

Case Number: 09-1968 (SKM)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DEBORAH RUBIN and  
THE HORSE PEOPLE

Plaintiffs/Appellants

v.

KEN SALAZAR,  
ROBERT ABBEY and  
THE BUREAU OF LAND MANAGEMENT

Defendants/Appellees

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ON APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

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BRIEF FOR PLAINTIFFS/APPELLANTS

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## **ISSUES PRESENTED FOR REVIEW**

- I. Whether the district court erred when it denied Plaintiffs motion for a preliminary injunction seeking to prevent the Bureau from moving forward with a wild horse removal plan because the plan violates the Wild Horse Act and exceeds the scope of statutory authority intended by Congress.
- II. Whether the district court erred when it ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the NEPA when the Bureau failed to prepare an EIS even though the gather plan calls for the use of experimental, untested weapons that could adversely impact the viability of the herd, could destabilize the horse population, and could diminish recreational opportunities in the area.
- III. Whether the district court erred when it held that the balance of hardships did not favor Plaintiffs when the public has an interest in preserving the horse population and recreational opportunities in the area and the Bureau failed to show how it would be harmed by a temporary injunction.

## **STATEMENT OF JURISDICTION**

The United States District Court for the Eastern District of California Sacramento Division obtained subject matter jurisdiction in this matter pursuant to 28 U.S.C. § 1331, which was proper given that Plaintiff's claim arises under 16 U.S.C. § 1331 and 42 U.S.C. § 4332.

The United States Court of Appeals for the Ninth Circuit has appellate subject matter jurisdiction over all final decisions issued by the United States District Court for the Eastern District of California Sacramento Division pursuant to 28 U.S.C. § 1291.

According to Rule 4(a)(1)(B) of the Rules of Appellate Procedure, a timely notice of appeal must be filed with the district clerk within 60 days after the judgment or order appealed from is entered when the United States or its officer or agency is a party to a civil action. On October 1, 2006, the United States District Court for the Eastern District of California Sacramento Division denied Plaintiff's motion for a preliminary injunction seeking to prevent the Bureau of Land Management (Bureau) from moving forward with a wild horse removal plan. On October 1, 2006, pursuant to Rule 4(a)(1)(B), Plaintiffs filed a timely notice of appeal with the United States Court of Appeals for the Ninth Circuit appealing all aspects of the District Court's ruling.

## **STATEMENT OF FACTS**

### **A. The Wild Free Roaming Horses and Burros Act**

In December 1971, in response to congressional concern wild horses and burros were fast disappearing from the American scene, Congress enacted the Wild Free-Roaming Horses and Burros Act (Wild Horses Act). 16 U.S.C. § 1331 (2006). The Act declared "wild free-roaming horses and burros . . . living symbols of the historic pioneer spirit of the West that . . . contribute to the diversity of life forms within the Nation and enrich the lives of the American people." Id.



The Act protects all wild horses and burros “from capture, branding, harassment or death,” 16 U.S.C. § 1331 (2006), and makes it a federal crime to remove any wild horse or burro from public land, convert any wild horse or burro to private use, or kill or harass any wild horse or burro. 16 U.S.C. § 1338 (2006).

The Wild Horses Act grants the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros on public lands and directs the Secretary to “manage [them] in a manner . . . designed to achieve and maintain a thriving natural ecological balance.” 16 U.S.C. § 1333(a) (2006). The Bureau, acting as the Secretary’s delegate, carries out this function in localized herd management areas and the agency is required to consider wild horses and burros “integral components of the natural system of public lands . . . .” 16 U.S.C. § 1331 (2006). Several herd management areas currently exist in ten western states, including the Rafiki Mountain Wild Horse Range, located in northeastern California. (EA at 1.)

In each herd management area, the Bureau must determine an appropriate management level for the wild horse and burro populations. 16 U.S.C. § 1333(b)(1) (2006). The Bureau describes the appropriate management level as “the number of wild horses determined through [the agency’s] planning process to be consistent with the objective of achieving and maintaining a thriving natural ecological balance and . . . multiple use relationships.” (EA at 1.) When the Bureau determines that an overpopulation of wild horses and burros exists on public land and action is necessary to remove the excess animals, the agency must “remove [them] from the range . . . to achieve the appropriate management levels.” 16 U.S.C. § 1333(b)(2) (2006). Before removing excess animals from public lands, the Bureau may be required to prepare an environmental impact statement in compliance with the National Environmental Policy Act. 40 C.F.R. § 1501.4(b) (2009).

## **B. The National Environmental Policy Act**

The National Environment Policy Act (NEPA) requires all federal agencies to prepare an environmental impact statement for “all major federal actions affecting the quality of the human environment.” 42 U.S.C. § 4332(c) (2006). The NEPA ensures agencies “apprise themselves of the environmental consequences of their projects and consider a reasonable range of alternatives, including those with fewer adverse environmental impacts than the proposed action.” (Mem. Op. 9.) The NEPA serves two purposes: (1) it provides federal agencies with sufficient information to ensure that environmental consequences are considered and (2) it gives the public the opportunity to participate in the decision making process. (Mem. Op. 9.) Agencies embarking on certain actions may begin with an environmental assessment to determine whether a full environmental impact statement is necessary. (Mem. Op. 9.) If the agency determines that project’s effect will be insignificant, then the agency issues a Finding of No Significant Impact (FONSI). (Mem. Op. 9.)

## **C. The Rafiki Mountain Wild Horse Range**

The Rafiki Mountain Wild Horse Range is home to one of California’s only remaining herds of wild horses. (Mem. Op. 2.) The range was created by order of the Secretary in 1969 in response to public outcry over the Bureau’s plans to remove wild horses from the Rafiki Mountains and sell them for slaughter. (Mem. Op. 2.) The designation set aside 36,000 acres “to protect this unique and irreplaceable herd of wild horses of Spanish lineage and to protect the native wildlife and local watershed.” (Mem. Op. 2.) In 1984, the Bureau set the initial stocking rate for the range between 125 and 137 wild horses. (EA at 1.) In 1992, after admitting that it had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability, the Bureau set the appropriate management level

for the range between 85 and 105 wild horses. (Mem. Op. 2.) Following this reduction, a Field Manager for the Bureau expressed concern for “the genetic viability of the Rafiki herd due to dangerously low numbers of horses on the range.” Recently, the range “suffered from a major drought” which the Bureau contends “significantly compromised the herd’s food supply security.” (Mem. Op. 2.) In response, the Bureau determined 100 of the 190 wild horses on the range were “excess” and devised a gather plan to round up and remove them. (Mem. Op. 2.)

#### **D. The Gather Plan**

The Gather Plan calls for the initial capture and removal of all wild horses currently on the range for an unspecified period of time. (Mem. Op. 2.) The specific methods of capture employed by the Bureau during the gather will include helicopter drive trapping, which “involves chasing horses with a helicopter, facilitated by wranglers on the ground, to scare the horses into running into traps, from which they will be [removed from the range].” (EA at 4.) Following removal, scientists will conduct testing on each wild horse to determine the animal’s genetic profile. (EA at 1.) When testing is complete, the Bureau will return 90 wild horses to the range considered to have optimal genetic profiles. (EA at 1.) The Bureau contends “this method will ensure that the healthiest herd of horses remains on the range.” (Mem. Op. 3.) The gather was scheduled to begin in September 2006, but budgetary problems forced the Bureau to delay the plan until February 2010. (Mem. Op. 1)

#### **PROCEDURAL HISTORY**

In September 2006, Plaintiffs filed suit in the United States District Court for the Eastern District of California Sacramento Division alleging the Bureau’s proposed gather plan violates the Wild Horses Act and the NEPA and is otherwise arbitrary and capricious and therefore violates the Administrative Procedures Act (APA). (Mem. Op. 3.) Plaintiffs moved for a

preliminary injunction to prevent the Bureau from implementing the plan and from removing or transferring any wild horse in connection with the challenged action from the Rafiki Mountain Wild Horse Range. (Mem. Op. 3.) In October 2006, the district court denied the motion for a preliminary injunction and held Plaintiffs: (1) were unlikely to succeed on the merits of their claim under the Wild Horses Act; (2) were unlikely to succeed on the merits of their claim under the NEPA; and (3) the balance of equities and consideration of the overall public interest in the case tipped in favor of the Bureau. Plaintiffs appealed all aspects of the District Court's ruling with the United States Court of Appeals for the Ninth Circuit. (Br. Order 1.)

### **STANDARD OF REVIEW**

Judicial review of an agency action under the Wild Horses Act and the NEPA is governed by the APA, which requires this Court to set aside an agency action that is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A) (2006). Under the APA, “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2006).

While an agency is entitled to some deference under this standard, APA review is “not toothless,” City of W. Chicago v. U.S. Nuclear Regulatory Comm’n, 701 F.2d 632, 648 (7th Cir. 1983) and “requires a thorough, probing, in-depth review.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). The APA standards are violated if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

### **SUMMARY OF THE ARGUMENT**

The district court erred when it denied Plaintiff’s motion for a preliminary injunction seeking to prevent the Bureau from moving forward with a wild horse removal plan. The Bureau’s plan is based on an impermissible construction of the Wild Horses Act and exceeds the statutory authority intended by Congress. The Bureau’s findings that an overpopulation of wild horses exists are arbitrary and capricious because the agency failed to consider all available information when making its determination. The methods proposed to be employed by the Bureau during the gather violate the Wild Horses Act because the methods are inhumane and will cause the animals unnecessary stress, suffering and potentially death. Thus, this Court must prevent the Bureau from proceeding with the proposed plan.

The Bureau should be enjoined from implementing the gather plan because its failure to prepare an environmental impact statement was arbitrary and capricious because the gather plan constitutes major federal action that will significantly degrade the human environment. The removal of 190 horses from the range and the ultimate reduction in herd size by a 100 horses could destabilize the population and affect the genetic diversity of the herd leading to possible extinction. Plaintiffs made a sufficient showing of controversy to require the preparation of an environmental impact statement. The Bureau based its appropriate management level on a six-year-old study; this data is unreasonable and unreliable. Requiring the Bureau to prepare an environmental impact statement would force them to take the requisite “hard look” at data currently available. Further, preparation of an environmental impact statement is required when the action to be taken is highly uncertain or the risks are unknown. The gather plan calls for the

initial capture of 190 horses through the use of highly experimental and untested weapons. The LRADs and the ADS have never been tested on animals and the effects are unknown. Since the Bureau is unsure as to what the effects of these weapons on the horses may be, it cannot conclude that they will be insignificant.

The balance of equities and overall public interest tips sharply in Plaintiff's favor. The gather plan could affect the genetic diversity of the herd and possibly lead to extinction of the herd. It further could render the range unusable for recreation indefinitely. Plaintiffs and the public have a significant interest in being able to enjoy and observe the wild horses in their natural habitat. The Bureau has failed to show how a preliminary injunction prohibiting the removal of the horses would cause the agency any harm. The Bureau previously postponed the gather by several months; thus, further postponement will not cause any additional harm.

## **ARGUMENT**

**I. The district court erred when it denied Plaintiff's motion for a preliminary injunction seeking to prevent the Bureau from moving forward with a wild horse removal plan because the plan violates the Wild Horses Act and exceeds the scope of statutory authority intended by Congress.**

The Bureau's plan to round and remove all wild horses and burros from the Rafiki Mountain Wild Horse Range violates the Wild Horses Act because it is based on an impermissible construction of the statute and exceeds the scope of statutory authority intended by Congress. While Congress recognized "that some control over the number of animals may be necessary in order to maintain an ecological balance in a [particular] area," guidelines were provided to ensure any reduction would "be carefully weighed before being undertaken." S. REP. NO. 92-242, at 2152 (1971). The arbitrary and haphazard approach proposed by the Bureau disregards Congressional intent and would lead to the "indiscriminate slaughter [and] removal of wild horses and burros." Id.

In determining whether the Bureau’s decision to remove the entire herd of wild horses and burros from the Rafiki Mountain Wild Horse Range violates the Wild Horses Act, this Court must apply the two-step analytical framework set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron, this Court must determine whether “Congress has spoken to the precise question at issue.” Id. If the intent of Congress is clear, this Court “as well as the agency, must give [deference] to the unambiguously expressed intent of Congress.” Id. If this Court determines Congress has not spoken to the precise question at issue, this Court must determine “whether the [Bureau’s] interpretation is based on a permissible construction of the statute.” Id.

**A. The Bureau’s plan to remove the entire herd of wild horses from the Rafiki Mountain Wild Horse Range violates the Wild Horses Act because the plan is based on an impermissible construction of the statute and exceeds the scope of statutory authority intended by Congress.**

The Bureau’s decision to remove the entire herd of wild horses and burros from the Rafiki Mountain Wild Horse Range is based on an impermissible construction of the Wild Horses Act. Although the Bureau is given a high degree of discretionary authority for the purposes of protection and management of these animals on public lands, Am. Horse Prot. Ass’n, Inc. v. Frizzell, 403 F. Supp. 1206, 1217 (D. Nev. 1975), the agency’s authority is “expressly made subject to the provisions of the [statute].” Colorado Wild Horse and Burro Coal., Inc. v. Salazar, 639 F. Supp. 2d 87, 96 (D.D.C. 2006). The district court erred when it denied Plaintiff’s motion for a preliminary injunction because the Bureau’s interpretation exceeds the scope of statutory authority intended by Congress.

First, the Wild Horses Act permits the Bureau to remove only the number of wild horses necessary to “restore a thriving natural ecological balance to the range and to protect the range from the deterioration associated with overpopulation.” 16 U.S.C. § 1333(a) (2006). Although

the Bureau set the appropriate management level for the range at 90 wild horses, the gather plan calls for the capture and removal of all wild horses on the range. (EA at 1.) The Bureau contends the authority for the decision is “contained in 16 U.S.C. § 1332(b)(2).” (FONSI at 2.) In Colorado, however, the district court held “that Congress clearly intended to protect non-excess wild . . . horses and burros from removal and . . . the Bureau’s authority is limited to those wild horses and burros that it determines to be excess animals within the meaning of the [statute].” 639 F. Supp. 2d at 96. According to the court, it would be inconsistent with the statute to infer that by appointing the Bureau custodian of wild horses and burros “Congress intended to permit the [agency] to subvert the primary policy of the statute by capturing and removing from the wild the very animals Congress sought to protect from being captured and removed from the wild.” Id.

Moreover, the Wild Horses Act requires all management activities be maintained “at the minimal feasible level . . . in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.” 16 U.S.C. § 1333(a) (2006). The Bureau’s plan to remove all wild horses and burros from the range and transport them to the Richfield Corrals Facility for an undetermined period of time constitutes “[a]n intensive management program . . . [that] would destroy the very concept that this legislation seeks to preserve.” S. REP. No. 92-242, at 2152 (1971). Nevertheless, the Bureau contends the agency “is not removing [all wild horses and burros] as the [Wild Horses Act] uses that term . . . [because] 90 horses will be returned to the range” following testing. As the district court expressed in Colorado, however, “it is difficult to think of a management activity that is farther from a minimal feasible level than removal.” 639 F. Supp. 2d at 96.



Further, the Wild Horses Act directs the Bureau “to protect and manage wild free roaming horses and burros as components of the public lands . . .” 16 U.S.C. § 1333(a) (2006). The Bureau contends the proposed method of removal “will ensure that the healthiest possible herd of wild horses remains on the range.” (Mem. Op. 11.) Regardless, Congress did not authorize nor did they intend for the Bureau “to manage the wild horses and burros by corralling them for public maintenance or long-term care as non-wild free roaming animals off of the public lands.” Colorado, 639 F. Supp. 2d at 96. Rather, Congress believed wild horses and burros “should be protected and preserved in their natural habitat without undue interference and unnecessary confinement.” H.R. REP. NO. 92-681, pt. 1, at 2159 (1971). Upon removal from the range, whether for adoption and/or long term care, the Rafiki Herd would “forever cease to be wild free-roaming horses as components of the public lands contrary to Congress’ intent to protect the horses from capture.” Colorado, 639 F. Supp. 2d at 96.

**B. The Bureau’s finding that an overpopulation of wild horses exists is arbitrary and capricious because the agency failed to consider all available information when making its determination.**

Prior to removal under the Wild Horses Act, the Bureau “must first determine that overpopulation exists and the wild . . . horses and burros slated for removal are excess animals.” Colorado, 639 F. Supp. 2d at 98. The statute defines “excess animals” as wild horses or burros that “have been removed from an area by the [Bureau] pursuant to applicable law or [that] must be removed from an area . . . to preserve and maintain a thriving natural ecological balance and multiple use relationship in that area.” 16 U.S.C. § 1332(f) (2006). Prior to making its determination, the Bureau is encouraged to consider “the inventory of federal public land, land use plans, information from environmental impact statements, and the inventory of wild horses.” Am. Horse Prot. Ass’n, Inc. v. Watt, 694 F.2d 1310, 1318 (D.C. Cir. 1982). Although the

Bureau's "findings of wild horse overpopulations should not be overturned quickly on the grounds they are predicated on insufficient information," the Bureau must use all available information when it determines an overpopulation of wild horses exists. Id. at 1319.

First, the Bureau's finding that an overpopulation of wild horses exists is arbitrary and capricious because the agency failed to consider all available information prior to reaching its decision. According to the Bureau, allowing wild horses to remain on the range at their current levels "would lead to a steady increase in wild horse numbers and the carrying capacity of the range would continue to be exceeded." (EA at 7.) To illustrate, the Bureau modeled the no action alternative for ten years to determine the projected population of the herd. (EA at 8.) The agency predicts if the population continues to grow without removal the median population size will total 314 wild horses. (EA at 8.) Nevertheless, the Bureau's prediction is based on the assumption that the herd will experience an annual growth rate of 7.2 percent and fails to consider whether overgrazing and drought have increased horse mortality or decreased reproduction among the herd.

Moreover, the Wild Horses Act requires the Bureau to consider the multiple use relationships in a particular area, which Congress considers "vitally important to full utilization of the rangeland." S. REP. NO. 95-1237, at 4081 (1978). Multiple use relationships include "the public livestock industry, watershed and water quality, and wildlife populations." Id. Although the Bureau acknowledges other species of wildlife currently inhabit the range, the agency has failed to consider their adverse impact and range utilization. Rather, the Bureau simply contends removing the excess wild horses from the range is "necessary to restore and maintain a thriving natural ecological balance, prevent [further] deterioration of range, and maintain multiple use relationships." (EA at 2.) Thus, the Bureau ignores the impact of other wildlife species,

including the estimated 160 bighorn sheep, mule deer, and elk that “commonly feed on the sagebrush type grass” at the lower elevations of the range. Frank Olsen and Richard Hansen, Food Relations of Wild Free-Roaming Horses to Livestock and Big Game, Red Desert, Wyoming, 30 Journal of Range Management 17, 19 (1977).

Further, the Bureau contends low elevation areas of the range are “experiencing a downward trend in ecological condition due to the excess of wild horses coupled with the effects of drought.” (EA at 8.) According to the Bureau, removing excessive wild horses “would achieve a thriving natural ecological balance immediately.” (EA at 8.) The Bureau has failed to consider the possibility that human encroachment, and not overpopulation, is responsible for a downward trend in ecological condition at low elevation areas of the range. According to the environment assessment, recreation related visitation to the range has increased significantly in recent years and visitor’s logs located at the top of the East Rafiki Mountain indicate an increase in visitor use, especially over the past five years. (EA at 11). Thus, it can be reasonably inferred that the downward trend in ecological condition at the low elevation areas are caused by human encroachment rather than overpopulation.

**C. The methods proposed to be employed by the Bureau during the gather violate the Wild Horses Act because the methods are inhumane and will cause the animals unnecessary stress, suffering and potentially death.**

The Bureau is mandated by the Code of Federal Regulations to ensure the humane care and treatment of wild horses and burros. 43 C.F.R. § 4700.02 (2009). The Code defines humane treatment as any “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. § 4700.05(e) (2009). Although the Bureau is given a high degree of discretionary authority, the agency “must proceed with [its] decisions under humane conditions and care and

in the most humane manner possible.” Frizzell, 403 F. Supp. at 1217. When the Bureau chooses an inhumane manner of capturing and distributing wild horses and burros, this Court may review the agency’s decision and set it aside if it’s “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A) (2006).

First, the Bureau’s decision to use helicopters is arbitrary and capricious because the agency ignores the basic and often sordid events resulting from the use of aircraft and other mechanized vehicles when used to chase and capture wild horses and burros. Although the agency acknowledges the proposed action could cause death in 6 to 10 wild horses, the environmental assessment fails to consider the inhumane circumstances and unnecessary suffering likely to result. (EA at 7). In American Horse Protection Ass’n v. United States Department of Interior, 551 F.2d 432 (D.C. Cir. 1977), ranchers attempted on several occasions to roundup wild horses and burros with the aid of a helicopter, which caused “approximately 21 wild horses to become trapped in a high rimrock area . . .” *Id.* As a result, four horses fell over a 40 foot cliff to their death and three other horses caught their hooves in the rocks. *Id.* When efforts to free them proved unavailing, the ranchers cut the horses throats and pushed their bodies over the cliff. *Id.* The following week, ranchers attempted another roundup with the aid of a snowmobile and although “another 20 horses were captured . . . three broke their legs while attempting to avoid capture and were [subsequently] shot.” *Id.* The surviving horses were shipped to Nebraska to be slaughtered for dog food, but “some died en route. . .” *Id.*

Moreover, the Bureau acknowledges that studies analyzing the effect of long range acoustic devices on horses or other wild animals do not exist, but the agency justifies its use because “the effects of these devices are believed to be temporary in humans.” (EA at 7.) Nevertheless, the Bureau ignores the biological and physiological effects associated with the use

of such devices. For example, the Bureau ignores “high intensity noise is dangerous to the auditory and respiratory systems and provokes negative psychological effects, such as fear and panic.” Roman Vinokur, Acoustic Noise as a Non-Lethal Weapon, Sound and Vibration, Oct. 2004, at 20. The Bureau also ignores the enormous effect high intensity noise can have on internal human organs such as the heart, lungs and stomach. Id. It is unlikely the potential for such injuries are compatible with animal husbandry practices accepted in any veterinary community. Thus, the Bureau’s decision to use long range acoustic devices is arbitrary and capricious.

Further, the Bureau ignores the severity of and the district court dismissed the suffering wild horses will experience during capture, processing and transportation. Although the Bureau acknowledges “the horses will suffer some degree of stress, ranging from nervous agitation to physical stress,” the agency contends the use of helicopter drive trapping is common and “causes no more stress than necessary to corral horses.” (EA at 7.) In Brower v. Daley, 93 F. Supp. 2d 1071, 1077 (N.D. Cal.), the court recognized the potential effects of long-term stress in terrestrial mammals associated chase and capture, which include “stress induced pathologies, impairment of the immune system, and impaired reproduction, growth and metabolism.” The resulting syndrome, commonly referred to as capture myopathy, can be manifested within hours or days and can cause more severe symptoms such as “massive muscle damage and death.” Earth Island Inst. v. Evans, No. C 03-0007 TEH, 2004 WL 1774221, at \*16 (N.D. Cal. Aug. 9, 2004)(unpub.). Further, necropsies conducted on terrestrial mammals suffering from capture myopathy following chase and capture have revealed “lesions in the heart, lungs and kidney that most likely result from an overwhelming alarm reaction and presumably led to death by cardiac arrest.” Id. at 19.

**II. The Bureau should be enjoined from implementing the gather plan because it violated the law in drafting the EA and FONSI.**

The Bureau's failure to prepare an environmental impact statement was arbitrary and capricious because the gather plan constitutes a major federal action that will cause significant degradation to the environment. Congress enacted NEPA to ensure federal agencies "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321 (2006). NEPA requires federal agencies to prepare an environmental impact statement for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2006). The Counsel on Environmental Quality (CEQ) regulations define "significantly" as based on "considerations of both context and intensity." 40 C.F.R. § 1508.27 (2009). In terms of context, the action must be analyzed with respect to factors such as society as a whole, the affected region, and affected interests. 40 C.F.R. § 1508.27(a) (2009). "Intensity" refers to the "severity of impact" of the action including factors such as the "highly controversial nature" of the action and the degree to which the effects of the proposed action are "highly uncertain or involve unknown risks." 40 C.F.R. § 1508.27(b) (2009).

The threshold determination requiring an environmental impact statement for all major federal action significantly affecting the quality of the human environment does not require the court to determine "whether the proposed action will have a significant effect; rather the courts are to determine whether the responsible agency has reasonably concluded that the project would have no significant adverse environmental consequences." City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975). An agency's decision that the project will have no significant environmental consequences will be considered unreasonable if the agency fails to supply convincing reasons why the potential effects are insignificant. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing Save the Yaak Comm. v.

Block, 840 F.2d 714, 717 (9th Cir. 1988)). The plaintiff need not show that significant effects will occur; it is enough that plaintiff raises substantial questions as to whether the proposed action may have a significant effect on the environment. Blackwood, 161 F.3d at 1212 (citing Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998)).

**A. The plan to remove 190 wild horses from the range and ultimately reduce the herd size by 100 wild horses requires the preparation of an environmental impact statement because it will significantly impact the ongoing viability and survival of the herd.**

The removal of 190 horses from the range and the ultimate reduction in herd size by 100 horses has significant environmental consequences because the removal of such a large number of horses will destabilize the population. The wild free-roaming horses “contribute to the diversity of life forms within the nation and enrich the lives of the American people,” and are considered “an integral part of the natural system of public lands.” 16 U.S.C. § 1331 (2006). The Bureau is uncertain as to whether it will be able to preserve the genetic diversity of the herd and has failed to supply convincing reasons why the destabilization of the heard is not a significant impact.

In Frizzel, the Bureau proposed a plan to round up and remove approximately 400 wild horses from Stone Cabin Valley to stabilize the range temporarily. 403 F. Supp. 1206, 1208 (D. Nev. 1975). The district court held that since the horse roundup would not have a significant effect on the environment, an environmental impact statement was not required. Id. at 1219. However, the round-up was an interim measure pending a complete study and development of a long term solution to alleviate the overgrazing problem. Id. In American Horse Protection Ass’n, Inc. v. Andrus, 608 F.2d 811 (9th Cir. 1979) the Court of Appeals for the Ninth Circuit held that while an interim action may not be significant as to require the preparation of an environmental impact statement, “it would not follow that the ultimate decision to remove horses

in order to maintain the horse population at a permanent level would be equally insignificant.” 608 F.2d at 814-15. The Court of Appeals remanded the case for the district court to determine whether the proposed roundup and removal constituted action significantly affecting the environment. Id. at 813.

The gather plan raises a substantial question as to the significant impact on the environment. In this case the gather plan is not a temporary solution pending a more thorough investigation of the impacts, but is a permanent plan to remove 190 horses, reduce the herd size by 100 horses, and maintain the population through future gathers and fertility control. (EA at 13.) Further, since the Bureau is relying on six-year-old data to determine the appropriate management level they cannot predict the impact the gather may have on the current population of horses. (Mem. Op. 10.)

Under the CEQ’s definition, to determine whether a proposed action will have significant effects on the environment, the Bureau must evaluate the degree to which the effects on the environment are likely to be highly controversial. Blackwood, 161 F.3d at 1212. The gather plan is highly controversial because of the effects it will have not only on the horse population but also on recreation in the range. The removal and ultimate reduction of such a large number of horses can cause social displacement and conflict between the studs. (EA at 7.) The potential effects of these impacts are a decrease in herd growth and the number of live births in the population. (EA at 7.) This could destabilize the population ultimately leading to the destruction of the entire herd. (Mem. Op. at 10.) The Wild Horses Act was designed to “protect the interests of those who enjoy observing wild horses and burros in their natural habitat and who are interested in preserving elements of our national heritage that have historical and cultural value.” 16 U.S.C. § 1331 (2006). See also Frizzell, 403 F. Supp. at 1214-15. Opportunities to view and



photograph the horses on the range will be diminished by the reduction of the herd size and revenue from tourism in the area will be adversely impacted. (EA at 12.) The Bureau's decision not to prepare an environmental impact statement is a violation of the procedural requirements under the NEPA because the removal of 190 horses and ultimate reduction in the size of the herd by 100 horses may cause significant degradation to the environment.

**B. The methods used for the roundup will significantly impact the environment because of the scientific uncertainty involved with the use of LRADS and the ADS thus requiring preparation of an environmental impact statement.**

The use of LRADS and the ADS are experimental and their effects are highly uncertain. A proposed action may have significant environmental impacts where it involves uncertainty or unknown risks to the environment. 40 C.F.R. § 1508.27 (2009). "An agency generally must prepare an environmental impact statement for proposed actions with highly uncertain environmental effects." Cloud Found., Inc. v. Kempthorne, No. CV-06-BLG-RFC, 2008 WL 2794741, at \*8 (D. Mont. July 16, 2008) (citing Native Ecosystems Council v. USFS, 428 F.3d 1233, 1240 (9th Cir. 2005)).

In National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) the National Park Service proposed a plan that would increase the number of times cruise ships could enter Glacier Bay each summer. 241 F.3d at 725. The National Parks Service prepared an environmental assessment acknowledging the plan would expose the wildlife to increased vessel encounters, noise pollution and air pollution. Id. The court held that the National Parks Service made a clear error in judgment by finding no significant impact and failing to prepare an environmental impact statement where the likely environmental impact was uncertain and the environmental assessment described the impacts as unknown. Id. at 739.

In Sierra Club v. U.S. Forest Service, 843 F.2d 1190 (9th Cir. 1988), the Forest Service prepared an environmental assessment and determined an environmental impact statement was not necessary because logging would not significantly affect the environment. 843 F.2d at 1191. The court held that the Forest Service's decision not to prepare an environmental impact statement was unreasonable because its decision was not well considered. Id. at 1195. There were substantial questions raised regarding the unknown and uncertain risks associated with modified clear cutting an experimental, untested, and unproven plan. Id. at 1194.

In this case, the environmental assessment prepared by the Bureau indicates the impact on the horses from use of LRADs and the ADS are uncertain, thus requiring an environmental impact statement under the NEPA. The Bureau determined that impacts to individual animals could occur as a result of stress associated with the use of experimental devices such as the LRADs and the ADS, which have mostly been used for urban counterinsurgency and riot control. (EA at 7.) Further, the use of rubber bullets could cause injury to the horses. (EA at 7.) The proposed action could cause the mortality of 6 to 10 horses. (EA at 7.) The stress caused by these experimental weapons could cause unknown psychological problems leading to disruptions in reproductive capabilities, decrease in herd growth, and destabilization of the herd. (EA at 7.) The Bureau is not aware of any facilities that use LRADs on animals, nor is it familiar with any scientific studies on the effects. (EA at 7.) The purpose of the environmental impact statement is to ensure that all data is collected and analyzed to resolve uncertainties and prevent speculation. Forest Service, 843 F.2d at 1195. The methods planned for the round-up will separate family groups and interrupt the reproductive capacity affecting number of successful conceptions and live births, which will significantly impact the herd. (Mem. Op. 11.) The Bureau determined that these devices would have no significant impact on the environment;

however, it stated that the effects of the use of these methods are unknown. (FONSI at 4.) The Bureau fails to supply convincing reasons as to why these potential effects will be insignificant.

In Kemphorne the court determined the high uncertainty associated with the use of PZP fertility control did not render the Bureau's determination not to prepare an environmental impact statement arbitrary and capricious. 2008 WL 2794741, at \*9. The environmental assessment prepared by the Bureau cited eight different sources in support of fertility control use and listed several studies regarding the potential side effects of the drug. Id. Further, the Bureau administered PZP to the wild horse range for years prior to the proposed action. Id. In this case, the Bureau did not include any studies on the side effects. (EA at 7.) There have been no studies analyzing the effect of either LRADs or the ADS on horses or other wild animals. (EA at 7.) The Bureau's determination of the potential effects is too speculative not to require further study and preparation of an environmental impact statement.

**III. The Bureau should be enjoined from implementing the gather plan because Plaintiffs have raised serious questions on the merits and the balance of hardships tips sharply in their favor.**

The balance of equities and overall consideration of the public interest tips strongly in favor of Plaintiffs. To determine whether injunctive relief is appropriate the court applies the traditional balance of harms analysis. Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). When the proposed action may significantly degrade the environment injunctive relief is appropriate. Id.

In Babbitt, the court undertook the traditional balancing of harms to determine that the plan to increase the number of times cruise ships were allowed into the bay could not be

implemented until an environmental impact statement was prepared because there was a sufficient possibility of environmental harm. 241 F.3d at 738. “Where an environmental impact statement is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.” Id. at 737. In this case, due to uncertainty of the effects of the gather plan on the herd there is a sufficient possibility of environmental harm and an environmental impact statement should have been prepared. The Respondents allege the most serious injury would be harm to a relatively small number of the horses; however, the genetic diversity of the herd could be effected by the gather leading to destabilization of the herd or possible extinction. (R. at 11.) Further, the gather may render the range unusable for recreation. (EA at 12.)

In determining whether to issue an injunction the court must also consider the public interest. Amoco, 480 U.S. at 542. The public has an interest in preserving the wild horse population and the gather plan will significantly affect recreation in the range. The Wild Horses Act was designed to protect the interest of those who enjoy observing wild horses in their natural habitat. Frizzell, 403 F. Supp. at 1214-15. Recreation has increased in the Rafiki Mountains over the last several years and continues to do so based on the ability to view wild horses. (EA at 11.) Opportunities to view and photograph the wild horses would be diminished. (EA at 12.) Recreationists might be unable to utilize the area for an indefinite period of time and the gather will interfere with the rifle-hunting season creating conflict for sportsmen. (EA at 12.)

While the public also has an interest in the multiple use mandate of the Bureau, no overall priority is assigned to any specific use. 43 C.F.R. § 1725.3(1) (2009). See also Frizzell, 403 F. Supp. at 1221. In preserving the native grasslands and natural environment, the Bureau should proceed “only after taking into account all of the various elements of the ecosystem

involved.” Frizzell, 403 F. Supp. at 1221. The Bureau failed to consider alternatives available to them to alleviate the overgrazing problem. The public has a greater interest in having government officials act in accordance with the law. Seattle Audubon Soc’y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991).

A preliminary injunction prohibiting the horse removal would not cause the Respondents any hardship. The Respondents allege that if left on the range some of the horses could starve to death due to food shortage. (Mem. Op. 11.) However, the reduction in herd size by 100 horses will result in the most significant decrease in the number of wild horses from the range since before the passage of the Wild Horses Act. (Mem. Op. 3.) Further, the Bureau relied on a six-year-old study conducted during the worst two years of the drought to determine the AML. (Mem. Op. 6.) There is evidence that the range could support a greater number of horses than those accounted for by the Bureau. The Bureau postponed the gather from September 2009 to mid-February 2010. (Mem. Op. 3.) The deterioration of the range condition is not recent, but has occurred over a significant period of time. 402 F. Supp. at 1210. The range is not going to dramatically change while this case is pending further litigation. The Respondents failed to show that further postponement of the gather plan until final adjudication would cause them any harm.

## CONCLUSION

The district court erred when it denied Plaintiff’s motion for a preliminary injunction seeking to prevent the Bureau from moving forward with a wild horse removal plan because the plan violates the Wild Horses Act and exceeds the scope of statutory authority intended by Congress. Allowing the Bureau to proceed with the gather in an arbitrary and haphazard manner

would lead to the indiscriminate slaughter and removal of wild horses and burros from the Rafiki Mountain Wild Horse Range.

Plaintiffs have alleged facts that show the gather plan will significantly degrade the environment and should be entitled to injunctive relief. The removal of 190 horses and ultimate reduction in herd size by 100 horses could impact herd growth, the number of live births, and could destabilize the population leading to the destruction of the entire herd. The Bureau's failure to comply with NEPA procedures and file an environmental impact statement is a clear violation of the law. The purpose behind the procedural requirement of an environmental impact statement for a major federal action constituting a significant impact to the environment is to resolve uncertainties and prevent speculation. The Bureau is uncertain of the effects the LRADs and the ADS will have on the herd and, therefore, should be enjoined from implementing the gather plan pending further investigation of the effects from the use of these devices.

Plaintiffs have raised serious questions regarding the merits of this case and the balance of harms tips sharply in their favor. There is a sufficient probability of environmental harm in that the genetic diversity of the herd may be adversely affected. The public has an interest in preserving important historic, cultural, and natural aspects of its national heritage. Due to the methods proposed for the gather plan and high degree of uncertainty as to their effects, recreation in the area could be severely diminished and the range could be unusable for an indefinite period of time. The Bureau's plan is far too speculative to let it continue without further investigation.