, CONSERVE, AND PROPAGATE WILDLIFE.

FOA commences its argument by conflating the State's right to regulate wildlife with its duty to do so. It is the latter interest that has suffered the injury in that the continuing presence of excess wild horses on the Onaqui and Muddy Creek HMAs hinders the State's ability to fully perform this duty.

As thoroughly discussed in its Statement of Points and Authorities supporting its Renewed Motion to Intervene, the State has statutory (sovereign) and public trust (quasi-

sovereign) responsibilities regarding the wildlife within its borders. (ECF No. 100-1 at 6-13). See also *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."). Those responsibilities are in the nature of a duty to protect, propagate, conserve and maintain wildlife not otherwise subject to federal law. *See*, *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) ("The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders."); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948) ("Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests . . . so that it may exercise its police power to protect and regulate that fishery.); Utah Code Ann. § 23-14-1(2)(a) (1953). (The Division of Wildlife Resources is charged with the duty to "protect, propagate, manage, conserve, and distribute protected wildlife").

The State has standing to protect both its sovereign and quasi-sovereign interests. *See Alfred L Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The State may sue in its own right to protect its sovereign rights, and it may sue as *parens patriae* to enforce its quasi-sovereign rights. *Id.*

Regarding the State's quasi-sovereign standing, and its *parens patriae* representation of its citizens common interests, FOA first argues that the State must itself be "among the injured" and cites *Wilderness Society v. Norton*, 434 F.3d 584 (D.C. Cir. 2006). However, the *Wilderness Society* case dealt with "associational standing" and not *parens patriae* standing. As pointed out by the court in *City of Olmsted Falls v. Federal Aviation Administration*, 292 F.3d 261 (D.C. Cir. 2002), there is a fundamental difference between these two jurisdictional avenues. Associational

standing applies where the claimant sues on behalf of the organization's members which would have standing to sue in their own right. *Id.* at 267, 268 ("An association only has standing to bring suit . . . in their [member's] own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit."). In *parens patriae* standing, the claimant governmental entity sues in its quasi-sovereign capacity to protect the common interest of its citizenry. *Alfred L. Sapp & Son Inc.*, 458 U.S. at 600 ("This prerogative of *parens patriae* is inherent in the supreme power of every State [and] is a most beneficent function…often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."). The individual citizens cannot sue in their own right.

FOA also argues that *parens patriae* standing cannot be employed by the State because the federal government represents the same citizens: the so-called "*Mellon* Bar". *See Massachusetts v. Mellon*, 262 U.S. 447 (1923). However, the *Mellon* Bar does not apply to the State's standing for two reasons. First, the federal government and the State don't represent the same interest. *See Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019) ("'The general supremacy of federal law' means that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the *same interests* of the same citizens.") (emphasis added). Here the State's *parens patriae* interest is the duty to protect, etc. wildlife other than wild horses, while the federal interest is in its duty to manage wild horses. Second, the *Mellon* Bar only precludes suits *against* the federal government. *Id.* Here, the State is intervening on the side of the federal government and in support of the management of wild horses through periodic gathers.

II. THE INJURIES TO THE STATE'S SOVEREIGN AND QUASI-SOVEREIGN INTERESTS ARE PARTICULARIZED, CONCRETE, ACTUAL, IMMINENT AND NOT CONJECTURAL.

FOA relies on *Otter v. Jewell*, 227 F. Supp. 3d 117 (D.D.C. 2017) for the proposition that the State has no standing to participate in litigation "which applies only to federal property and will be implemented by federal officials." (ECF No. 104 at 5). While the State of Idaho inexplicably failed to assert its rights on federal land, that was not the basis for the decision denying standing. Rather, the basis for the denial of standing was that the plaintiffs did not provide sufficient facts to show that the claimed injuries were particular and concrete or that they were not conjectural or hypothetical:

> Even if there was legal precedent for plaintiffs' theory of injury to state sovereignty, based on the record before the Court, plaintiffs have failed to meet their burden of demonstrating that they "suffered an injury in fact---an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical…set forth by affidavit or other evidence specific facts" supporting the alleged injury-in-fact.

Id. at 125.

While *Otter* does not inform the issue of the State's standing in the instant case, it does serve, by contrast, to demonstrate that the State *has* carried its burden with "concrete and particularized" facts demonstrating an "actual or imminent" injury. In *Otter*, plaintiffs' declarations merely speculated about various injuries that *may* harm. *Id.* In contrast, the State here has submitted declarations that assert particularized, concrete, and ongoing harm that the presence of excess horses has caused and is presently causing to mule deer, elk, pronghorn, and sage grouse. *See* Declarations of Terry Messmer (ECF No. 100-3) and Brock Millen (ECF No. 100-4); Onaqui EA (ECF No. 45-2); Muddy Creek EA (ECF No. 46-1).

Examples of the particularized and concrete evidence of injuries to wildlife caused by wild horses on the Onaqui and Muddy Creek and submitted by the State are numerous, for instance:

l. Regarding the No Action alternative in which no further gather operations would be conducted, the Onaqui EA (ECF No. 45-2) states at ¶3.3.8:

> "UDWR has identified areas of crucial habitats that are considered essential to the life history requirements of big game species, such that continued degradation and loss of crucial habitats will lead to declines in carrying capacity and/or numbers of big game species."

2. In Terry Messmer's Declaration he states that, regarding a recent study in the Onaqui HMA, the adverse effects excess wild horses:

> "Based on these recent studies, and similar studies evaluating sage grouse habitat range wide, it is my scientific opinion that wild horse populations have a negative effect on sage grouse populations and may also have a negative effect on native ungulate populations."

(ECF No. 100-3 ¶ 19).

3. Similarly, Brock Millan testifies in his Declaration regarding the effects of wild horses on other species' access to water:

> "These results [of studies] indicated that horses displaced other wildlife species at water sources providing evidence of a negative influence on how communities of native wildlife access a limited resource in an arid environment."

(ECF No. 100-4 ¶ 10).

There is more than sufficient evidence of particularized and concrete injury to support the State's standing.

III. THE STATE'S PAST, PRESENT AND FUTURE INJURIES ARE DIRECTLY TRACEABLE TO AND CAUSED BY THE PRESENCE OF EXCESS WILD HORSES.

As noted in the Introduction, FOA seeks to direct the Court to the administrative process that is challenged, and not to the physical results actually at stake. Certainly, the State is well aware that FOA seeks to unwind a process that has successfully resulted in the removal of excess wild horses. However, it is not the administrative process that directly causes the harm. Rather, it is the implications of that process that is really at issue in this case, and it is those concrete implications that have the direct causal relationships to the injuries to the State's wildlife responsibilities.

FOA's claims are procedural in nature in that it alleges violations of procedural requirements, e.g. NEPA, by the BLM in formulating the 10-year plans, and then conducting actual gathers of wild horses pursuant to these plans. In other words, FOA asserts that without these procedural violations past gathers would not have occurred and future gathers may not go forward. "Traceability" or causation in a procedural-injury case is determined by a somewhat relaxed standard in that it is not necessary to "show that but for the alleged procedural deficiency the agency would have reached a different substantive result." *Hawkins v. Haaland*, 991 F.3d 216, 224 (D.C. Cir. 2021). In a procedural-injury case, causation or traceability is established if there is "an adequate causal claim [that] must contain at least two [factors]: (1) a connection between the omitted procedure and a government decision and (2) a connection between the government decision and plaintiff's particularized injury." *Id.*; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013).

Applying this relaxed standard to the instant case and to the question of the State's standing, the State needs not show that granting FOA's request for NEPA review for each

proposed gather will, with certainty, result in a permanent cessation of gathers. All that is required is a showing that there is a causal claim between NEPA review and a decision by BLM to suspend or eliminate gathers and the connection of such a decision and the injury to wildlife that would result. The State meets this test in two ways: First, with respect to the Onaqui gathers that occurred in July 2021, a decision by the Court in favor of FOA would, with certainty, result in the return of wild horse to the Onaqui HMA. Second, with respect to future gathers, a decision in FOA's favor would, with certainty, delay the occurrence of future gathers and may result in their permanent cessation. Therefore, under this relaxed standard, causation or traceability is present and at least some of this causation would be *immediate.*

IV. THE INJURIES TO THE STATE'S SOVEREIGN AND QUASI-SOVEREIGN INTERESTS IN WILDLIFE WILL BE REDRESSED BY A RULING IN BLM'S FAVOR.

As with causation, there is also a relaxed redressability requirement in a procedural-injury case. *See Hawkins v. Haaland*, 991 F.3d at 225. A claimant "need only show that correcting the alleged procedural violation *could* still change the substantive outcome in the [claimants] favor, not that it *would* effect such a change." *Id*.; *see also American Rivers v. Federal Energy Regulatory Commission*, 895 F.3d 32, 42 (D.C. Cir. 2018) ("Where, as here, a party alleges deprivation of its procedural right, courts relax the normal standards of redressability and imminence." [citation omitted].)

For the reasons set forth above regarding causation, so too has the State demonstrated the required redressability. The 10-year gather program is designed to facilitate and expedite necessary gathers of excess wild horses. If the Court upholds prior and projected gathers, excess wild horses can be removed (and previously gathered horses retained) and food and water needed by wildlife will be available. On the other hand, if the Court invalidates the 10-year gather

program and orders the return of previously gathered horses, the State will continue to be frustrated in its efforts to perform its duties to protect, propagate, and conserve wildlife.

CONCLUSION

This matter is before the Court pursuant to the State's motion to intervene in support of the BLM. While federal courts favor intervention, the State recognizes that it must nonetheless demonstrate that it has Article III standing. Also, as a sovereign state, the State is accorded "special solicitude" in the standing analysis. Nonetheless, the State must still meet the tests for standing.

The State has proven by sworn testimony that it has suffered and will continue to suffer injury to a protectable interest if the gathers of wild horses are ceased, i.e., its sovereign and quasi-sovereign duty to protect, propagate, and conserve wildlife. These injuries are particular and concrete, actual and imminent, and are not conjectural. There is a causal connection between the relief that FOA requests and this injury which would be redressed by a ruling in favor of BLM. In short, the State meets the tests of both standing and intervention as of right.

The problem of excess wild horses on the public lands is serious, controversial, and of long duration. Animal well-being is at the heart of this debate: including the well-being of the wildlife that is under the States' care. The voice of the State is warranted and critical to the determination of how these issues are most fairly and evenly addressed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March 2022, the undersigned electronically transmitted the foregoing **PROPOSED INTERVENOR-DEFENDANT STATE OF UTAH'S REPLY MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION TO INTERVENE** to the Clerk's Office using the CM/ECF system which will send notification of this filing to all counsel of record.

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