United States Court of Appeals,

Ninth Circuit

Deborah Rubin, and The Horse People, Plaintiffs – Appellants

v.

Ken Salazar, in his capacity as Secretary of the Department of the Interior, and Robert Abbey, in his capacity as the Director of Bureau of Land Management, Defendants – Appellees

January 4, 2010.

**Brief of Appellees**

Moot Team #5

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Statement of the Issues

1. Did the District Court correctly deny a Preliminary Injunction because Plaintiffs failed to prove a likelihood of success on the merits under the Wild Free-Roaming Horses and Burros Act?
2. Did the District Court correctly rule 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 correctly find that the balance of hardships did not tip in favor of the Plaintiffs?

Statement of Facts

Statutory Background

The Wild Free-Roaming Horses and Burros Act (WFHBA) was enacted in 1971 at a time when wild horses were in danger of vanishing from the West, largely because of commercial exploitation by persons who captured them and sold them for profit. See 16 U.S.C. § 1331 (2006). The Secretary of the Interior (Secretary) was given jurisdiction over all wild horses and burros located on the public lands administered by the Bureau of Land Management (BLM) and instructed to “manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. 1333(a) (2006). The Secretary was given “a high degree of discretionary authority for the purposes of protection, management, and control of wild free-roaming horses and burros on the public lands.” H.R. Rep. No. 92-681 at 6-7 (1971), 1971 U.S.C.C.A.N. 2149, 2160.

The WFHBA was largely effective and horse populations in the West reached significant numbers. Congress found that the “excess numbers of horses and burros pose a threat to wildlife, livestock, the improvement of range conditions, and ultimately their own survival.” H.R. Rep. No. 95-1122 at 21 (1978). Congress concluded, therefore, “action is needed to prevent a successful program from exceeding its goals and causing animal habitat destruction.” *Id*. The purpose of the 1978 amendments was “to cut back on the protection the Act affords wild horses, and to reemphasize other uses of the natural resources wild horses consume.” *American Horse Protection Ass'n, Inc. v. Watt,* 694 F.2d 1310, 1316 (D.C. Cir. 1982). Pursuant to the WFHBA, the Secretary, through BLM, manages the public lands for multiple uses and manages wild horses in a manner that is designed “to preserve and maintain a thriving natural ecological balance and multiple-use relationship.” 16 U.S.C. § 1332(f), 16 U.S.C. § 1333(a) (2006). The WFHBA provides for BLM to set an “appropriate management level” (AML) of wild horse and burro populations for each Herd Management Area (HMA). 16 U.S.C. § 1333(b)(1) (2006). If 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) (2006). BLM regulations ensure humane treatment of excess animals. 43 C.F.R. §§ 4720.1, 4740.2 (2006). “Humane treatment” means that the horses must be handled according to “animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering.” 43 C.F.R. § 4700.0-5(e) (2008).

The purpose of the National Environmental Policy Act is to focus the attention of the government and the public on proposals for major federal action so that potential environmental consequences of the proposal can be studied and disclosed before the action is implemented. 42 U.S.C. § 4321 (2006); see [*Marsh v. Oregon Natural Resources Council,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1989063360&ReferencePosition=371) 490 U.S. 360, 371 (1989). Thus, NEPA requires each federal agency to take a 'hard look' at the environmental consequences of its proposed actions.  *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976). NEPA does not, however, mandate particular results or impose substantive environmental obligations upon federal agencies. *Marsh,* 490 U.S. at 371; *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-228 (1980). NEPA provides that federal agencies should prepare a detailed Environmental Impact Statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §4332(C) (2006). In order to determine whether an action requires an EIS, the agency may prepare an Environmental Assessment (EA). 40 C.F.R. §§ 1501.4(b), 1508.9 (2006). “NEPA's EIS requirement is governed by the rule of reason an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action.” *Cabinet Mountains Wilderness v. Peterson,* 685 F.2d 678, 682 (D.C. Cir. 1982).

Factual Background

The Rafiki Mountain Wild Horse Range (RMWHR) is home to one of California’s only remaining herds of wild and free-roaming horses. *Lower court opinion, pg. 2*. In 1969, the RMWHR was created because of public protest of the BLM’s plans to remove horses from this area for slaughter. Created by the Secretary of the Interior, the RMWHR is 36,000 acres “to protect this irreplaceable herd of wild horses of Spanish lineage and to protect native wildlife and the local watershed.”  *Id*. It has been determined by the BLM that the “appropriate management level” (“AML”) for the RMWHR is between 85 and 105 horses. The total number of horses on the RMWHR today is approximately 190 horses. *Id*.

The RMWHR has recently suffered major droughts and as a result the herd’s food supply has been severely compromised. *Id.* Due to the deteriorating conditions of the range, BLM determined that of the 190 horses currently living on the range, 100 of those horses were “excess.” *Id.* A plan was devised in August 2009 to round up these excess horses and remove them from the RMWHR (“the Gather Plan”). *Id.*

The Gather Plan requires all 190 horses to be round up and blood samples taken from each horse to determine which of the horses have the best genetic profiles. *Id at* 2, 3. The 90 horses with the best genetic profiles will be returned to the range so as to ensure the healthiest possible herd remains on the range. *Id at* 3. The methods employed in rounding up the horses under this gather plan are the use of Long Range Acoustic Devices (“LRADs”), the Active Denial System (“ADS”), rubber bullets, and helicopter drive-trapping. *Id.* The BLM prepared an Environmental Assessment which found the proposed plan would have no significant impact on the natural environment and after thirty days of public comment, which included submissions by the Plaintiffs, the BLM issued its Decision Record (“DR”), final Environmental Assessment (“EA”), and Finding of No Significant Impact (“FONSI”). *Id.* Due to budgetary problems the round up, which was supposed to begin in September 2009, was delayed until mid-February 2010. *Id.*

**Argument**

1. **THE DISTRICT COURT CORRCTLY RULED THAT PLAINTIFFS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM UNDER THE WOLD FREE-ROAMING HORSES AND BURROS ACT.**

**Overview and Standard of Review**

The District Court below did not commit an error in judgment by ruling the Plaintiffs failed to prove a likelihood of success on the merits of their case under the Wild Free-Roaming Horses and Burros Act (WFHBA). Although the issue is complex, the law clearly supports the government’s case. This court should affirm the decision of the court below for the following reasons: First, the BLM is not “removing” all of the horses as that term is used by the WFHBA. Second, the BLM determination that there are currently 100 excess horses is not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. Third, the specific round-up methods in this case will not expose all of the horses to unnecessary suffering, inhumane treatment, harassment, and potential death.

A decision regarding a preliminary injunction is reviewed for abuse of discretion, which occurs only if the district court based its decision on either an erroneous legal standard or clearly erroneous factual findings. *Nadar v. Brewer*, 386 F.3d 1168 (9th Cir. 2004). “This review is limited and deferential.” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003).

1. **The Bureau of Land Management is not in violation of WFHBA by temporarily removing all horses from the Rafiki Mountain Wild Horse Range (RMWHR).**

The Secretary, through the Bureau of Land Management, “shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. §§1332 (a), 1333(a) (2006). “The goal of wild horse and burro management, as with all range management programs, should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros.” Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1894 (1978), House Conference Report No. 95-1737. The Secretary was given “a high degree of discretionary authority for the purposes of protection, management, and control of wild free-roaming horses and burros on the public lands.” H.R. Rep. No. 92-681 at 6-7 (1971), 1971 U.S.C.C.A.N. 2149, 2160.

In reviewing an agency’s interpretation of a statute that it administers, the two-step approach is followed as set out in Chevron: first, traditional tools of statutory construction are used to determine whether Congress has unambiguously expressed its intent on the issue, and if so, that is the end of the matter, for the federal court, as well as the agency, must give effect to the unambiguously expressed intent of Congress, but if a statute is silent or ambiguous with respect to a specific issue, then at step two the question is whether the agency's answer is based on a permissible construction of the statute.

*Natural Resources Defense Council v. Environmental Protection Agency*, 526 F.3d 591 (9th Cir. 2008).

It is unclear whether “removal,” as used in the WFHBA, encompasses both temporary as well as permanent removal. Neither the WFHBA, nor its legislative history or judicial interpretation, provides the definition of the term “removal.” Considerable weight is given to the principle of deference to administrative interpretations of a statute that the agency is charged with administering. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The standard of review for claimed violations of the WFHBA is whether the BLM’s actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A), *American Horse Protection Association v. Frizzell*, 403 F.Supp. 1206, 1217 (D. Nev. 1975). “Where an agency action is rational, based on relevant factors and within the scope of authority delegated to the agency by the statute, a reviewing court may not set this decision aside.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 43-44 (1983). It can be stated then that the Secretary has the authority to allow for the temporary removal of wild horses and burros under the act. The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands. 16 U.S.C. §1333(a) (2006). Additionally, the Code of Federal Regulations under Title 43 Part 4700 provides the Secretary the authority to implement the laws relating to the protection, management, and control of wild horses and burros under the administration of the Bureau of Land Management. 43 C.F.R. § 4700.0-1 (2008). The objectives of these regulations are “management of wild horses and burros as an integral part of the natural system of the public lands under the principle of multiple use; protection of wild horses and burros from unauthorized capture, branding, harassment or death; and humane care and treatment of wild horses and burros.” 43 C.F.R. § 4700.0-2 (2008). Management of the range in a manner designated to protect the habitat of the wild horses is consistent with the Secretary’s duty to protect the wild horses. *American Horse Association, Inc. v. Frizzell*, 403 F.Supp. 1206, 1217-18 (D. Nev. 1975).

The present case would seem to fall within issue decided by the recent District Court decision in *Colorado Wild Horse and Burro Coalition, Inc. v. Salazar*, 639 F.Supp.2d 87 (D.D.C. 2009). While the facts seem almost identical the real issue in that case comes down to permanent removal of an entire herd of free-roaming wild horses and burros that are not determined to be “excess animals” within the meaning of the WFHBA. *Id. at* 95. The court in *Salazar* stated “Congress did not authorize BLM to ‘manage’ the wild horses by corralling them for private maintenance or long-term care as *non-wild* free-roaming *off* public lands.” *Id. at* 96. (emphasis in original). The court went on further to state:

Congress expressly limited BLM’s authority “to relocate wild free-roaming horses or burros to areas of public lands where they do not presently exist”. 16 U.S.C. §1339. Given the policy [of that] statute, it would make no sense to prohibit BLM from relocating wild horses to public lands where they did not historically exist but permit BLM to take the more drastic measure of removing non-excess animals from the public lands altogether.

*Id. at* 97.

The court’s decision in *Salazar* can easily be distinguished from the issue of the present case. The WFHBA provides a list of circumstances for the loss of status as wild free-roaming horses and burros. 16 U.S.C. §1333(d) (2006). Absent from that list is temporary removal. Private adoption and long-term care at issue in *Salazar* is inapplicable to the 90 horses that will be returned to RMWHR. 639 F.Supp.2d 87 *at* 96. In addition, the WFHBA contemplates the temporary capture of wild horses and burros as well as transportation and possible relocation pursuant to range management activities. 16 U.S.C. §§ 1333, 1334, 1338a, 1339 (2006). It would be anomalous to say that BLM is authorized to allow temporary removal for transportation or possible relocation but not authorized for temporary removal where the animals will be returned to their original location.

1. **BLM properly determined that there were 100 excess horses under WFHBA.**

Under the WFHBA, the Secretary is charged with the duty to maintain an inventory of wild horses and burros on given areas of public lands. 16 U.S.C. §1333(b)(1) (2006). The purpose of such inventory shall be to: “make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels (AML) of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).” Id. “The term AML generally refers to the optimum number of wild horses and burros that ‘results in a thriving natural ecological balance and avoids a deterioration of the range’." *Thomas M. Berry*, 162 I.B.L.A. 221, 222 (2004), *Animal Protection Institute of America*, 109 IBLA 112, 119 (1989). “Excess animals” are defined as animals that must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area. 16 U.S.C. §1332(f)(2). The WFHBA further provides:

Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to §1712 of Title 43; (iii) information contained in court ordered environmental impact statements as defined in §1902 of Title 43; and (iv) such additional information as becomes available to him from time to time, including that information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above, on the basis of all information currently available to him 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) (2006).

This statute 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.” *American Horse Protection Ass’n v. Watt*, 694 F.2d 1310, 1318 (D.D.C. 1982). As mentioned above administrative action is reviewed under the arbitrary-and-capricious standard. 5 U.S.C. § 706 (2)(A). “The court may not substitute its judgment for the agency's; rather, it is limited to an inquiry whether the agency's decision was based on a consideration of relevant factors and whether there was a clear error of judgment.” *Washington State Farm Bureau v. Marshall*, 625 F.2d 296 (9th Cir. 1980); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). A District Court decision from Nevada is instructive on the present issue. *American Horse Protection Ass’n v. Frizzell*, 403 F.Supp. 1206 (D. Nev. 1975). In *Frizzell*, the court noted that “wise range management techniques dictate that a given area must be restricted in use to those numbers that can be supported adequately and still allow the range to replenish its vegetation. *Id. at* 1217. The BLM in that case sought to remove a significant number of horses that were deemed to be “excess”. The court went on to state that BLM’s removal decision “to reduce grazing pressures is arguably in the best interests of the remaining wild horses” and “the Court cannot say that the decision was arbitrary or capricious or in violation of BLM’s duty to protect wild horses.” *Id. at* 1218. The record in the present case clearly demonstrates that the optimal number of horses for the RMWHR is between 85 and 105 horses and that today the herd consists of approximately 190 wild horses. (not sure how to cite memorandum opinion provided to us). Accordingly, a finding of overpopulation is not arbitrary and capricious. See *Cloud Foundation, Inc. v. Kempthorne*, 2008 WL 2794741 (D. Mont. 2008). It is a well-established principle of law that agency decisions of this kind are entitled to great judicial deference. *Id*.

1. **The specific roundup methods in this case do not violate WFHBA.**

The WFHBA provides that upon determination by the BLM "that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, [the agency] shall immediately remove excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. §1333(b)(2) (2006). BLM however does not have unlimited discretion in this regard. The regulations provide for the “humane care and treatment of wild horses and burros.” 43 C.F.R. §4700.0-2 (2006). The regulations further provide that “humane treatment means handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse or burro.” 43 C.F.R. §4700.0-5 (2008). As noted in the decision below, “because the horses at issue in this case are *wild* horses, they cannot be herded and captured without some degree of discomfort.” See Lower Court Opinion page 8.

The policy of the WFHBA is that “wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.” 16 U.S.C. §1331 (2006). However, in 1978 the WFHBA was amended to “cut back on the protection the Act afford wild horses.” *American Horse Protection Ass’n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982). While the Secretary is given a “high degree of discretionary authority for purposes of protection, management, and control of wild horses and burros,” he “does not have discretion to choose an inhumane manner of capturing and distributing excess wild horses.” *American Horse Protection Ass’n v. Frizzell*, 403 F.Supp. 1206, 1217 (D. Nev. 1975). The policy of Congress clearly contemplates the capture of wild horses and burros under the WFHBA. Furthermore, the Secretary is authorized to “use motor vehicles, fixed-wing aircraft, or helicopters, or to contract for such use, in furtherance of the management of the National Park System.” 16 U.S.C. §1338a (2006). It therefore cannot follow that the use of helicopters in the roundup of horses would be violating the WFHBA. Again, because the WFHBA clearly contemplates the capture of horses, it would be contrary to its policy to find that the suffering of the wild horses upon being captured violates that act.

In addition, the use of experimental weapons to roundup horses in this case does not violate the WFHBA. It is the policy of the WFHBA to ensure that the purposes of the act are carried out in the most humane ways possible. One scholar notes that “most courts agree [that anti-cruelty] statutes are intended to prevent humans from acting in cruel ways toward each other and regard cruel treatment toward animals as leading to cruel treatment toward humans.” Gary L. Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 Rutgers L. Rev. 721, 753-54 (1994). In that view, the purpose of these statutes is “to improve human character, not the protection of animals.” *Id.* Francione further acknowledges that animals do not have rights under the law. *Id. at* 723. Additionally, he observes that while there are laws which protect animals from “inhumane” treatment, “these laws concern animal welfare, or the notion that animals may be exploited by humans as long as this exploitation does not result in the infliction of ‘unnecessary’ pain, suffering, or death.” *Id.*

Animal husbandry practices are not codified in any statute or regulation. Again, the decision of an agency will be set aside if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706 (2)(a) (2006). There are no laws that prohibit the use of experimental non-lethal weapons for the purpose of herding animals. If these weapons are permitted for the use of human crowd control it can be inferred that their use on animals is permitted. The use of the Active Denial System is much less invasive to an animal than a dart from a tranquilizer gun would be. “The invisible millimeter wave--effective at the speed of light to a remarkable range of a kilometer or more--stimulates the nerve endings in human skin, but penetrates only 1/64 of an inch. It almost immediately produces a powerful sensation of heat--as if the person were touching a hot light bulb--but does not, in fact, burn the skin or inflict any injury.” David A. Koplo, *Tangled Up in Khaki and Blue: Lethal and Non-lethal Weapons in Recent Confrontations*, 36 Geo. J. Int'l L. 703, 720 (2005). As noted in the decision below rubber bullets merely cause momentary distress as opposed to more significant physical injury potentially caused by more lethal weapons. Important to note is the fact that the definition of humane treatment cited above refers to *unnecessary* stress and suffering. Certainly some discomfort and stress was contemplated in the capture and removal of wild animals. Furthermore, it was well within the discretionary authority of the Secretary to determine which methods would be used under the Gather Plan. Lastly, as noted by the court in *Frizzell*, round up by helicopter would be more humane that the water trap method. 403 F.Supp. 1206 at 1218 (D. Nev. 1975). However, the court approved the water trap method in that case because helicopter round up was unavailable at that time. Therefore it cannot be said that the helicopter method employed in the present case would violate the WFHBA.

**Conclusion**

In light of the above issues, it is clear that the court below was correct in determining the plaintiffs failed to prove a likelihood of success on the merits of their case under the WFHBA.

1. **THE District Court correctly ruled that the Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the National Environmental Policy Act.**

The District Court’s decision to uphold the Bureau of Land Management’s issuance of a Finding of No Significant Impact and deny plaintiff’s preliminary injunction was not in error, and is correct as a matter of law. Plaintiffs have not shown a likelihood of success on the merits of their claim under the National Environmental Policy Act. To the contrary, the Act, its regulations, and related case law support the Bureau of Land Management’s finding that no full-blown Environmental Impact Statement was necessary in the promulgation and implementation of its “Gather Plan.”

**Statutory and regulatory background: the National Environmental Policy Act and Administrative Procedure Act**

The National Environmental Policy Act (NEPA) requires a federal agency to prepare an environmental impact statement (EIS) only where its major federal action will “significantly affect the quality of the human environment.” 42 U.S.C. § 4332 (c) (2006). While a plain reading of the statute provides little guidance as to what effects may be considered “significant,” the Council on Environmental Quality’s regulations require that an agency must assess the context and intensity of the impact. 40 C.F.R. § 1508.27 (2008). As the lower court noted, the purpose of NEPA is to inform both the federal agency and public of the possible environmental consequences. NEPA therefore requires federal agencies to take a ‘hard look’ at the environmental impacts of its proposed actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 250 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). NEPA does not force an agency to eliminate environmental impacts imposes no substantive environmental obligations. *See Robertson*, 490 U.S. at 350-51.

An agency may undertake an environmental assessment to determine whether a full-blown EIS is necessary. 40 C.F.R. § 1501.4 (b) (2008). The EA must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9 (a)(1) (2008). Where the agency determines that no significant impact will result, an EIS need not be prepared, and a finding of no significant impact (FONSI) may be issued. *Id*.

Where an agency finds no significant impact, its decision not to prepare an EIS is controlled by the Administrative Procedure Act and is challenged under its arbitrary and capricious standard. 5 U.S.C. § 706 (2)(A) (2006); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). NEPA challenges may only be set aside under the APA where a district court finds that the agency’s action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id*. While a court’s thorough review may be necessary, agency decisions are “entitled to a presumption of regularity.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Since the agency’s finding of no significant impact is a factual determination that requires scientific expertise, judicial review is highly deferential. *Oregon Natural Recourses Council*, 409 U.S. at 377. Furthermore, when a litigant “challenges an agency determination on the grounds that…allege that the agency’s expert review was incomplete, inconclusive, or inaccurate, the greater degree of deference expressed by the arbitrary and capricious standard is appropriate.” *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1350 (9th Cir. 1992). Plainly, a presumption of validity attaches to agency decisions made on the record. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976).

**Standard of Review**

The District Court dismissed Plaintiffs’ motion for a preliminary injunction as it found that plaintiffs failed to show a likelihood of success on the merits. Such a district court’s ruling to deny a preliminary injunction is reviewed under the abuse of discretion standard. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

1. **The District Court correctly denied the Plaintiffs’ Motion for a Preliminary Injunction on the basis that the removal of 190 horses and reduction of herd size by 100 horses are not significant impacts under NEPA.**

BecauseNEPA does not create a private right of action, challenges to the Bureau of Land Management’s (BLM) Gather Plan (“Plan”) must be brought under the Administrative Procedure Act. In order to obtain a preliminary injunction against BLM at the District Court, Plaintiffs were thus required to show that BLM acted arbitrarily and capriciously in finding that the Plan would have no significant impact on the human environment.

First, Plaintiffs assert that BLM’s decision to temporarily remove 100 horses and permanently remove 90 horses from the Rafiki Mountain Wild Horse Range (“RMWHR”) without first issuing an EIS is in violation of NEPA. Specifically, Plaintiffs contend that the removal of this number of horses will destabilize the herd population, what they contend to be a “significant impact” that necessitates the issuance of an EIS.

As a preliminary matter, this court has found that the temporary removal of horses does not constitute a significant impact for NEPA purposes. *American Horse Protection Ass’n, Inc. v. Andrus*, 608 F.2d 811 (9th Cir. 1979). Therefore, only 100 of the proposed removal of 190 horses may be deemed eligible to be considered in a quantitative assessment of impact. Several district courts have held that the removal of a particular number of wild horses does not rise to the level of significant impact so as to necessitate the issuance of an EIS. Such was the case in *American Horse Protection Association, Inc. v. Frizzel*, where it was deemed that the roundup of 400 horses in Stone Cabin Valley, Nevada would not have a significant effect on the environment for NEPA purposes. *American Horse Protection Ass’n, Inc. v. Frizzel*, 403 F.Supp. 1206 (D.Nev. 1975). Similarly, the District Court for the Central District of California found that where the National Park Service issued a FONSI for the removal of twelve horses from an island that could not ecologically support the species, the Service had not acted arbitrarily or capriciously. *Foundation for Horses and Other Animals v. Babbit*, 995 F.Supp. 1088 (C.D.Cal. 1998). In *Greater Yellowstone Coalition v. Babbit*, 952 F.Supp. 1446 (D.Mont 1997), the District Court for the District of Montana found that no EIS was necessary where the management plan for Yellowstone National Park called for the capture and removal of excess bison, the repercussions of which were discussed in the Environmental Assessment. The district court in *Cloud Foundation, Inc. v. Kempthorne* held that BLM’s decision to remove 22 horses from the Pryor Mountain Wild Horse Range required no EIS. *Cloud Foundation, Inc. v. Kempthorne*, 2008 WL 2794741 (D.Mont. 2008).

In the case at bar, Plaintiffs’ first assertion is that the simple removal of 100 horses will cause destabilization among the herd, constituting a significant impact to the human environment. As the lower court observed, however, the new population will fall precisely to levels deemed ecologically stable. BLM’s scientific data and documentation provided in its AML and EA clearly indicate that it has taken a hard look at the potential impacts of the removal plan. The EA cites specifically to the Rafiki Mountains Herd Management Plan and the Hawk Lake Resource Area Management Plan, two properly formulated scientific studies on which the AML is based. Thus, BLM’s decision to go forward with the Plan without a full-blown EIS, especially in light of the supporting caselaw, cannot be said to be arbitrary and capricious. Since Plaintiffs failed to show that BLM acted arbitrarily and capriciously in promulgating and undertaking the Gather Plan, it was thus appropriate for the District Court to deny the Plaintiffs’ motion for preliminary injunction on these grounds.

1. **The methods used for roundup do not necessitate an EIS.**

As discussed above, federal agencies are given great deference with regard to scientific findings, and courts do not substitute their own scientific judgment for that of the agency. The leading case on the issue of uncertain science is *State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978), *vacated in nonpertinent part dub nom. Western Oil & Gas Ass’n v. State of Alaska*, 439 U.S. 922 (1978). In that case, the Circuit Court for the District of Columbia upheld the Department of the Interior’s decision to proceed with the sale of an offshore oil and gas exploration lease even though it could not discuss all of the environmental effects because they were unknown. *Id*. Additionally, information in the record that may be favorable to the Plaintiff’s argument “does not necessarily raise a substantial question about the significance of a project’s environmental effects.” *Native Ecosystems Council v. United States Forest Service*, 428 F.3d 1233, 1240 (9th Cir. 2005). NEPA does not call for “the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome.” *Id*.

In *Cloud Foundation v. Inc. v. Kempthorne*, the District Court applied these well-established principles of deference to agency discretion to scientific uncertainty surrounding BLM’s application and side effects from PZP, an experimental sterilization drug. *Cloud Foundation*, 2008 WL 2794741. The court reasoned that although the record showed that the side effects of PZP were unknown, BLM’s decision to issue a FONSI rather than an EIS was not arbitrary and capricious. *Id*. Since BLM incorporated multiple scientific sources in its EA, it had taken a sufficiently hard look at environmental impacts and no EIS was necessary.

Here, BLM has predicted that the use of planned roundup methods will not have a significant impact on the human environment. As the lower court noted, BLM has forecasted that the proposed roundup methods will increase stress and reduce the number of live births among a horse population. Additionally, the record shows that BLM has carefully considered the potential effects of each of the three methods of roundup. Although the use of LRADs and ADS on horses has not undergone explicit scientific study, BLM impliedly relied on the scientific studies of these devices on humans in concluding that the effects of such use would be strictly temporary. Furthremore, BLM considered the effects of its use of rubber bullets, and properly concluded that these effects would be only temporary. Following Ninth Circuit caselaw, temporary environmental effects are not considered significant, and thus do not necessitate an EIS. *American Horse Protection Ass’n, Inc.*, 608 F.2d 811. Here too, such temporary environmental effects should not be considered significant.

Applying the aforementioned caselaw, BLM’s scientific finding that the environmental effects related to the use of LRADs, ADS, and rubber bullets would only be temporary must be given great deference. Thus, it cannot be shown that BLM acted arbitrarily and capriciously since its scientific inquiry discussed in the EA is in fact its “hard look” at potential environmental impacts—the only procedural requirement of NEPA. For this reason, Plaintiffs could not possibly show that BLM acted arbitrarily and capriciously in finding that the methods for the proposed roundup would have no significant impact on the human environment, and the lower court correctly decided against replacing BLM’s scientific conclusions with that of the Plaintiffs’ or that of its own.

**Conclusion**

For the reasons stated above, the lower court was correct in denying Plaintiffs’ motion for preliminary injunction on their NEPA claim due to a failure to show likelihood of success on the merits.

1. **THE DISTRICT COURT CORRECTLY HELD THAT THE BALANCE OF HARDSHIPS DID NOT TIP IN FAVOR OF PLAINTIFFS.**

In denying Plaintiffs’ motion for a preliminary injunction, the District Court correctly applied the preliminary injunction standard set out by the Supreme Court in *Winter v. Natural Resources Defense Council*, which states: “A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences.” *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 376 (2008). Accordingly, the District Court correctly held that, under *The Lands Council v. McNair*, Plaintiffs had not shown a balance of hardships tipping sharply in their favor. *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). Having found that Plaintiffs failed to show a likelihood of success of the merits of both the WFRHBA and NEPA claims, the court correctly found that Plaintiffs were not entailed to a preliminary injunction due to an absence of hardship tipping sharply in Plaintiffs’ favor.

Under *The Lands Council v. McNair,* the reviewing court must weigh the environmental injuries invoked by Plaintiffs’ requested injunction versus the potential injuries resulting from the Plan as identified by BLM scientists. *The Lands Council*, 537 F.3d at 1004. This traditional balance of harms test is required where injunctive relief is sought, even in the context of environmental litigation. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995). A court may not “exercise its equitable powers loosely or casually whenever a claim of ‘environmental damage’ is asserted.” *Aberdeen Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 409 U.S. 1207 (1972). Further, “[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests and absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

In assessing the balance of hardships in the case at hand, Plaintiffs have not shown that an injunction would be at all beneficial to the environment. At best, Plaintiffs point to harm caused by the “outside chance” that the Gather Plan could affect genetic diversity. To the contrary, the harm caused by enjoining the Gather Plan, such as horse overpopulation, starvation, overgrazing, and soil erosion, likely counterbalances any speculative harm Plaintiffs’ assert. Since BLM is charged with managing federal lands and would be significantly adversely affected by this proposed injunction, the balance of hardships actually tips strongly in favor of BLM. Thus, the balance of hardships does not tip strongly in favor of Plaintiffs.

**Conclusion**

Because it is clear that the balance of hardships does not tip strongly in favor of the Plaintiffs, the District Court did not err in denying Plaintiff’s motion for a preliminary injunction. The District Court’s ruling must therefore be affirmed.

**CONCLUSION**

For the foregoing reasons, the District Court’s denial of Plaintiff’s Motion for a Preliminary Injunction should be affirmed.