UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| DEBORAH RUBIN, an individual, and THE HORSE PEOPLE, a California not-for-profit corporation,<br><br>Appellants,<br>v.<br><br>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,<br><br>Respondents. | Civil Action no. 09-1968 (SKM)<br><br>BRIEF FOR APPELLANTS |

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## QUESTIONS PRESENTED

1. Did the District Court err when it ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the Wild Free-Roaming Horses and Burros Act?

2. Did the District Court err when it ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the National Environmental Policy Act?

3. Did the District Court err when it held that the balance of hardships did not favor Plaintiffs?

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## FACTS OF THE CASE

Appellants are Deborah Rubin and the Horse People. Rubin is the president of the Horse People, a California non-profit dedicated to protecting wild animals preventing the extinction of wild horse herds. It has been established in the lower courts that Appellant's standing in this action is well established and not at issue. Defendants are the Secretary of the Interior, Ken Salazar, who is responsible for overseeing the Bureau of Land Management's ("BLM") of wild horses, and the Director of the BLM, Robert Abbey, who responsible for management decisions for wild horses in accordance with the Wild Free Horse and Burros Act ("WHA" or "The Act").

The BLM has been reducing wild horse populations to trivial numbers. Memo. Op. at 2. Today only 186 areas remain where wild horses still roam[1]. Since 2004, the BLM has removed a substantial number of wild horses from the West. *Id.* These removal projects are ongoing despite 30, 000 wild horses being warehoused in government facilities. *Id.* The Rafiki Mountain Wild Horse Range ("the Range") is home to one of California's last wild horse herds. *Id.* The Range was created in 1969 in response to public outcry over the BLM's plans to remove wild horses to sell them for slaughter. *Id.*

In 1992, the BLM determined that the "appropriate management level" ("AML") for the Range was between 85 and 105 horses. *Id.* At that time, BLM had little knowledge of wild horse genetics or herd composition to ensure viability. *Id.* In a July 1999 letter, the Field Manager of the BLM's Tatu County Field Office expressed concern for the genetic viability of the herd due to "dangerously low numbers" of horses on the Range. *Id.* Today, the Range is home to approximately 190 wild horses. *Id.* In August 2009 the BLM determined that 100 of these horses were "excess" and would be removed pursuant to a Gather Plan ("the Plan"). *Id.* The Plan

[1] [1] Save Our Wild Horses: http://www.saveourwildhorses.com/blm.htm (accessed Dec. 29, 2009)

requires that all 190 horses be captured and be subject to genetic testing. *Id.* Some undetermined amount of time later, the BLM would return ninety horses to the Range who have a "diverse and healthy range of genetic profiles." *Id.* at 3. Removing 100 horses will result in the most significant decrease in the number of wild horses from the Range since before passage of the Act. *Id.* Long Range Acoustic Devices ("LRADs"), the Active Denial System ("ADS"), rubber bullets, and helicopter drive trapping will be used in the round-up. *Id.*

The BLM circulated a draft Environmental Assessment, finding that the proposed project would have no significant impact on the natural environment. *Id.* After opportunity for public comment, the BLM issued its Decision Record ("DR"), final Environmental Assessment (EA), and Finding of No Significant Impact ("FONSI"). *Id.*

The roundup was scheduled for September 2009 but was delayed to mid-February 2010. *Id.* Appellants filed this lawsuit immediately after the plan was finalized for September. *Id.* Appellants claim that the Plan violates the WHA and National Environmental Policy Act ("NEPA") and is otherwise arbitrary and capricious, violating the Administrative Procedures Act ("APA"). Additionally, Appellants moved for a preliminary injunction to prevent the BLM from implementing the Plan or otherwise removing or disposing of any horses who are in the Range or who may have been removed from the Range in connection with the challenged plan.

## STANDARD OF REVIEW

Neither a private right of action nor a citizen's suit is accorded by the WHA or NEPA. Therefore, Appellants' claim is brought under the APA. 5 U.S.C. § 701 (2006). The APA entitles "[a] person suffering a legal wrong because of an agency action, or adversely affected or aggrieved by agency action" to judicial review when there is no adequate remedy. *Id*. at 702; *Id*. at 704. The Plan is "final agency action" for purposes of review under section 704 of the APA

because it "mark[s] the consummation of the agency's decision making process" from "which rights or obligations have been determined." *Bennett v. Spear,* 520 U.S. 154, 177-78, (1997).

Under the APA, the standard of review requires a court to "hold unlawful and set aside agency action, findings, and conclusions" that are: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A), (C). An agency decision is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, "entirely failed to consider an important aspect of the problem," or offered an explanation "that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003).

To determine if the Secretary has exceeded his statutory authority, the Court must engaged in the two-step inquiry required by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). If Congress's intent is unmistakable, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously express intent of Congress." *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue" the court must determine if "the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Appellant's challenge the district court's denial of a preliminary injunction. A district court abuses its discretion in denying a request for such relief if it "base[s] its decisions on an erroneous legal standard or clearly erroneous findings of fact." *Earth Island Inst.*, 442 F.3d at 1156. A preliminary injunction is appropriate when plaintiffs/appellants show: (1) that they will likely succeed on the merits; (2) they would likely be irreparably injured absent preliminary

relief; (3) the balance of hardships tips in their favor; and (4) a preliminary injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc*., 129 S. Ct. 365, 374 (2008).

## ARGUMENT

Appellants' motion for preliminary injunction should have been granted because Appellants successfully demonstrated a likelihood of success on the merits of their claims under the WHA and NEPA. Also, the balance of hardships tips sharply in their favor.

### I. THE DISTRICT COURT ERRED WHEN IT RULED THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM UNDER THE WILD AND FREE-ROAMING HORSES AND BURROS ACT

Appellants would succeed on the merits of their claims under the Wild and Free-Roaming Horses and Burros Act because Defendants' Gather Plan is arbitrary, capricious, and is an abuse of discretion. Defendants: (1) abused their discretion by planning to illegally remove ninety wild horses from their sanctuary; (2) arbitrarily and capriciously determined that 100 horses were "excess"; and (3) want to use military and riot-control equipment as roundup-methods and thereby illegally harass the horses and inflict severe physical and psychological injury.

In 1971, Congress passed the Wild and Free-Roaming Horses and Burros Act ("WHA" or "the Act") under the Territorial Clause of the United States Constitution. U.S. Const. art. IV, §3; 16 U.S.C. §§ 1331-1340 (2006). Both the House and Senate bills were passed without a dissenting vote. Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 Envtl. L. 503, 508 (1985). The WHA states that wild horses "are living symbols …of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people" and are fast disappearing." § 1331. Congress requires that they be protected from capture, harassment and death. *Id*. Wild and free-roaming horses ("wild horses") are those which are unbranded, unclaimed, and are on the public lands. *Id*. at §1332(b).

Congress entrusted the Secretary of Agriculture and the Secretary of the Interior, through the BLM, with the "management and protection" of wild horses in accordance with the WHA. *Id*. at § 1333(a). In 1978 Congress amended the Act to balance competing interests with the interest of protecting America's wild horses, *not* to degrade this protection. *Dahl v. Clark*, 600 F.Supp. 585, 587 (D. Nev. 1984). The amendment requires Defendants to maintain a *current* inventory of wild horse populations to determine if overpopulation exists, whether excess horses need to be removed, and to determine AMLs. § 1333(b)(1). "Excess horses" are those which must be removed "in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship." *Id*. at § 1332(f)(2). An AML is the number of horses that will "achieve and maintain a thriving, ecological balance on the public lands." *Id*. at § 1333(a).

Defendants do not have blanket discretion under the Act. They are bound by the statute's procedure when seeking to extract horses from the public lands. *American Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1319 (D.C. Cir. 1982) (under the WHA "the Secretary's discretion remains bounded"). Defendants may initiate a removal regime only if (1) "an overpopulation exists" and (2) "action is necessary to remove excess animals." § 1333(b)(2). Additionally, Defendants' activities must *always* be at the "minimal feasible level." § 1333(a).

The Appellants' request for a preliminary injunction should have been granted. Defendants' abused their discretion in seeking to unlawfully remove non-excess horses in direct violation of the WHA. *Watt*, 694 F.2d at 1319. Defendants' determination that over 50% of the herd is "excess" horses was arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A) (2006). In addition, Defendants' unlawful, violent roundup methods are not the "minimal feasible level," and will result in severe injury to the horses.

A. Non-Excess Horses Cannot Be Removed from the Range Because that would be Contrary to Congressional Intent and an Abuse of Defendants' Discretion

The WHA authorizes the removal of *excess* animals and does not grant Defendants the discretion to remove non-excess horses, and therefore the ninety non-excess horses may not be removed. §1332(f). Moreover, once a horse is removed from the Range it is forever stripped of its status as wild, despite Congress's intent to preserve wild horses.

Congress clearly intended to protect non-excess horses from removal. Defendants' authority to remove non-excess horses has been challenged in the past. *Colorado Horse and Burro Coalition v. Salazar*, 639 F.Supp.2d 87, 96 (D.D.C. 2009) (hereinafter "*Colorado*"). In *Colorado*, the court held that "Congress clearly intended to protect non-excess wild horses" from removal and that Defendants' only have authority to remove excess horses. *Id*. at 95-96. The court's decision was based on the two-pronged analysis of *Chevron*, relying most heavily on the second prong. *Chevron,* 467 U.S. at 842-843 ("the agency's answer was based on a permissible construction of the statute" when it is silent). Congress intended the Act to protect wild horses. § 1331. Inferentially, it would be illogical if those vested with the duty to protect the wild horses could "subvert the primary policy of the statute" by removing from the wild the very animals that Congress sought to protect from capture. *Colorado*, 639 F.Supp.2d at 96.

Removal of the non-excess wild horses from the Range would not classify as a management activity that would be deemed at the "minimal feasible level." § 1333(a). In fact, the court in *Colorado* stated that management by removal violated the WHA because "[i]t is difficult to think of a "management activity" that is farther from a "minimal feasible level" than removal." *Colorado*, 639 F.Supp.2d at 96. Defendants must protect wild horses on public land, not "manage" the wild horses by corralling them for private maintenance or long-term care as *non*-wild free-roaming animals *off* of the public lands." § 1331. Defendants' argument that

removal is required to conduct testing is moot, as *Colorado* noted that "corralling them for private maintenance" is not management of wild horses, and Defendants have failed to determine what a "reasonable time" for temporary restraint it. *Colorado*, 639 F.Supp.2d at 96.

Defendants abused their discretion by illogically concluding that Congress's silence as to removing non-excess horses meant that Defendants might do as they please. Given the statute's purpose, "the only plausible inference to be drawn from the omission of any procedure for removing non-excess animals" is that the BLM cannot remove non-excess animals as a means of management. *Id*. at 97. Once horses are removed from the public lands, they are no longer classified as "wild" horses protected under the WHA. *Id*. Therefore, the District Court erred in concluding that only 100 horses would be removed, because all horses taken from the public lands forever lose their status as "wild horses." *Id*. Therefore, Defendants would be illegally removing all 90 non-excess horses. The BLM was granted authority to remove excess horses when overpopulation was determined in *Blake v. Babbitt*. 837 F.Supp. 458, 459 (D.D.C. 1993). *Blake* is distinguishable, however, because it speaks to excess horses, not non-excess horses. *Id*. Furthermore, *Blake*'s holding was informed by the fact that "the endangered and rapidly deteriorating Range [could not] wait." *Id*. In contrast, Defendants have not proven that the Range is in terrible condition or that a stay of removal would greatly harm the Range.

Defendants abused their discretion in seeking to remove a portion of the horses from the Range that are deemed not in excess under the AML, which is prohibited by the WHA. Furthermore, Defendants abused their discretion in planning to remove non-excess horses, in direct conflict with Congress' intent, because once removed, the horses will be gone forever because their status as wild will be terminated.

B. Defendants Violated the WHA by Basing Decisions on Obsolete Data Collected Under Different Circumstances than the Present Was Arbitrary And Capricious

Defendants' determination of what constituted an "excess" number was arbitrary and capricious because it was based on outdated data that was irrelevant to their ultimate conclusion. Defendants failed to examine pertinent data and provide an acceptable explanation for their decision, including a rational relation between the facts found and the decision. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-43 (1983).

Appellants did not challenge, as the lower court ascertained, "the factual question of whether 100 horses are "excess." Memo. Op. 6-7. Rather, Appellants challenged the *methodology* in that determination. A court may not supplement the agency's determination of "excess" with its own under the "arbitrary and capricious" standard. *State Farm*, 463 U.S. at 42-43. However, the standard requires that the means be rationally related to the ends. *Id*.

Defendants have failed to demonstrate relevant data to sufficiently support their determination of an AML of 90 horses. Defendants' conclusion that there was overpopulation in 2009 was based on an AML from 1992, when Defendants had insufficient knowledge of wild horse genetics and the numbers required to guarantee herd viability. Memo. Op. 2. Seven years later a BLM Field Manager voiced concern regarding the "dangerously low numbers" of horses and genetic viability. *Id*. Defendants failed to keep a congressionally required *current* inventory of wild horse populations for the purposes of determining the AML or excess horses. §1333(b)(1). Despite Congress's instruction, Defendants failed to employ relevant evidence to determine the AML. G.A.O. Report to the Secretary of the Interior: Rangeland Management, *Improvements Needed in Federal Wild Horse Program.* Aug. 1990, http://archive.gao.gov/d23t8/142041.pdf (accessed Jan. 3, 2010) (hereinafter "GAO Study").

Because the horses are an important part of the Range's ecological balance, the genetic viability of the herd must be accounted for in determining the AML. Kristen H. Glover,

*Managing Wild horses On Public Lands: Congressional Action And Agency Response*, 79 N.C. L. Rev. 1108, 1119 (2001) (hereinafter "Glover"). A recent analysis of population dynamics of wild horse herds found that herds managed "with a target size of fewer than 500 horses were at some risk of losing more than 90% of selective neutral genetic variation over a long period of 200 years." Francis J. Singer & Linda Zeigenfuss, "Genetic Effective Population Size in the Pryor Mountain Wild Horse Herd: Implications for Conservation Genetics and Viability Goals in Wild Horses" (Nat'l Applied Res. Scis. Ctr., Bureau of Land Mgmt., Resource Notes Nov. 29, 2000), www.blm.gov/nstc/resourcenotes/resnotes.html (accessed Dec. 30, 2009) ("hereinafter Singer"). However, Defendants disregarded this recent research and used the 1992 AML.

The District Court was incorrect in finding that the evidence used by Defendants was valid and reasonably considered the Range conditions. Memo. Op. 7. Defendants' significant reliance regarding the impact of drought on the Range is nothing but a red herring. Defendants determined that the Range was in a "deteriorating condition" in 2009 based on studies from 2002 and 2003, during which time the drought was severe. *Id*. at 6. However, the Range's vegetation and water stores have significantly improved since 2006 because of "unusually heavy amounts of precipitation." *Id*. By relying on old data that did not represent the current Range condition, it was impossible for Defendants to determine the impact the horses are having on the Range.

The BLM is additionally required to explore alternatives and review relevant facts when deciding whether or not to remove horses, but Defendants failed to take into consideration pertinent information in determining the AML. Defendants do not have to consider every possible alternative plan to improve the Range, but must give alternatives to the Gather Plan more than a cursory glance. *Watt*, 694 F.2d at 1312. Under *State Farm*, Defendants failed to

consider an important part of the problem when making the decision, and therefore it was arbitrary and capricious. *State Farm*, 463 U.S. 29 at 41.

Excess horses are those that must be removed only when necessary to sustain the Range's ecological balance and maintain its multiple-use purpose. § 1332(f)(2). Inferentially, to determine whether there are, in fact, excess horses, requires investigation of the impact *other* uses have on the Range, potentially grazing of other animals. Appellants recognize that the multi-use purpose does not give priority to one species of animal over the other. *American Horse Protection Ass'n, Inc. v. Frizzell*, 403 F.Supp. 1206, 1219 (1975). However, Defendants acted arbitrarily and capriciously by removing the horses without taking into consideration the significant fact that domestic livestock is greatly contributing to range deterioration nationwide, and is likely happening on the Range as well. For instance, nationally, cattle far outnumber wild horses, as there is one horse on public land for every 100 cattle. Glover at 1120. However, Defendants have historically neglected the causal effects the overuse of the public lands for grazing privately owned livestock and have failed to establish the causality between horse removal and improved Range condition. *Id*. at 1121.

Defendants' decision of what number of horses was "excess" was arbitrary and capricious. They incorrectly relied on irrelevant data, and disregard important issues in their decision.

C. Using Military and Riot-Control Equipment to Roundups Violates the WHA and The APA Because These Methods Are Not "Minimal," Will Terrorize The Horses, and Will Inflict Severe, Irreparable Injury to the Horses, Despite Congress's Intent

Defendants' intent to use the Active Denial System, the Long Range Acoustic Devices, and rubber bullets as roundups methods is prohibited under the WHA. Such weaponry diverges from Congress's intent to protect the wild horses through noninvasive management, and is inhumane because they will in harass the horses, causing them physical and psychological injury.

The Active Denial System ("ADS") is a weapon that emits a shaft of electromagnetic radiation, inflicting the pain of unbearable heat if aimed at skin. *See* EA at3. Long Range Acoustic Devices ("LRAD") "emit[] an extremely loud and piercing noise" "similar in tone to a smoke detector (but much louder)." Id. and Memo. Op. at 7. Defendants intend to mount both weapons onto helicopters, and the aerial attack of painful heat and unbearable noise would force the horses to run towards a trap. Although helicopters may be used in roundups if used humanely, Defendants have no authority to mount the ADS or LRADs onto helicopters to use as roundup methods by essentially bombing the horses with severe heat and agonizing noise from the sky. § 1338a. The lower court's reasoning that these devices are acceptable in part because they alleviate the need for more lethal weapons was irrational, and completely disregarded Congress's intent to treat the horses humanely and with minimal levels of force. § 1333(a). The fact that they are less lethal does not dismiss the reality they may cause serious injury or death.

While the Act provides no definition for "humane," the circumstances surrounding the passage of the Act are insightful. Congress passed the Act in response to the public outrage over the "abusive methods" used in trapping wild horses, including "tying horses to trucks to exhaust them or abandoning foals to die who did not weigh enough." Lafcadio H. Darling, *Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect?*, 6 Animal L. 105, 109-110 (2000). Therefore, it is clear that Congress intended the Act to prevent any methods that would abuse, injure or severely neglect wild horses during roundups. However, the BLM's proposed methods have serious potential for severe, permanent physical and psychological injury to the horses which is further evidence that these methods are inhumane.

Defendants have no way to verify the entire spectrum of injury that these methods will inflict, and they are therefore there is a great likelihood of inhumane, unforeseen results to occur.

Both the ADS and LRADs are experimental arms intended for military and riot control situations. Memo. Op. at 7. Neither have been tested or used as a form of animal control, and it is unclear how these instruments used against enemy combatants are equally appropriate for horses. The ADS is normally mounted on a truck and using an aircraft may be less exacting in hitting its target, thereby potentially subjecting sensitive areas of the body like the eyes, genitals and anus to this extreme pain. Also, the horses may be victim to all of these weapons at once.

The WHA makes it unlawful to harass these horses. 16 U.S.C. § 1331. It is clear terrorizing the horses from the sky and subjecting them to fear, annoyance and distress over the piercing noise and a constant feeling that their flesh is searing hot. Defendants could put them at risk for injuries, such as miscarriage, colic, upper respiratory infections, severe anxiety, and exhaustion. Further, herd could become so panicked that they will be put at higher risk for muscle, tendon and bone damage from running harder with less composure because of their alarm. The District Court noted that because these are wild horses, they cannot be "captured without *some* degree of discomfort." Memo. Op. at 8. However the inherent degree of discomfort does not open the door for unlimited pain and irritation.

Defendant's removal of the horses is an abuse of discretion under the WHA because the removal is contrary to Congress' intent, the Defendants relied on outdated data in reaching their decisions as to the AMLs, and the proposed methods are inhumane. The Gather Plan is an arbitrary and capricious decision of the BLM, and the Court should grant Appellant's injunction.

## II. THE DISTRICT COURT ERRED IN RULING THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Appellants are likely to succeed on the merits of their claim under the National Environmental Policy Act because Defendants failed to complete an Environmental Impact

Statement for the Plan as required by the statutory procedure. The BLM's EA did not accurately ascertain the ecological effects the Plan would have on the horses or the surrounding area and further inquiry through an impact statement is indispensable.

The National Environmental Policy Act ("NEPA"), enacted in 1970 and requires federal agencies to prepare an environmental impact statement ("EIS") for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. §4332(C) (2006). The intent of NEPA is to foster better decision-making and to permit informed public participation for actions affecting humans and nature. *Id.* at §4321. An agency must draft an Environmental Assessment ("EA") to determine whether its project will "significantly affect" the environment, and if so, an EIS is triggered because NEPA requires an EIS for all substantial Federal acts that significantly impact the human environment. *League of Wilderness Defenders v. Zielinski,* 187 F.Supp.2d 1263, 1268 (Oregon 2002). When an agency does not prepare an EIS, the court must determine if the "agency has reasonably concluded" that the act will not have significant adverse environmental costs. *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988).

Preliminary relief in a NEPA action will likely be granted if a claimant can exhibit irreparable harm to the environment that defendant did not consider in an EIS. *Mooreforce, Inc. v. U.S. Dept. of Transp.*, 243 F. Supp. 2d 425 (M.D. N.C., 2003). If an environmental injury is sufficiently likely, and such injury cannot be adequately repaired by monetary damages, the balance of harms will normally tip in favor of granting the preliminary injunction to protect the environment. *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531 (1987).

The Ninth Circuit recognizes that NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions. *Inland Empire Pub. Lands v. U.S. Forest Serv.,* 88 F.3d 754, 758 (9th Cir. 1996). To prevail on a claim that an agency

violated its duty to prepare an EIS, a plaintiff need only raise "substantial questions whether a project may have a significant effect" on the environment, not that significant effects will in fact occur. *League of Wilderness Defender*, 187 F.Supp.2d at 1269 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). If substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment, a decision not to prepare an EIS is unreasonable. *Save the Yaak Comm.*, 840 F.2d at 717.

If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" explaining why the impacts are insignificant. *Id.* This statement of reasons is "crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.* To determine if a proposed plan will significantly impact the environment, an agency must evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial and the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." *League of Wilderness Defenders,* 187 F.Supp.2d at 1269. A court will defer to an agency's decision only if it is "fully informed and well-considered." *Save the Yaak*, 840 F.2d at 717.

Defendants' decision that the Plan did not have a significant affect on the environmental was not fully informed nor well considered, and Defendants failed to take the requisite "hard look" at environmental consequences required by NEPA by failing to prepare a EIS. *See id.* The preparation of an EIS over the already prepared EA is necessary for several reasons: (1) the removal of 190 horses will significantly affect the ongoing survival of the herd and the BLM's EA was severely lacking in certain aspects; (2) the ultimate reduction in herd size by 100 horses is based on insufficient data and will affect the ongoing viability of the herd; and (3) there is

unsatisfactory evidence to determine the impact specific roundup tools will have on the herd and the surrounding environment. The BLM violated the APA because it abused its discretion by not conducting the require investigation before removal and the conclusion that no environmental impacts would ensue was both arbitrary and capricious.

A. Removal of 190 Horses from the RMWHR Will Significantly Affect the Ongoing Viability and Survival of the Herd and BLM's Environmental Assessment Lacked Adequate Information to Make an Informed Decision

Defendants' Gather Plan to remove all 190 horses from their natural habitat before returning a portion of them will disrupt and significantly affect the herd's ongoing viability. Moreover, the EA is lacking legitimate alternatives that Defendants should have considered before reaching the ultimate conclusion to remove over half of the horses on the range.

Defendant's EA proposes to gather all of the wild horses from the Range and ultimately return ninety horses they deem "genetically viable" to the Range. Defendants' 2009 Environmental Assessment at 1 (hereinafter "EA"). The EA states that the gather will continue until "management objectives are met" and "public lands will be closed for as long as the gather operation takes." *Id.* at 2. There is no scientific certainty as to how long the proposed project will take, and any predictions about the environmental impacts or outcomes are lacking sufficient data necessary to render an adequate final decision as to potential ecological outcomes. An EIS is crucial to determine whether Defendants' plan will have any long-term environmental effects.

The removal of the entire population will substantially affect the herd's environment by significantly affecting the social hierarchy of horses. It will disrupt the entire herd population, as well as affect inter-herd dynamics by breaking apart smaller family groups.[2] Conducting the

[2] Herds are comprised of numerous smaller bands ranging in size from one animal (rare) to bands of more than twenty animals. Typically a wild horse band will consist of one stallion and one to several mares with their offspring. *See* BLM, Seaman Herd Management Area, http://www.nv.blm.gov/ely/pdf/seaman_hma.pdf (accessed Jan. 1, 2009).

mass round up of all 190 horses will undoubtedly result in the separation of mare from foal, fights among stallions, and break apart bands in the process. The EA did not address the issue of how removing the entire herd, even temporarily, would affect overall herd composition. Furthermore, the EA lacked the adequate information on how the BLM will determine which horses will return to the range and how these determinations of the most "genetically viable" horses will affect the overall herd dynamics.

The EA was additionally deficient because it failed to consider and make available for public comment a wide variety of alternatives, as required under NEPA. In the EA, the BLM focused on the "action alternative" of the Gather Plan and a "no action alternative" – the extreme opposite. The no-action alternative of doing nothing was the *only* suggestion that the BLM explored in-depth. While the BLM attempted to briefly describe and explain away the need to investigate a few options, it failed to consider a variety of viable plans. For example, it is undisputed that the public land housing the Range promotes a multiple use function. However, the BLM failed to consider reducing the population of domestic livestock grazing on the range as a solution to prevent or help ameliorate overgrazing of the pastures. It is estimated that private livestock outnumber wild horses and burros at least 200 to one on public lands. The American Wild Horse Protection Campaign, http://www.wildhorsepreservation.com/numbers.html (accessed Jan. 3, 2009). Little has changed since 1990 when the U.S. General Accounting Office reported, "the primary cause of the degradation in rangeland resources is poorly managed domestic (primarily cattle and sheep) livestock." *See* Animal Welfare Institute, "Myths and Facts about Wild Horses and Burros," http://www.awionline.com/ht/d/sp/i/13559/pid/13559 (accessed Jan. 1, 2010). Cattle and other livestock far outnumber wild horses on public ranges, yet Defendants presented no alternative to reduce the livestock that contribute to overgrazing.

By ignoring these other issues, the BLM failed to do all that is necessary to preserve the wild horse population and the ecosystem alike. Historically, most horse removals have not resulted in improved rangeland condition – the exact goal that the BLM seeks to achieve by the supposed "necessary" wild horse round up.[3] By not addressing the alternative of removing domestic livestock, the BLM did not conduct a sufficiently in depth analysis into a possible alternative that could drastically reduce the problem of overgrazing while preserving wild horses. The BLM failed to take a "hard look" at the environmental impacts of the plan and the EA they provided was devoid of necessary information to render it an ample analysis under NEPA.

B. The Ultimate Reduction in Herd Size By 100 Horses is Based on Arbitrary Statistics and Will Significantly Impact Herd Dynamics by Reducing the Herd by Over a Half

The Defendants' arbitrary decision to reduce the total herd population to less than one half of its original size will significantly affect the entire herd. Furthermore the data that the BLM relied on in reaching the AML was outdated and resulted in the arbitrary determination to remove such a substantial number of horses. The deduction of such a large portion will affect the balance of the environment, and more extensive research through an EIS is required.

The BLM determined that the AML for the RMWHR was between 85 and 105 horses in 1992. In 1992, BLM had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability. BLM noted in the EA that the purpose and need of the proposed action was to "immediately manage for a [thriving natural ecological balance] over the next several years and limit wild horses to within the RMWHR."

[3] In a General Accounting Office Study, BLM could not provide GAO with any information demonstrating that federal rangeland conditions have significantly improved because of wild horse removals. This lack of impact has occurred largely because BLM has not reduced authorized grazing by domestic livestock, which because of their vastly large numbers consume twenty times more forage than wild horses, or improved the management of livestock to give the native vegetation more opportunity to grow. *See* GAO Study, *supra*.

*See* EA at 1. However, the BLM based this finding on data from 2004 and 2006. *Id.* None of the research relied upon had been performed within three years prior to the BLM's determination.

During the years between 1993 and 2005 the area experienced below average precipitation levels, resulting in several years of severe drought. Since 2006, however, the condition of the range has improved dramatically, with unusually heavy amounts of precipitation on the range resulting in significant water stores. The BLM admits that "the precipitation levels in 2008 were far above the 30-year average and current year precipitation data indicates 200% [above] average for 2009." *See* EA at 2. Yet the BLM failed to conduct further research into the condition of the range when preparing their 2009 EA and instead relied on data compiled during 2002 and 2003, the two worst years of the drought. Memo. Op. at 6. Despite the fact that the range was in substantially better condition, the BLM neglected to investigate the 2009 Range status when determining the AML. Therefore the determination that 100 horses must be removed to improve the Range was arbitrary because it was based on outdated statistics. An EIS would require the BLM to take a closer look and lead to more informed decision-making.

The Ninth Circuit has recognized that removing a substantial number of horses will affect the quality of the human environment. *See American Horse Protection Assoc., Inc. v. Andrus*, 608 F.2d 811 (9th Cir. 1979). Although Defendants claim that they are reducing the overall herd size to better the condition of the Range for future generations of the herd, they failed to further investigate how removing over half of the population will affect the overall herd's long-term genetic stability. Scientists have found that populations managed with a target size of fewer than 500 horses were at risk of losing more than 90% of selective neutral genetic variation over a period of 200 years. *See Singer*, *supra*. Isolated populations of less than 200 animals are particularly vulnerable to the loss of genetic diversity. *Id*. This scenario sets the stage for a host

of biological problems associated with inbreeding including reduced reproduction and foal survival, reduced adult physical fitness and physical deformities. Animal Welfare Institute, "Myths and Facts about Wild Horses and Burros," http://www.awionline.org/ht/d/sp/i/13559/pid (accessed Jan. 1, 2009). A herd size of merely 90 horses is at a much greater risk of losing genetic diversity, and populations managed at these low numbers for decades would inevitably become inbred, suffer genetic deformities, and could potentially face extinction. *See id.*

The BLM's plan to eliminate more than fifty percent of the herd is so drastic as to constitute a "major Federal action" that will significantly affect the quality of the environment for the remaining horses. Inter-herd groups will undoubtedly be split apart and members of the herd will be permanently removed severing close family bonds. Defendants' decision to remove 100 horses was arbitrary and based on outdated information rendering the AML inaccurate. Moreover, before such a drastic reduction may take place, the BLM is required by NEPA to prepare an EIS to determine how the major Federal action of removing over half the population will affect the herd and surrounding environments.

C. <u>The Defendant's EA Includes Methods For Use in The Round-Up Have Uncertain Scientific Effects That Could Potentially Harm the Horses and the Environment</u>

The BLM's proposed roundup methods in their EA lack scientific certainty as to their effects and an EIS is necessary to further investigate potential outcomes. In the EA, two of the roundup methods proposed by the BLM, the ADS and the use of the LRADs, are both untested and the BLM has no idea how either method will affect the herd or other species.

The ADS is described in the EA as a "non-lethal, directed energy" device that "projects a focused beam of millimeter waves to induce an intolerable heating sensation on an adversary's skin." *See* EA at 3. The ADS would be mounted on a helicopter and the beam would cause such discomfort that the horses would run in the opposite direction of the beams into traps. However,

the extreme heat emitted by the ADS could cause irreparable harm, such as rendering stallions sterile. Studies have shown that the ADS proved harmful in human subjects and tests of the weapon proved that reflection off water or the ground can produce peak energy densities twice as high as the main beam. New Scientist: *Microwave weapon 'less lethal,' but still not safe,* http://www.newscientist.com/article/mg19125695.800-microwave-weapon-less-lethal-but-still-not-safe.html (accessed Dec. 29, 2009). If the beam contacts sweat or moisture it further intensifies the effect. *Id.* Hence, because the horses will be forced to run at high speeds for long distances during the Gather, they will inevitably be perspiring, putting them at much greater risk of long term harm. Additionally if a group of horses are attempting to escape the intense heat and cannot avoiding the beams due to colliding with each other, certain animals would receive a disproportionate amount of the beam, thereby increasing their potential for long-term damage.

The method using LRADs could have equally detrimental effects on the horses. The LRADs transmit noise in a highly directional beam resulting in harmful audio levels. *See* EA at 3*; see also* American Technology Corporation, Long Range Acoustic Device: Product Overview, http://www.atcsd.comsite/content/view/15/110/ (accessed Jan. 1, 2010). The targeted noise becomes so unbearable that the subject flees the direction of the beam to alleviate this extreme discomfort. According to Defendants, the LRADs are not supposed to hurt bystanders, however there is no guarantee that injury will not result. In addition to the physical and psychological injury that the high noise levels have on the horses (*see* Section I, C *supra.*), the noise levels could equally affect surrounding wildlife. The BLM admittedly proclaims in the EA that the noise level produced by the LRADs could be harmful to human, so it is evident how the noise could be equally harmful to the equines or other species.

Defendant's EA lacks any authority as to the environmental effects the ADS and the LRADs will have on the horses and the environment. Defendants do not cite to any studies that would lend insight or expert opinions regarding possible long-term effects or environmental harms produced by the high intensity beams of the ADS or the high noise levels emitted by the LRAD, leaving sizeable gaps in their assessment.

Defendants failed to follow the requisite procedure under NEPA by taking a "hard look" into environmental impacts of the Gather Plan and further investigation through an EIS is necessary. Appellants have successfully risen "substantial questions whether the project may have a significant effect" on the environment, and therefore have met the burden of showing that an EIS should have been prepared. *See League of Wilderness Defenders,* 187 F.Supp.2d at 1269. An EIS is necessary because removal of 190 horses from the range constitutes a major Federal action that will significantly affect the environment, the decision to reduce the herd by such a substantial number was arbitrary and lacked sufficient scientific research based on up-to-date information, and the BLM failed to produce scientific certainty as to environmental effects from the ADS and the LRSD's. The BLM's decision that there is no significant environmental impact was neither "fully informed" nor "well-considered," and therefore, the decision to not prepare an EIS was unreasonable. *See Save the Yaak Comm.*, 840 F.2d at 717. By failing to include all prudent information and by not considering important aspects of the problem before releasing the EA to the public, the BLM fell short of their statutory duty under NEPA and Appellant's request for preliminary injunction should have been granted. *See Earth Island Inst.*, 351 F.3d at 1298.

## III. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE BALANCE OF HARDSHIPS DID NOT FAVOR APPELLANTS

The District Court erred when it held that the balance of hardships did not favor Appellants. The appellants, and the public alike, will suffer hardship if the Plan is carried out

because they will suffer injury from being unable to view the horses in their natural habitat and the BLM's plan is not in the best interest of the wild horses.

1. Appellants will Suffer Irreparable Injury When the Free-Roaming Horse Population Will No Longer Exist on the Rafiki Mountain Range

If the BLM executes their plan of removing over half of the wild horse population of the Rafiki Mountain Range, the Appellant's will suffer irreparable injury because they will no longer be able to observe those animals in their natural habitat. Appellants share the interests of the public alike in seeking to preserve the wild horse population for generations to come.

Appellant's personal interest in observing the horses in their natural habitat is threatened by Defendants' Plan. The courts recognize that one who observes a particular animal that is threatened by a federal decision faces perceptible harm, since the very subject of his interest will no longer exist. *See Colorado*, 639 F.Supp.2d at 92. The BLM's decision threatens these horses in their native habitat, and the Plan will permanently remove the majority of these historically and culturally significant creatures, depriving Appellants of enjoying the animals in the wild. Once the horses are removed from the Range, they will be gone forever, and this is an irreparable injury that the Appellant's are faced with if the Plan is permitted to continue.

Appellants share a common affinity for the wild horse as do a vast majority of the American population. It is uncontested that horses have a strong connection to America and Americans. *See* Lafcadio H. Darling, *Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect?*, 6 Animal L. 105 (2000). Despite the horse's working career in American life being rendered obsolete due to advances in technology, millions of Americans continue to own, use, ride, and admire horses. *See id.* Every year countless Americans travel West to witness the wild horse in his native habitat. However, with the extensive removal of these wild animals, the public is being denied its right to view and admire the wild horses the

way that the WHA intended – as free roaming on the range, protected from "capture, branding harassment, or death." 16 U.S.C. § 1331.

Public support for the protection of wild horses is not an insulated phenomenon.[4] For years, Americans across the country have banded together to condemn and protest the BLM's roundups in an effort to preserve the wild horse herds for generations to come. Numerous activists groups, websites, organizations, and grassroots campaigns have worked toward a common goal of protecting America's native horse herds in light of the sobering reality that there are precious few left in the wild.[5]

California is no exception to this widespread public sentiment. The Rafiki Mountain Range became a sanctuary for wild free-roaming horses in 1969 "in response to public outcry over" the Defendants' plan to remove wild horses. Memo. Op. at 2. The Range is now one of California's few wild horse sanctuaries left, providing the public with limited opportunity to view these creatures in the land they once flourished. Appellants, and the public alike, face the hardship of not being able to see the horses in their natural habitat without fear that the continuing trend of removal will eventually lead the horses to extinction. Appellants' hardship is not isolated to these particular individuals, and is a hardship that will injure innumerable members of the community as the BLM continues to strip the public lands of wild horses.

B. The BLM's Gather Plan Is Not in the Best Interest of the Horses that the Defendants are Statutorily Required to Protect

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[4] The Humane Society of the United States estimates that one in every 28 Americans currently supports their mission to end animal cruelty, exploitation and neglect. The HSUS are open supporters of the Restoring Our American Mustangs (R.O.A.M.) Act (H.R. 1018) which seeks to restore longstanding protections for wild mustangs and would also require the BLM to take the first step toward a rational, fiscally responsible and compassionate program, while fulfilling the mission, spirit and original intent of the 1971 Act – protecting wild horses on public lands. *See* Hearing on the ROAM Act, U.S. House of Representatives, Testimony of Wayne Pacelle, President and CEO, The HSUS. March 3, 2009. http://www.humanesociety.org/assets/pdfs/wildlife/pacelle_roam_act_0309.pdf

[5] Among countless others, these groups include "Help Save America's Wild Horses" (http://www.madeleinepickens.com/); "The American Wild Horse Preservation Campaign" (http://www.wildhorsepreservation.com); "Save our Wild Horses" (http://www.saveourwildhorses.com); with a shared mission of protecting free-roaming horse populations.

The BLM's Plan is not in the best interest of the wild horses of the Rafiki Mountain Range. While Defendants claim that the Plan will promote optimal range conditions for future generations of the horse herd, they have failed to provide any data where wild horse removals have materially improved the specific areas from which they have been removed. *See* G.A.O. study. Furthermore, Defendants claim that the Plan will seek to preserve only the most genetically viable horses to return to the range, and providing those horses with improved range conditions. However, they have failed to present any data to attest to this fact, and scientific studies have shown that horse herds sustained at these low population densities face a host of genetic deficiencies[6] and could potentially face extinction.

The BLM has not proven that removal of these horses will, in fact, solve the dilemma of overgrazing, and without accounting for other factors, it is inevitable that the BLM will continue rounding up wild horses until one day they are eventually gone forever. While Defendants claim that wild horses are "overpopulating" the habitat, they paid little or no attention to the indiscriminate overpopulation of domestic livestock on public land. *See* Save Our Wild Horses: BLM, http://www.saveourwildhorses.com/blm.htm (accessed Jan. 3, 2010). This clearly demonstrates that despite Defendants' claim, they are not acting in the best interest of the horses if they blatantly fail to consider alternatives that could greatly improve Range condition.

While the BLM claims that horses on the Range will starve if left alone, the WHA was not intended to micro-manage wild horse populations by constantly removing large quantities, and Defendants instead should leave the wild populations alone and allow nature to take its course. 16 U.S.C. § 1333(a). Moreover, the Range spans over 36,000 acres originally set aside for the wild horses. Memo. Op. at 2. With the current population of 190 horses, that amounts to

[6] *See* Section II, 2, *supra.*

over 189 acres per single horse on the range. It is difficult to fathom how these horses will starve with such abundant amounts of land, and further how reducing the wild horses will improve range conditions for all, despite their overall low numbers on vast span of the Range.

Wild horses would naturally regulate their herd size if left alone. This falls under the scientific definition of "density dependence," which has been defined as "the regulation of the size of a population by mechanisms that are themselves controlled by the size of that population (e.g. the availability of resources) and whose effectiveness increases as population size increases." Michael Allaby. "density dependence." A Dictionary of Zoology. 1999, http://www.encyclopedia.com (accessed Jan. 3, 2010). Wild horse populations would self-regulate, and bloodlines and genetics would be naturally passed from one generation to the next, if Defendants would stop managing by removal. This hands-off management of the wild horse population would be in the best interest of the herd, and was exactly was Congress intended when it created the Act: to preserve these mystic creatures in their native habitats.

The appellants and the public will suffer hardship if the Plan is carried out because they will suffer injury by being unable to view those horses in the wild. Further, the BLM's plan is not in the best interest of the wild horses, and the balance of harms tip in Appellant's favor.

## CONCLUSION

The district court erred in denying Appellants' motion for preliminary injunction because Appellants successfully demonstrated a likelihood of success on the merits of their claims under both the WHA and NEPA. Defendant's abused their discretion under the WHA and failed to meet the statutory requirements of NEPA by completing an EIS. Moreover, the balance of hardships tips sharply in their favor, and the preliminary injunction is in the public's best interest. For these reasons, the court should grant Appellant's motion.