UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH RUBIN, an individual, and THE HORSE PEOPLE, a California not-for-profit corporation, Plaintiffs / Petitioners v. KEN SALAZAR, in his capacity as Secretary of the Department of the Interior, and ROBERT ABBEY, in his capacity as the Director of the Bureau of Land Management, Defendants / Respondents	Civil Action No. 09-1968 (SKM) BRIEF FOR DEFENDANTS / RESPONDENTS Team **20**

QUESTIONS PRESENTED

I. Whether the trial court abused its discretion when it ruled Plaintiffs failed to demonstrate a likelihood of success in proving Defendants' federal agency allegedly acted arbitrarily and capriciously in interpreting the Wild Free-Roaming Horses and Burros Act?

II. Whether the trial court abused its discretion when it ruled Plaintiffs failed to demonstrate a likelihood of success in proving Defendants' federal agency allegedly acted arbitrarily and capriciously in interpreting the National Environmental Policy Act?

III. Whether the trial court abused its discretion when it found the balance of hardships did not favor the Plaintiffs where no harm to them was imminent?

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SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it denied Plaintiffs' motion for a preliminary injunction to stop the Bureau of Land Management ("the BLM" or "the Bureau") from carrying out a wild horse removal under a "Gather Plan."

Defendants Ken Salazar and Robert Abbey, in their respective capacities as Secretary of the Department of the Interior and Director of the Bureau of Land Management, ask this Circuit Court of Appeals to reject this interlocutory appeal and affirm the decision of the trial court below. The trial court rightfully determined that it would be premature to grant a preliminary injunction to the plaintiffs, halting the Gather Plan, because Plaintiffs were unlikely to succeed on the merits of their action and the balance of hardships did not favor them. The trial judge correctly ruled that the Defendant agencies were due *Chevron* deference in deciding to implement the Gather Plan and that, as the plan was based on extensive scientific research, public comment, and sound interpretation of Congressional policy, neither Defendant acted "arbitrarily and capriciously." Since administrative agencies are accorded due deference to their rational decisions, the trial court did not have authority to second-guess the Bureau of Land Management's Gather Plan.

Furthermore, because this appeal is taken from a motion to deny a preliminary injunction, it is reviewed by this Court of Appeals for abuse of discretion: it is not for this Court to determine how it would have acted on the initial motion, only to decide whether the trial court's decision was within the bounds of reason and judicial economy. It was clearly within the trial court's discretion to rely on the extensively researched opinion of the BLM. The appropriate remedy for the Plaintiffs is to develop the factual record in trial if they believe they can prove that the BLM acted arbitrarily and capriciously and then move for a permanent injunction. A preliminary injunction is premature and not yet ripe.

STATEMENT OF THE CASE

Plaintiffs are a state non-profit corporation and its principal, whose mission is promoting the protection of wild animals, with a special emphasis on preventing the extinction of wild horse herds. Defendant Ken Salazar is the Secretary of the Department of the Interior. Defendant Robert Abbey is Director of the Bureau of Land Management. They are required by the relevant Congressional statutes to maintain and manage the wild horse herd in question and appear only in their official capacities. Plaintiffs' standing in this suit is conceded.

Wild horses are one of the most enduring symbols of the American West and the pioneer spirit of independence. Recognizing that herds of wild horses are subject to capture, injury, or death, in 1971 Congress passed the Wild Free-Roaming Horses and Burros Act ("WFHBA"), 16 U.S.C § 1331-1340 (2009). This act protects wild horses "from [unauthorized] capture, branding, harassment, or death." *Id*. § 1331. It is the duty of the Secretary of the Interior under the WFHBA to set aside, maintain, and regulate "ranges" for wild horses that are to be protected. *Id*. § 1332(a). The range should be "devoted principally but not necessarily exclusively to [the horses'] welfare in keeping with the multiple-use management concept for the public lands." *Id*. The WFHBA requires the Director of the Bureau of Land Management to set an "appropriate management level" ("AML"), which is the optimum number of horses for the range.

The Rafiki Mountain Wild Horse Range ("RMWHR"), comprising 36,000 acres in California, is a range created in 1969[1] to house and protect the Rafiki herd of wild horses. Record ("R.") at 2. The Rafiki herd is of unknown origin and only some of them carry a rare genetic variant. RMWHR 2009 Gather Plan and Environmental Assessment ("EA") at 6. In 1992 the BLM set the AML for RMWHR at between 85 and 105 horses. Since 1996, the range has

1The RMWHR could not have been created under the authority of the WFHBA since it was created two years before the statute's passage. It has been administered under the WFHBA since at least 1992. R. at 2.

averaged 160 horses; as of March of 2009, 190 wild horses were counted, excluding the current foal crop, nearly twice the maximum optimum number. EA at 2. In fact, twenty-nine of the horses permanently reside outside of the range. *Id*. Little effort has been made by the BLM over the past decade to control the growing horse population, even in the midst of an extended drought from 1993 to 2005. *Id*. As a result, "[e]xcess wild horses were allowed to remain on the RMWHR during drought years, thereby magnifying the deterioration of the range that otherwise would have occurred at a slower rate." *Id*. BLM statisticians studied computer models to determine what unchecked growth of the Rafiki herd would lead to in ten years: an "average of 100 population modeling trials indicates that if the current wild horse population continues to grow without a removal at this time, the median population size would be 314 wild horses with a growth rate of 7.2%." *Id*. at 8.

Because of the negative environmental impact on the RMWHR from such a large number of horses and lack of food for such a large herd, the BLM determined that 100 of the 190 horses were in excess of the RMWHR's carrying capacity and, pursuant to the WFHBA, would have to be removed. R. at 2. The BLM created a "Gather Plan" in 2009 to collect the excess horses and remove them from the range. *Id*. The Gather Plan calls for capturing all of the Rafiki herd, drawing each member's blood, analyzing the genetic profiles, and returning[2] "within a reasonable time," the ninety horse that have the best range and variability of healthy genotypes. R. at 2-3. The Bureau plans to use several different technologies to round up the Rafiki herd: Long Range Acoustic Devices ("LRADs"), the Active Denial System ("ADS"), rubber bullets, and helicopter

2It is unclear from the record where exactly the horses will be kept. Both the trial opinion and the EA refer to the "Richfield Corrals Facility" as the destination for those horses that will be permanently removed but this facility's location is unknown. Some language in the EA states that "horses would be sorted on site," (EA at 1), while other section indicate that the horses will be temporarily held off-site. *See* DR at 1.

drive-trapping. R. at 3. Although the first two have never been used on animals before, there is no evidence that they are dangerous to animals, either. *Id*. at 7.

The BLM drafted and circulated a draft Environmental Assessment ("EA") of the Gather Plan, finding that it would have no significant impact on the natural environment. *Id.* at 3. Pursuant to both the Administrative Procedure Act (5 U.S.C §§ 701-6 (2009), "APA") and the National Environmental Policy Act (42 U.S.C. §§ 4331-35 (2009), "NEPA"), the Bureau held thirty days of public comment and received submissions from a number of sources, including the Plaintiffs, who submitted at least two proposals for alternative action. R. at 3; EA at 5. All of the comments were dutifully reviewed and the BLM responded to all of the comments as required by law. EA at 14. After this comment period ended, the BLM issued its Decision Record ("DR"), final Environment Assessment ("EA"), and Finding of No Significant Impact ("FONSI"). R. at 3. Plaintiffs' two proposals were rejected by the BLM because neither would reduce the Rafiki population to sustainable levels. EA at 5.

The BLM scheduled the round-up to begin in September 2009, a few days after the final DR, EA, and FONSI were issued, but budgetary problems forced the BLM to delay the Gather Plan until February 2010. R. at 3. Plaintiffs filed suit to stop the Gather Plan immediately after the final documents were issued, alleging the Gather Plan violates the APA. Contemporaneously with this suit Plaintiffs moved for a preliminary injunction enjoining the BLM and Defendants from proceeding with the Gather Plan, or indeed, any removal of wild horses whatsoever. R. at 3-4. Plaintiffs alleged that the BLM had violated the APA by not correctly interpreting the WFHBA and NEPA and had so acted in an "arbitrary and capricious" manner. *Id*. Both parties fully briefed the issues and the trial court heard oral argument. *Id*. On October 1, 2009, the trial court issued its memorandum opinion denying Plaintiffs' motion for a preliminary injunction, finding that Plaintiffs had neither demonstrated a likelihood of proving Defendants' federal agency acted

"arbitrarily and capriciously" nor shown that the balance of hardships favored them. R. at 11-12. Accordingly, the trial court denied Plaintiffs' motion. R. at 13.

STANDARD OF REVIEW

Because Plaintiffs are appealing from the trial court's decision to deny their motion for a preliminary injunction, it is essential to note the two strict standards of review that must be applied: one for the review of the denial of the motion and the other for deference to the BLM's interpretation of the WFHBA and NEPA.

As this Court of Appeals has repeated, such denials are reviewed only for abuse of discretion. "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court. Its order granting or denying the injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion." *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982). The appellate court does not have the authority to conduct an independent review of whether a preliminary injunction should or should not have been granted; it is instead limited to deciding whether the trial court abused its discretion. "To determine whether there has been an abuse of discretion, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... The (reviewing) court is not empowered to substitute its judgment for that of the (district court)." *Id*. (internal citations omitted). Since a motion for preliminary injunction must, by definition, come before there has been a full hearing on all the facts and legal issues, the trial court must be given wide latitude to deny premature motion. "Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of

law are freely reviewable." *Id* at 753. This Court has expressed its strong dislike for overturning denials of preliminary injunctions:

> We emphasize the ways in which review of an order granting or denying a preliminary injunction differs from review of an order involving a permanent injunction because we are persuaded that in some cases, parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation. Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits. Furthermore, in many cases, appeal of district courts' preliminary injunctions will result in unnecessary delay to the parties and inefficient use of judicial resources. We think it likely that this case, for instance, could have proceeded to a disposition on the merits in far less time than it took to process this appeal. Furthermore, our disposition of this appeal will affect the rights of the parties only until the district court renders judgment on the merits of the case, at which time the losing party may again appeal.
> *Id*.

The standard for granting a preliminary injunction is whether the plaintiff has established "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003). The two factors are not independent: "[t]his analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id*. at 918. It is the Plaintiffs' burden of both production and persuasion to show that these factors exist: where they cannot, no preliminary injunction should be granted. *Id*.

Since neither WFHBA nor NEPA provide for a private cause of action, Plaintiffs' original suit was brought under the APA, alleging that the BLM failed to adequately follow those two statutes guidelines. The standard of review of alleged violation of the APA one is whether the federal agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law," or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C § 706(2)(A), (C) (2009). Under the *Chevron* doctrine, federal agencies are given deference by the courts to their expertise and rule-making authority and thus a two-part test must be satisfied to overcome the presumption that an agency's interpretation of a statute is sound. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. So long as the agency's interpretation is a reasonable one, the court may not substitute its own judgment for that of the agency, even if it would have come to another conclusion. *Id*.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND PLAINTIFFS WERE UNLIKELY TO SUCCEED ON THEIR MERITS.

Since a motion for preliminary injunction requires the moving party to show that they are likely to win on the merits of the case if it were to go forward, it was Plaintiffs' burden to convince the trial court that they would be able to prove Defendants acted "arbitrarily and capriciously" in interpreting and applying the WFHBA and NEPA. Because Defendants followed the clear text of the statutes and promulgated reasonable interpretations, it was not an abuse of discretion for the trial court to rule that Plaintiffs were unlikely to succeed. This Court is urged to remember that the trial court has already rejected the Plaintiffs' arguments: under the standard of review, this decision should not be reviewed anew, but instead only for abuse of discretion.

A. The trial court was within its discretion to find that Plaintiffs were unlikely to succeed on the merits of their WFHBA claim because Defendants' interpretation of the statute was reasonable and permissible.

Plaintiffs challenged the Gather Plan as a violation of WFHBA (by way of the APA) under three different theories. They alleged that the Gather Plan would violate WFHBA by removing non-excess horses, over-counting the number of excess horses, and use unnecessarily harsh and painful round-up methods, as well as causing unnecessary harm during the corralling period. However, all of these challenges are flawed: in none of them has the Gather Plan or the Defendants violated the clear meaning of the WFHBA and the trial court was within its discretion to grant deference to the BLM's interpretation of the requirements of the WFHBA. Plaintiffs also cite *Colo. Wild Horse and Burro Coalition, Inc. v. Salazar*, 639 F. Supp. 2d 87 (D.D.C 2009) as evidence that a similar plan was held to be an arbitrary and capricious interpretation of the WFHBA but their reliance is misplaced: *Colo. Wild Horse and Burro Coalition* involved a very different gather plan; indeed, the difference illuminates exactly why the Gather Plan in question is consistent with Congress' intent and the rule-making authority of the BLM.

i. The WFHBA grants Defendants wide latitude in maintaining wild horse herd size and requires that they limit herd sizes when, as here, the herd size threatens both the horses and the environment.

The BLM is given exclusive authority to care for, monitor, and manage wild horses on the public lands it administers, such as the RMWHR. 16 U.S.C. § 1333(a). BLM officials are required by the WFHBA to set an optimum level of horses on the public lands, the AML, "designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id*.

Congress has granted the BLM wide discretion is setting the AML, allowing it to consult with scientists, other federal officials, and experts in "rangeland management." *Id*. at § 1333(b)(1).

Congress has required that Defendants manage wild horse populations not just for the health of the wild horses but also for the preservation of the "mixed-use" of public lands. Excess population can lead to suffering and death for the herd, as the large number of horses strip the surrounding area of food and degrade the environment. DR at 2. In addition, Congress has announced a strong policy of "mixed-use" of public lands, seeking not to preserve public lands for a single purpose but to allow multiple interests access to the land. Thus, the WFHBA requires that the management of the range be "devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands." 16 U.S.C. § 1332(c). When the number of horses the range can safely hold exceeds the AML, the Bureau is required to remove the excess number of horses to preserve the health of the herd and the range: "[w]here the Secretary determines... that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2). Although the statute allows for the destruction of excess horses, the BLM has announced as a policy under the Gather Plan to not destroy healthy animals, instead placing them for adoption or sale. EA at 3.

The BLM set the AML for the RMWHR at between 85 and 105 in 1992. R. at 2. Although the BLM has not apparently revisited this AML since, it was based on the opinion of best-available information at the time. EA at 1. A number of removals have taken place at the RMWHR in 1997, 2001, 2003, and 2006. *Id*. Despite these removals, the population of the Rafiki herd has increased to 190, nearly twice the maximum carrying capacity. *Id*. Over the past decade, a drought has placed severe stress on the food supply of both the herd and the other wild

animals in the RMWHR; despite this decline in food security, no removal took place during the drought years, increasing the number of horses beyond what the range can hold, according to BLM researchers. EA at 2.[3]

If the Bureau's findings and decisions are upheld, then the WFHBA requires that Defendants proceed with some removal plan. 16 U.S.C. § 1333(b)(2). Under the APA, the trial court will defer to the Defendants' expertise in managing wild horses and will find that the Gather Plan is permissible and that Plaintiffs have no merits to their challenge unless Plaintiffs can prove that the Gather Plan is an impermissible interpretation of the WFHBA. *Chevron*, 467 U.S. at 843. Plaintiffs cannot do this with any of their theories.

ii. The trial court was within its discretion when it found that the Gather Plan did not remove non-excess horses.

Plaintiffs' first challenge to the reasonableness of the Gather Plan under the WFHBA is to claim that the Gather Plan would "remove" from the RMWHR non-excess horses. Since the WFHBA only authorizes the removal of *excess* horses, Plaintiffs argue, any removal of non-excess horses violates the clear text of the WFHBA and thus Defendants allegedly acted "arbitrarily and capriciously." *See Colo. Wild Horse and Burro Coalition*, 639 F. Supp. 2d at 98. But Plaintiffs' reliance on *Colo. Wild Horse and Burro Coalition* is misplaced. In that case, the proposed plan would permanently remove all of the horses from the range in question, not returning any to the range as the Gather Plan in the present case would. *Id*. As the trial court noted, "the BLM is not 'removing' all 190 horses as the WFHBA uses that term. The fact that ninety horses will be returned to the range after genetic testing means that the BLM is ultimately

3 It is true that the last two years have experienced above-average precipitation, but as will be discussed *infra*, this temporary change does not make Defendant's Gather Plan arbitrary or capricious.

removing a total of 100 horses." R. at 6. The Bureau's interpretation of "remove" under the WFHBA is to mean a permanent removal.[4] *Id*.

Plaintiffs contend that the trial court abused its discretion here because the plain-meaning of "remove" means any removal from the range, even temporary removals. The WFHBA, Plaintiffs argue, only allows for the removal of excess horses and taking any wild horse off of the range counts as a removal. Thus, *Colo. Wild Horse and Burro Coalition* should be accepted as persuasive authority as on-point and adopted by the Ninth Circuit. This interpretation of the WFHBA is neither compelling nor likely.

First, even if Plaintiffs' interpretation of the meaning of "remove" is a valid and permissible one, their interpretation is not the governing one: under *Chevron*, so long as the federal agency's interpretation is reasonable, other reasonable interpretations are irrelevant. *Chevron*, 467 U.S. at 843. Since the term "remove" is not defined by the WFHBA, the meaning of the term is ambiguous, an ambiguity that Congress has left to the agency, here the BLM, to resolve. Thus, Plaintiffs' alternate reasonable interpretation, even if it is the most reasonable interpretation, the one that both this Court and the trial court would adopt themselves, does not prove Defendants acted "arbitrarily and capriciously."

It is not clear, in fact, that Plaintiffs' interpretation of "remove," as including temporary removals, is reasonable. First, if the Plaintiffs' interpretation were imposed, temporarily removing a non-excess for, say, emergency veterinary care, or for evacuation from a natural disaster, would violate the WFHBA. Since the statute requires the Bureau to maintain the health of the wild horses (16 U.S.C. § 1332(c)), this would be absurd. Second, the canon of statutory interpretation *noscitur a sociis* states that a word is known by the meaning it keeps. *U.S. v.*

4 It is conceded that in various parts of the EA, DR, and FONSI Defendants use "remove" to describe the non-excess horses under the Gather Plan but the term here was used in its colloquial sense and should not be taken as agreeing with Plaintiffs' position.

Williams, 128 S. Ct. 1830, 1839 (2008). In 16 U.S.C § 1333(b)(1) "remove" is placed as an alternative to "destruction." Congress has mostly clearly indicated that "removal" is to be considered in the same context as destruction, strongly arguing that "remove," for the purposes of the WFHBA, must be permanent to count as a removal.

iii. The trial court was within its discretion to accept the BLM's expert determination of the AML for the RMWHR.

Plaintiffs next challenge the Gather Plan as incorrectly counting the number of excess horses. The AML for the RMWHR has, admittedly, not been updated since 1992, when it was set at between 85 and 105. R. at 2. Plaintiffs claim that the AML has been improperly set by Defendants because no new AML has been issued, because the AML is based on insufficient knowledge of the Rafiki herd's genetic diversity, and because recent precipitation has mitigated the effects of a nearly decade-long drought. R. at 6. These complaints, however, do not show that the BLM has exceeded its discretion in setting the AML.

The BLM has wide latitude to set the AML; *See* 16 U.S.C. § 1333(b)(1). This deference must be respected unless Defendants have acted arbitrarily and capriciously, which they have not done. First, it is not accurate to say that the AML has not been reviewed since 1992. While it is true that the AML has *remained* the same since 1992, that is not the same as saying the AML has been *ignored* since 1992, as Plaintiffs claim. Through the public comment and hearing period for the Gather Plan, Defendants reviewed all the comments and proposals submitted to them, including the two of the Plaintiffs. EA at 14. Several removals have taken place at RMWHR over the past decade and despite this, the herd population has still grown. Data was taken from these removals that supported the existing AML. R. at 10. Population models predict a 7.2% growth rate if no removal action is taken. EA at 8. Although the trial judge noted that she personally would have preferred to use more recent data, she conceded that it was reasonable for

the BLM to continue to use an established AML since it had no reason to believe that it was no longer valid; deference to the agency's decision-making power meant she could not substitute her judgment for theirs. R. at 10. As the Court of Appeals for the District of Columbia Circuit held, in a sensible reading the Ninth Circuit is urged to adopt:

> That section [16 U.S.C. § 1333(b)(2)] addresses in detail the information upon which BLM may rest its determination that a horse overpopulation exists in a particular area. The Agency is exhorted to consider (i) the inventory of federal public land, (ii) land use plans, (iii) information from environmental impact statements, (iv) the inventory of wild horses. But the Agency is explicitly authorized to proceed with the removal of horses "in the absence of the information contained in (i-iv)." *Id*. Clauses (i-iv) are therefore precatory; in the final analysis, the law directs that horses "shall" be removed "immediately" once the Secretary determines, *on the basis of whatever information he has at the time of his decision,* that an overpopulation exists. The statute thus clearly conveys Congress's view that BLM's findings of wild horse overpopulations should not be overturned quickly on the ground that they are predicated on insufficient information.
> *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1318 (C.A.D.C. 1982).

Ironically, by seeking to block the Gather Plan, Plaintiffs are attempting to eliminate the ability to determine the genetic diversity of the Rafiki herd: the Gather Plan calls for blood draws and genetic testing to determine the best genetic profiles for continued herd vitality. R. at 2-3. If this testing reveals that a larger AML must be set, it would be an abuse of discretion for Defendants to ignore this new information, but such evidence cannot be obtained without first implementing the Gather Plan: neither of Plaintiffs proposed alternatives would obtain this genetic data. *See* EA at 5.

Finally, although it is true that recent precipitation has alleviated the long-term drought condition, *see* EA at 2, Defendants have an obligation to ensure the *long-term* health of the Rafiki herd. 16 U.S.C. § 1333(a). It is reasonable for the BLM to take into account the possibility that the current precipitation may be temporary and that the range may return to its apparent trend towards aridity. The EA also noted that needed removals were not taken during

the drought period, exacerbated the impact on the local environment and putting further stress on the herd. *Id*. It is well within Defendants' discretion to decide to place the herd at a manageable level that will allow it to weather another dry season without undue harm.

iv. The trial court did not abuse its discretion when it deferred to Defendants' decision that the proposed round-up methods were not unnecessarily harmful.

Plaintiffs' final challenge to the reasonableness of the Gather Plan under the APA is that the round-up methods are untested on animals, may cause them harm and injury, and that being corralled may cause the captured horses to injure themselves. Since the WFHBA requires the BLM to protect the horses from harm, the Gather Plan allegedly violates the WFHBA and so, the Plaintiffs argue, is arbitrary and capricious. *See* 16 U.S.C. § 1333(a). This argument commits the common fallacy of allowing the perfect to be the enemy of the good.

The trial court correctly noted that *any* method of corralling wild horses must carry with it some possible risk of injury. R. at 8. Although two of the proposed methods have not been tested on animals, the BLM did hold hearings on and investigated their use and has determined that the LRADs and ADS will not pose a significant threat to the Rafiki herd. EA at 3-4. Crucially, Plaintiffs offer no evidence or findings to counter this decision: since there is no reason to believe that the BLM is incorrect in its decision, it cannot be said to be arbitrary or capricious.

Indeed, as the trial court notes, the alternative to these technologies may actually be worse for the horses: more lethal and injurious methods may have to be used to capture the horses if these non-lethal methods are not allowed. R. at 8. Previous round-ups have mostly involved cowboys of horse-back, bait-trapping, and helicopter drive trapping. EA at 1. There is no reason to believe that the new methods will pose any greater threat to the health of the Rafiki herd than the previous ones.

Curiously, Plaintiffs' proposed alternatives might actually cause more harm than the Gather Plan they oppose. Defendants admit that it "is possible that the proposed action could cause the mortality of 6 to 10 horses." EA at 7. The Plaintiffs' two proposals involve allowing mountain lions to cull the herd "naturally," and removing and small number of horses and applying limited fertility control to some of the remaining. *Id*. at 5. The first will definitely involve some death and harm to the herd and the second would require a round-up not dissimilar to the proposed Gather Plan. The BLM found that neither would adequately reduce the number of excess horses and that the end result of unchecked growth would be famine, disease, and death among the herd, as well as general environmental degradation. *Id*. at 7-8. Thus, it was reasonable for Defendants to decide that the Gather Plan was the best method to achieve an appropriate AML and the trial court was within its discretion to defer to their judgment.

v. The trial court did not abuse its discretion by finding Plaintiffs were unlikely to succeed on the merits of their WFHBA claim.

The Gather Plan is a reasonable interpretation of Congress' preferences in the WFHBA and a permissible exercise of the BLM's rule making authority. The fact that alternative plans exist does not reduce the reasonableness of the Bureau's determinations. The Gather Plan was sufficiently researched, properly proposed, and rationally planned. Under *Chevron*, the trial court had to defer to Defendants' expertise and deny the motion for preliminary injunction; this Court of Appeals should defer to the trial court's determination and uphold its denial as within its discretion.

B. The trial court was within its discretion to find that Plaintiffs were unlikely to succeed on the merits of their NEPA claim because Defendants' interpretation and implementation of the statute was reasonable and permissible.

Plaintiffs' second claim of violation of the APA rests on an alleged violation of NEPA. After issuing a draft EA, circulating it, and hearing public comment, Defendants determined that the Gather Plan would pose no significant environmental impact and thus issued a final EA, a DR, and a FONSI, instead of an Environmental Impact Statement (EIS). R. at 3. Plaintiffs claim that the failure to issue an EIS violated NEPA because they believe the Gather Plan will significantly impact the environment in three ways: the removal of all the horses, the permanent removal of 100 of those horses, and the methods used for the round-up. Plaintiffs fail to acknowledge that Defendants did consider those potential impacts and found them to be negligible. The trial court correctly deferred to the Bureau's expertise in this matter and this Court of Appeals should find that the trial court was within its discretion to do so.

i. NEPA does not require an EIS for insignificant government actions and federal agencies are granted wide latitude to determine what constitutes a significant impact.

NEPA was enacted in 1970 to ensure that all federal agencies considered the environmental impact of their actions. Agencies, including the BLM, must issue an EIS for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2009). The Council on Environmental Quality is charged under NEPA with issuing relevant regulations. These regulations allow an agency to undertake an EA to determine whether a proposed action is significant enough to require an EIS. 40 C.F.R. § 1501.4(b) (2009). If the agency determines that the impact is significant, it must issue an EIS; if the agency determines that the impact is not significant, it must issue a FONSI. 40 C.F.R. §§ 1501.4, 1508.13 (2009). The factors the agency uses to determine whether the impact is significant are found in 40 C.F.R. § 1508.27 (2009), demanding that the agency review both context and nine intensity criteria. In this case, Defendants did issue a full EA, listing alternatives, consideration of possible the environmental impact of proceeding with Gather Plan as opposed to not

proceeding with plan, and balanced the nine different intensity factors. DR at 4. Reviewing all of this data, Defendants found no significant impact and issued a FONSI. *Id*. This interpretation is, of course, due respect, given the BLM's experience in managing environmental impacts, and the trial court was within its discretion to accept it.

ii. The trial court was within its discretion to reject Plaintiffs' contention that the removals will have a significant impact.

Plaintiffs claim that the initial removal of the herd and the permanent removal of one hundred Rafiki horses will amount to a significant environmental impact and thus, an EIS should be issued. As the trial court noted, however, "[t]his argument, however, ignores the fact that the new population will fall squarely in the range deemed appropriate by the BLM's AML." R. at 10. It is precisely the excessive number of horses above and beyond the AML that is causing the significant environmental impact. Without enacting the Gather Plan:

> Increased wild horse use throughout the area would adversely impact the few riparian resources present and their associated surface waters and water quality would decrease. As native plant health deteriorates and plants are lost, soil erosion would increase. With the no action alternative, the severe localized trampling would continue to occur. This alternative would not make progress towards achieving and maintaining a thriving natural ecological balance.
> EA at 10.

Crucially, despite having had participated in the thirty day public comment period on the Gather Plan, Plaintiffs are unable to introduce any evidence, either at trial on now on appeal, to gainsay Defendants' determination that the removal of some of the Rafiki herd will have a negative impact; indeed, as stated, the evidence indicates that the Gather Plan will improve the environmental quality.

In the EA, the Bureau considered the environmental impact of the proposed Gather Plan on the Rafiki herd (EA at 6-8), rangeland health, vegetation, and soils (*Id*. at 8-9), riparian /

wetland areas and surface water quality (*Id*. at 9-10), wildlife, including migratory birds (*Id*. at 10-11), and recreation (*Id*. at 11-12).[5] In all save the recreation category, the proposed Gather Plan was determined to definitely provide long-term improvement over the current situation, one where over-population has led to environmental degradation. *Id*. at 8. Even in recreation, the Gather Plan was deemed to possibly provide a net benefit: although there would be fewer horses to watch, they would be healthier and more attractive. *Id*. at 12. All of these findings were finalized after the intra- and inter-agency review, public comment, and request for proposals. Defendants only issued a DR for the Gather Plan after extensive review had determined that it was the best means of accomplishing the agency's goals. *Id*. at 4-6. The trial court correctly deferred to Defendants' determination and thus did not abuse its discretion.

It is important to note that under the WFHBA, Defendants have a statutory obligation to remove enough horses to ensure a healthy population and environment. "Where the Secretary determines... that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2). This statutory command is vital because of the Supreme Court's holding in *Dept. of Trans. v. Public Citizen*, 541 U.S. 752 (2004). The Federal Motor Carrier Safety Administration ("FMCSA"), the agency responsible for evaluating the safety of motor carriers, was required by executive order to begin licensing Mexican motor carriers for operation in the United States. Petitioner brought a challenge under the APA alleging a violation of NEPA because the Respondent had not issued an EIS on the potential environmental impact of hundreds or thousands of new motor carriers on US highways. *Dept. of Trans.*, 541 U.S. at 758-60. The FMCSA did not have authority, however,

5 Defendants have a statutory obligation to ensure mixed-use of the RMWHR. 16 U.S.C. § 1332(c).

under the appropriate laws to deny admission to the country of the Mexican motor carriers and argued that it should be exempt from performing an EIS where it had no discretion to prevent the imposed action. The Court agreed: "It would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." *Id*. at 769. This exempted the FMCSA from considering the impact of the new motor carriers in determining whether to issue an EIS and what to consider in one. "We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.' " *Id*. at 770.

Just like the FMCSA, Defendants have no authority to not remove horses from the range. Even if there were a colorable argument that this removal would have a significant impact on the local environment, a contention for which there is no evidence, no action *by the agency* relating to the removal can be said to cause the impact: instead, under *Dept. of Trans*., the action is committed by Congress in its statutory order in the WFHBA; obviously, NEPA does not apply to acts of Congress.

iii. The trial court was within its discretion when it noted that the effect of uncertainty on the health of the herd due to the round-up methods meant there was uncertainty as to whether Plaintiffs could win on the merits.

Plaintiffs' final charge against the Gather Plan is factually correct: the effects of the new technologies proposed for use in the round-up are unknown on animals. Neither the LRADs nor the ADS have ever been used on wild horses to accomplish a round-up before. EA at 3-4. It is

possible that some unforeseen consequence could result. Where Plaintiffs err, however, is in understanding what such an uncertainty means at this stage of litigation.

The motion for a preliminary injunction is, by definition, made before a full and adequate hearing of all the facts has been made; it is made solely on briefs and limited oral argument. *Sports Form, Inc.*, 686 F.2d at 753. Because of the limited ability to avail itself of the expertise of expert witnesses, the trial court must defer to considerable judgments of knowledgeable parties. Most importantly, the trial court does not determine whether the moving party has a chance of proving itself correct, but whether it is *likely* to do so. Here, Plaintiffs correctly note that the full impact of the round-up methods is unknown, but that is not the same as saying that it is likely the methods will be shown to be harmful. In their preliminary briefs, Plaintiffs offered no scientific evidence to support the proposition the methods are injurious; indeed, they have not apparently even offered a theoretical explanation of what such injuries might be. R. at 11. That finding of fact by the trial court must be granted deference by this Court of Appeals since the trial judge was in the best position to weigh the various claims against each other. Thus, even if later evidence can be obtained to cast doubt on the proposed insignificance of the round-up methods, the correct remedy is not to grant a preliminary injunction but to develop the record more fully in trial and move for a permanent injunction at the end of litigation.

Finally, it must be noted that although Defendants do not have any evidence of the impact of the LRDs or ADS on wild animals, they did consult with veterinarians and scientists to come to their conclusion that these methods would be preferable to other, more lethal means. EA at 4, R. at 8.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THE BALANCE OF HARDSHIPS DID NOT FAVOR THE PLAINTIFFS.

Under Ninth Circuit case-law, a failure by the Plaintiffs to show that they are likely to succeed on the merits of their claim prevents them from obtaining a preliminary injunction unless they can show that the balance of hardships that would be imposed if the injunction were not issued would greatly harm them or the public. A plaintiff must establish "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *Sw. Voter Registration Educ. Project*, 344 F.3d at 917. The two factors are not independent: "[t]his analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id*. at 918. The Plaintiffs claim that they will suffer great injury if the Gather Plan is implemented because then they would be unable to watch and appreciate the horses in the RMWHR. Defendants concede that this may cause Plaintiffs hardship but argue that it cannot cause Plaintiffs greater hardship than the other relevant parties for four reasons: not implementing the Gather Plan is likely to harm the horses more than the Gather Plan would, the rest of the range would benefit from a removal of the excess horses, public policy would be served by obeying a clear Congressional mandate, and finally, no hardship can yet befall Plaintiffs because the Plan has not yet been implemented and final removal is unlikely to occur for months, giving plenty of time to develop facts showing more concrete harm.

As discussed above, the BLM's EA has determined that the Rafiki herd is in danger of loss of food security and room due to unchecked population growth. EA at 7-8. In fact, the population is already so large that twenty-nine horses already reside "perpetually" outside of the range; that is, outside of the protection and care of the BLM and the WFHBA. *Id*. at 2. Not only will over-crowding cause hardship to the horses themselves, it may interfere with the ability of

groups like Plaintiffs to enjoy the horses: as previously noted, malnourished and sickly horses do not provide as great a wilderness spectacle as healthy ones. *Id*. at 12.

The EA also found that there would be a substantial improvement in the environmental health of the range, including in health, vegetation, and soils, riparian and wetland areas and surface water quality, and wildlife, including migratory birds. *Id*. at 8-11. The benefit to these other aspects of the mixed-use environment was explicitly cited by the trial court as reasons for denying the appeal. R. at 12.

Congress has issued a clear mandate to Defendants: "Where the Secretary determines... that an overpopulation exists... he shall immediately remove excess animals from the range...." 16 U.S.C. § 1333(b)(2). The appropriate venue to challenge removal of wild horses is not the judiciary but the national legislature. Congress' determination reflects the democratic will of the people of the entire United States and cannot be lightly compares to admitted hardship Plaintiffs may face.

Finally, the Gather Plan has not yet been implemented. When it is, Defendants would certainly be remiss under both WFHBA and NEPA if the continued removal created a greater degree of damage or injury than is likely to occur. Even at the initial stages the horses will be kept in temporary facilities located in the RMWHR. There is still plenty of time to reevaluate the impact of the Gather Plan as it is implemented piece-meal. Plaintiffs' hardship is mostly hypothetical at this point and can be addressed if it reifies.

CONCLUSION

Plaintiffs' appeal must be denied because it cannot withstand two, separate strict standards of review: the abuse of discretion review of the trial court's reliance on the BLM's interpretation of the WFHBA and NEPA and the abuse of discretion review of the trial court's

decision to deny the motion for a preliminary judgment. In order to prevail, Plaintiffs would first have to convince this Court of Appeals to find that the trial court abused its discretion when, on the basis of the preliminary briefs and evidence before it, it followed *Chevron* and deferred to the BLM's considerable expertise in interpreting WFHBA and NEPA. Since the Defendants' interpretation of both statutes is a rational, possible interpretation that does not contradict either statute, it was not for the trial court to substitute its judgment for the BLM's and thus is cannot be an abuse of discretion for the trial court to have deferred to Defendants' interpretations.

Even if this Court of Appeals believes that the BLM's interpretations were arbitrary and capricious, though, Plaintiffs should still be denied relief. That is because it is not for this Court of Appeals to substitute its judgment for that of the trial court, which should only be overturned if there has been a "clear error of judgment." The BLM's interpretations of the statutes are the only ones that have been clearly briefed and presented: Plaintiffs challenge them but do not offer clear interpretations of their own. Thus, even if a court were to reject Defendants' interpretations, Plaintiffs would not automatically be granted a preliminary injunction: the test requires that Plaintiffs demonstrate they are *likely* to succeed on the merits. But if the BLM's interpretations are rejected, then the correct interpretations of WFHBA and NEPA are unknown and thus neither party, without a full hearing, is likely to succeed, since the matter is ambiguous and indeterminate. Indeterminacy is fatal to a motion for preliminary injunction for either side. The appropriate action would still be to reject an appeal for such a motion, allowing for a fuller hearing and final determination by the trial court.

Such a decision would be especially appropriate in light of the fact that no removal of the Rafiki horses has taken place and no permanent removal will take place until all 190 horses have been captured, had blood drawn and genetic profiles mapped, and selection of the ninety healthiest made. This is an open-ended project with no particular end date in sight. There plenty

of time before Plaintiffs' supposed harm would become irreparable for the trial court to have a full hearing to completely adjudicate this issue. An interlocutory appeal, even if granted, does nothing to the status quo except require a lengthy briefing and hearing before this Court of Appeals that will almost certainly be re-litigated once the trial court issues its final ruling. In the interests of judicial economy, Plaintiffs' appeal should be rejected to allow the finder of fact to complete its mission, especially since no harm is imminent.[6]

Submitted this day, the 4th of January, 2010

_____ /s/

_____ /s/

Team 20

6 APPENDICES: In the interest of conserving paper resources, please constructively consider the following to be attached to the brief as appendices: I. Trial Court Memorandum Opinion; II. BLM EA; III. BLM DR and FONSI; IV. The full text of the WFHBA; V. The full text of NEPA.