Civil Action No. 09-1968 (SKM)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEBOROH RUBIN, an individual, and
THE HORSE PEOPLE, a California not-for-profit corporation,
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 the Bureau of Land Management,
Appellees

Appeal from the United States District Court Eastern District of California Sacramento Division

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BRIEF FOR APPELLEE

Team No. 9
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STATEMENT OF JURISDICTION

The District Court of the Eastern District of California, Sacramento Division, had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2006), as this civil action arose under the Wild Free-Roaming Horses and Burros Act ("WFRHBA") and the National Environment Policy Act ("NEPA"), both of which are laws of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a) (2006), as an appeal from the interlocutory decision of the district court of the Eastern District of California, Sacramento Division, denying a request for an injunction.

STATEMENT OF THE ISSUES

I. Should this court affirm the district court's finding that the appellants failed to demonstrate a likelihood of success on the merits of their claim under the National Environment Policy Act, because appellants failed to show that removal of horses from the Rafiki Mountain Range is not likely to destabilize the population and there is no uncertainty in the data relied upon**?**

II. Should this court affirm the district court's finding that the balance of hardships did not favor the appellants, because appellants' claim did not include a specific harm?

III. Should this court affirm the district court's finding that the appellants failed to demonstrate a likelihood of success on the merits of their claim under the Wild Free-Roaming Horses and Burros Act, because the BLM's determination of the adequacy of the proposed plan was substantially based on fact, and alternate methods would have placed undue burden on the agency, and the removal of all the horses from the RMWHR is not permanent?

STATEMENT OF THE CASE

The original case arose when the Bureau of Land Management ("BLM") implemented a plan ("the Gather Plan") in August 2009, to trap and remove free-roaming wild horses from the Rafiki Mountain Wild Horse Range ("RMWHR").

The RMWHR, comprising an area of 36,000 acres, is home to one of California's only remaining herds of wild and free-roaming horses. The RMWHR was established in 1969 by the Secretary of the Interior, in response to public outcry over BLM's intent to remove wild and free-roaming horses from the Rafiki Mountains and sell the seized animals to slaughterhouses. The RMWHR was intended to preserve the dwindling numbers of wild and free-roaming horses, at an appropriate management level ("AML"). In 1992, the BLM determined that the AML for the RMWHR was between 85 and 105 horses, with 190 wild horses currently residing on the RMWHR.

Recently, the RMWHR suffered from sever drought, which compromised the herd's food supply. In response, in August 2009, the BLM implemented the Gather Plan to remove 100 of the 190 horses from the RMWHR, to bring the number of horses within the AML established in 1992. The Gather Plan requires the capture of all 190 horses currently residing on the RMWHR. After required testing, including genetic testing, is complete on all the horses, 90 of the 190 horses would be returned to the RMWHR. The 90 horses chosen would be the most genetically viable of the herd. However, the BLM is unable to establish a fixed time frame for the return of the 90 horses to the RMWHR. Moreover, the removal of 100 horses will be the most drastic

decrease in the size of the herd since the initial implementation of the Wild Free-Roaming Horses and Burros Act ("WFHBA").

As part of the Gather Plan, the BLM drafted and circulated a draft Environmental Assessment, finding that the Gather Plan would not result in significant impact to the environment. After 30 days, the BLM issued its Decision Record (DR), final Environmental Assessment (EA), and Finding of No Significant Impact ("FONSI"). The public was given 30 days to submit their comments regarding the Gather Plan, and Appellants submitted their comments within the stipulated time.

In September, 2009, appellants filed suit in the United States District Court Eastern District of California Sacramento Division, naming Ken Salazar, in his capacity as Secretary of the Department of the Interior, and Robert Abbey, in his capacity of the Director of the BLM, as defendants. Appellants alleged that the Gather Plan was in violation of the Administrative Procedure Act, as being capricious and arbitrary. Appellants concurrently moved for a preliminary injunction to prevent the BLM from disposing of any horses at the RMWHR or horses removed from the RMWHR.

The district court found in favor of the appellees, and entered judgment that appellants were unlikely to succeed on the merits of their claims under the WFRHBA or National Environment Policy Act ("NEPA"), and that the balance of hardships did not favor appellants. Consequently, the district denied appellants request for a Preliminary Injunction.

In response to the district court's judgment in favor of appellees, the appellants this suit in the U.S. Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS

Appellants are Deborah Rubin and The Horse People. (Memo. Op. at 1.) The Horse People is a California-based not-for-profit organization dedicated to protecting wild animals that live on open ranges, and the prevention of extinction of wild horse herds. (Id.) Deborah Rubin is President of The Horse People. (Id.) Appellees are Ken Salazar, Secretary of the Department of the Interior, and Robert Abbey, Director of the Bureau of Land Management. (Id.)

In 1969, the Secretary of the Interior established the Rafiki Mountain Wild Horse Range ("RMWHR") to house California's only remaining herd of wild horse. (Memo. Op. at 2.) The RMWHR comprises 36,000 acres of land. (Id.) The RMHWR was intended to "protect this irreplaceable herd of wild horses of Spanish lineage and to protect native wildlife and the local watershed." (Id.)

In 1992, the BLM established an ALM for the RMWHR. (Id.) The ALM is the number of wild horses, determined by the BLM, to be consistent with promoting and maintaining a thriving natural and ecological balance (TNEB). (Envtl. Assessment at Sect. 1.1.) The ALM for the RMWHR was determined to be between 85 and 105 horses. (Memo. Op. at 2.) The BLM admits that the AML was determined arbitrarily as the BLM did not have knowledge regarding the wild horse genetics or the need to maintain minimum numbers of breeding individuals to ensure herd viability. (Id.) Currently, the RMWHR is home to 190 horses. (Id.) Twenty-nine of these 190 horses reside outside the RMWHR. (Envtl. Assessment at Sect. 1.3.)

Between 1993 and 2005, only four years had precipitation levels above average in the Rafiki Mountains. (Envtl. Assessment at Sect. 1.3.) As a result of below average precipitation from 1993 to 2007, the Rafiki mountains experienced drought like conditions. (Memo. Op. at 2.)

Although in 2008 precipitation levels were above the 30-year average, and the projected precipitation levels for 2009 are also above average, the below average precipitation between 1993 and 2007, resulting in drought-like conditions, significantly compromised the food supply for the horses at RMWHR. (Id.) To prevent reduction in food supplies, the BLM implemented the Gather Plan to remove 100 of the 190 horses from the RMWHR. (Id.) The horses that are removed will comprise horses both from within the RMWHR and outside the range. (Envtl. Assessment at Sect. 1.3)

The Gather Plan requires the capture of all 190 horses from the RMWHR. (Id.) The method of capture includes Long Range Acoustic Devices ("LRADs"), the Active Denial System (ADS), rubber bullets, and helicopter drive trapping. (Memo. Op. at 3.) LRADs "transmit [noise] in a highly directional beam, even with significant ambient noise" thereby "reduc[ing] the risk of exposing nearby personnel or peripheral bystanders to harmful noise levels." (Envtl. Assessment at Sect. 2.1.) The LRADS would be solely used to emit a loud noise. (Id.) The high decibel level of the LRADs would be emitted from the helicopter and induce the horses to flee the piercing noise and run into traps. (Id.) The ADS is 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." (Id.) Rubber bullets are rubber projectiles to be aimed at the horses by sharpshooters situated in helicopters. (Id.) Helicopter drive trapping involves chasing wild horses with a helicopter, facilitated by wranglers on the ground, to scare the horses into a trap. (Id.) Although, the horses may be subject to trauma during the gather up process, the harm to the horses will not be greater than the harm experienced via natural processes. (Id. at Sect. 3.1.) The minor welts and bruises suffered as a result of the use of LRADs and ADS are insignificant

and non-lethal. (Id.) Mortality experienced by the horses as a result of the rounding up process will only result in the mortality of 6 to 10 horses. (Id.) Under the "No Action Alternative" the area for horse forage would keep increasing, and the forage would be consumed earlier in the year. (Id. at Sect. 2.2.) Although the horses may suffer some traumatic injuries, the no action alternative will result in even more stress, and possible death of many more horses as a result of increased competition for limited water and forage as the size of the herd increases. (Id. at Sect. 3.1.)

BLM's proposed actions would also improve rangeland health, vegetation and soil quality by decreasing the extent of utilization of water resources and forage on the RMWHR. (Id. at Sect. 3.2.) The Gather Plan would not significantly impact other wildlife, vegetation, migratory bird species, and recreation. (Id. at 3.3-3.9.)

The BLM, The Horse People, and the Rafiki Mountains Wild Mustang Center proposed alternate methods of controlling the horse population on the RMWHR. (Envtl. Assessment at Sect. 2.3.) The alternate methods included (i) the use of fertility control of wild mares, (ii) bait, trap, gather, and selective removal of wild horses, which would not result in a dramatic and immediate decrease in numbers, (iii) using a gate cut gather, which is a maintenance tool commonly used in the management of wild horses, (iv) natural management, including maintenance of horse numbers through prey tactics, (v) application of limited fertility treatment and removal of only 20 horses, and (vi) administering a contraceptive to select mares. (Id.) The above alternate methods were not analyzed further by the BLM, because none of the proposed alternatives would result in immediate reduction in the number of horses on the RMWHR, which is required to maintain the TNEB. (Id.)

BLM has taken measures to incorporate comments from the public and interested parties regarding the Gather Plan. (Id. at Sect. 6.0-6.1.) A hearing was held on July 15, 2009, to discuss the experimental devices and motorized equipment that BLM intended to utilize in the Gather Plan. (Id. at Sect. 6.0.) Interested parties were afforded the opportunity to voice their opinion on the discussed devices and equipments. (Id.) On July 17, 2009, the notification was sent to interested parties regarding the BLM Gather Plan, and the 30-day window for receipt of comments. (Id.) Forty-six letters and two detailed recommendations for population control were received in response to the July 17, 2009, letter. (Id.) The BLM responded to all public comments in due course. (Id. at Sect. 6.1.) In response to the EA, the BLM issued a FONSI. (DR.)

SUMMARY OF THE ARGUMENT

This court should affirm the District Court's finding that the removal of horses from the Rafiki Mountains is not likely to destabilize the population because previously implemented round-up plans have not resulted in destabilization. Moreover, the methods used for rounding up the horses under the Gather Plan is not scientifically uncertain, especially since it has been previously established that the experimental data relied upon by an agency cannot be interpreted by a reviewing court. Additionally, the balance of hardships does not favor appellants because of their failure to include specific claims.

Turning to NEPA, this court should affirm the District Court's finding that the BLM determination that a hundred of the Rafiki Mountain horses is in excess of the AML, is not arbitrary or capricious because the agency action had a substantial basis in fact, and further examination of additional options would have placed an undue burden on the agency. Moreover,

BLM's methods for rounding up the horses will not result in unnecessary suffering of the captured horses, and the temporary removal of all 190 horses does not constitute a permanent taking.

ARGUMENT

I. STANDARD OF REVIEW

A. Review of Agency Action

The WFHBA and NEPA do not contain a private right of action or citizen's suit provision, and therefore appellants' claim arises under the APA. In reviewing APA-related cases, the court must determine whether the final agency action was "in accordance with the law", or whether the final agency action was "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right." 5 U.S.C. § 706(2)(A), (C) (2006); see id. at § 704; See also Village of False Pass v. Clark, 733 F.2d 605, 609-10 (9th Cir.1984).

The agencies actions are examined under the two-step process outlined in Chevron. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The first step requires a determination of whether the Congress has "directly spoken to the precise question at issue." Id. at 843. If after analysis under the first step, Congress's actions are ambiguous, then the court must apply the second step of the analysis. Id. Under the second step, the court must defer to the agencies actions, provided such actions are "based on a permissible construction of the statute." Id.

B. Review of District Court's Denial of Preliminary Injunction

Denial of a preliminary injunction by a district court is reviewed for abuse of discretion by a higher court. Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006).

In reviewing the district court's denial of preliminary injunction against appellees, this court must consider whether the appellants are successfully able to show that (i) there is substantial likelihood that appellants will succeed on the merits of the claim, (ii) the appellants will suffer irreparable injury absent an injunction, (iii) any injunction will not substantially harm any other parties that are involved in the suit, and (iv) public interest will be furthered, or at the very least, will not be harmed. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291 (D.C. Cir. 2009); Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (C.A.D.C. 2006). Moreover, appellants are not required to satisfy each of the four tests. Davis, 571 F.3d at 1291-92). Rather, a "sliding scale" is applied, i.e., if the movant makes "an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. Id.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF THEIR CLAIMS UNDER THE NATIONAL ENVIRONMENT POLICY ACT

This court should affirm the District Court's finding that Appellants failed to demonstrated a likelihood of success on the merits of their claim because Appellants failed to show that removal of horses from the Rafiki Mountain Range is not likely to destabilize the population and there is no uncertainty in the data relied upon.

A. National Environment Policy Act

Under NEPA, the Congress authorizes the Federal Agency to include in every recommendation or report on proposals for major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which

cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C) (2006). The Agency may prepare an Environmental Assessment in order to assist with Agency planning and implementation. 40 C.F.R. § 1501.3(b) (2006). Based on the Environmental Assessment, the Agency determines whether to prepare an environmental impact statement, and in the event that a statement is not required, the Agency will prepare a finding of no significant impact. 40 C.F.R. § 1501.4(c) and (e).

B. This Court Should Affirm The District Court's Finding That The Removal Of Horses From The Rafiki Mountains Is Not Likely To Destabilize The Population Because Previously Implemented Round-Up Plans Have Not Resulted In Destabilization

The purpose of the NEPA is to ensure that the various federal agencies are aware of the environmental impact of the implementation of their plans. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 985 (9th Cir. 1985) (citing Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir.1981).

Under the present scenario, the BLM considered various different alternatives to the proposed amendments, included a "no action alternative." (E.A. at Sect. 2.0.) As a result of their analysis, the BLM determined that there was no significant negative impact on the environment or animal health. (DR and FONSI at 1-2.) Moreover, trapping and removal exercises in 1997, 2001 and 2003, similar to BLM's proposed Gather Plan did not result in a destabilization of the population. (E.A. at Sect. 1.1.) The BLM is entitled to rely on the scientific evidence showing

that there is no significant impact on the environment as a result of the implementation of the Gather Plan. See Jantzen, 760 F.2d at 985 (finding that NEPA does not require that the court decide whether agency actions are based on the best scientific evidence, but the only requirement is to ensure that agency actions were based on a reasonable analysis of available evidence.)

Moreover, the BLM solicited various different comments from interested parties and incorporated theses comments into the proposal. (E.A. at Sect. 6.0-6.1.) Therefore, the BLM took sufficient steps to accommodate and address concerns about the sufficiency of the proposal. See Jantzen, 760 F.2d at 987 (finding that the concerned agency sought out and considered extensive comments on a biological study during the public comment period and afterward, and incorporated these comments into its final plan, and thus, the agency could not be faulted for specific criticisms which were not set forth during the prescribed time for comments.); see also Save Lake Washington v. Frank, 641 F.2d 1330, 1337 (9th Cir.1981); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir.1973)

As a result of the above steps employed by the BLM, the appellees will not succeed on a claim that implementation of the Gather Plan will result in destabilization of the horse population, absent additional data.

C. This Court Should Affirm The District Court's Finding That The Methods Used For Rounding Up The Horse Pursuant To The Gather Plan Is Not Scientifically Uncertain Because The Experimental Data Relied Upon By The Bureau of Land Management Cannot Be Interpreted By The Reviewing Court

The reviewing court should not attempt to resolve conflicting scientific opinions. County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1383 (C.A.N.Y. 1977). Moreover, NEPA does not require federal agencies to examine every possible environmental consequence, and detailed

analysis is required only where impacts are likely. See Izaak Walton League of America v. Marsh, 655 F.2d at 346, 350 (citing Carolina Environmental Study Group v. United States, 510 F.2d 796, 799 (D.C. Cir. 1975)); see also Lands Council v. McNair, 537 F.3d 981, 1002 (9th Cir. 2008) (affirming a lower court's decision that an agency must acknowledge and respond to any comments raised by outside parties regarding the sufficiency of experimental data relied on in preparing a proposed implementation plan); see also 40 C.F.R. § 1500.1(b) (providing that the agency "must insure that environmental information is available to public officials and citizens" and this "information must be of high quality" as "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA").

The BLM relied on unambiguous data that demonstrated that the Gather Plan would not result in significant impact greater than the harm caused via natural causes. (E.A. at 3.1.) See Village of False Pass, 733 F.2d at 983 (finding that there was no evidence that the agency issued a permit in ignorance or deliberate disregard of experimental evidence, where the biological study relied upon acknowledged that there was a "high variance" in results.)

Additionally, by seeking out comments from the public, responding to the comments, and incorporating suggestions and responses into the Gather Plan, the agency acted in good faith, and acted reasonably. See id. (finding that the agency acted reasonably in relying upon experimental studies to conclude that a proposed plan would not reduce the likelihood of survival of the species being protected); see also Lands Council, 537 F.3d at 1003 (finding that scientific evidence does not have to be complete and accurate, but the agency must consider all public comments, and the agency cannot ignore harmful effects, but provide an explanation of the effect of agency actions on the purported harmful effects; see also Izaak, 655 F.2d at 350 (overruling

district court's decision that an agency was not obligated to hold a public meeting after receiving congressional authorization in order to solicit comments on implementation of the project.) Moreover, in accordance with the court's assessment in Seattle Audubon, the BLM included response to public comments in the proposed plan. See Seattle Audubon Soc. v. Espy, 998 F.2d 699, 704-05 (9th Cir. 1993) (finding that an agency is should include a full discussion of any scientific uncertainty surrounding the implementation of a proposed plan.)

In the instant case, the BLM determined that under the no action alternative, the horses would be subject to more stress due to decrease in available forage and water resources, and that the injury to horses based on the round-up methods is within the range of injuries observed under natural conditions. (E.A. at Sect. 3.1.) Therefore, since BLM's proposed plan would not result in significant injury to the horses or to the environment, BLM's implementation of the plan is justified. See Izaak, 655 F.2d at 350) (finding that because reviewing courts cannot resolve conflicting scientific opinion, given an agency's conclusion that the physical effects of implementation of a program would be minor, its decision not to conduct a major biological study was clearly justified.)

In view of the above considerations, the BLM's determination that there was no significant impact on the environment based on experimental evidence was sufficient to allow BLM to implement its proposed Gather Plan.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT THE BALANCE OF HARDSHIPS DID NOT FAVOR APPELLANTS BECAUSE APPELLANTS DID CLAIM DOES NOT INCLUDE A SPECIFIC HARM

The Supreme Court of the United States has not established that, as a rule, any potential environmental injury merits an injunction. Amoco Production Company v. Village of Gambell, 480 U.S. 531 (1987). In balancing harms to a party of interest, environmental injuries must be weighed against any other injuries that are identified, as relating to the issue at hand. Lands Council, 537 F.3d at 1004.

In preparing its EA and FONSI, the BLM considered all possible impacts on the environment resulting from the implementation of the Gather Plan. (E.A. at Sect. 3.0.) In addition to the environmental effects, the effect of implementation of the Gather Plan on cultural resources, paleontological resources and recreation was also studied. (Id. at 3.2-3.9.) All of the above, were weighed against the impact from taking no action. (Id.) As a result, the EA generated by the BLM was a complete analysis of the impact of the Gather Plan. See Lands Council, 537 F.3d at 1004 (finding that environmental injuries including loss of trees and risk to an owl species, and economic losses for the agency and public - especially particularly the loss of jobs and harm to the local economy - must be weighed against the risks from no action, including catastrophic fire, insect infestation, and disease.)

The BLM found that there was no significant increase in harm to the environment, or to the public. (DR and FONSI at 3-4.) In fact, the BLM determined that there would be an increase in available forage and water resources for the remaining 90 horses on the RMWHR. (E.A. at Sect. 3.2.) In response, the appellants have not alleged any specific harm to the environment or the public. See Lands Council, 537 F.3d at 1004(finding that specific instances

of irreparable harm has to be relied on in proving the plaintiff's case, as opposed to a "general allegation that environmental harm is irreparable," refusing to "presume that in all environmental cases that irreparable harm will outweigh all other considerations")(quotation in the original.)

In view of the above, the balance of hardship does not favor the appellants.

IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS OF THEIR CLAIMS UNDER THE WILD FREE-ROAMING HORSES AND BURROS ACT

This court should affirm the District Court's finding that appellants failed to demonstrate a likelihood of success of their claims, because the BLM's determination of the adequacy of the proposed plan was substantially based on fact, and alternate methods would have placed undue burden on the agency, and the removal of all the horses from the RMWHR is not permanent.

A. Wild Free-Roaming Horses and Burros Act

The Congress enacted the Wild Free-Roaming Horses and Burros Act of 1971 to protect wild free-roaming horses and burros, living symbols of the historic and pioneer spirit of the West, from capture, branding, harassment, or death. 16 U.S.C. § 1331 (2006); see also Kleppe v. New Mexico, 426 U.S. 529, 535-36 (1976) (citing legislative history). In order to accomplish the goal of the WFHBA, the wild free-roaming horses are to be considered in the area where presently found, as an integral part of the natural system of the public lands. Id. The WFHBA assigns management and protection duties to the Secretary of the Department of the Interior, including among others, "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", determining "appropriate management levels of wild free-roaming horses and burros on these

areas of the public lands", and determining "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)." 16 U.S.C. § 1333(a)-(b) (2006) (emphasis added.)

B. This Court Should Affirm The District Court's Finding That The Bureau Of Land Management's Finding That Hundred Of The Rafiki Mountain Horses Is In Excess Of The Appropriate Management Level Is Not Arbitrary Or Capricious Because The Agency's Action Had A Substantial Basis In Fact And Examination Of Other Alternative Methods Would Have Placed An Undue Burden On The Agency

In reviewing an agency action, the reviewing court must set aside any agency action that may be deemed as arbitrary or capricious. 5 U.S.C. § 706(2)(A); see also Izaak, 655 F.2d at 371-72 (finding that in reviewing compliance with NEPA, courts must apply a two-step analysis wherein "procedural" obligations were satisfied by preparing an EIS that includes sufficient disclosure of the relevant issues and opposing viewpoints, while "substantive" obligations were satisfied by actions that were not arbitrary or capricious)(emphasis in the original.) A reviewing court does not have authority to determine a point during the germination process of a potential proposal at which an impact statement should be prepared. See Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976) (finding that such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, and would invite undesirable judicial involvement in the day-to-day decision making process of the agencies, which would lead to increased litigation.) Moreover, the court in Izaak found that in making these determinations the courts must be governed by a "rule of reason." Izaak, 655 F.2d at 371-72. Additionally, the court should not substitute its own judgment for that of the concerned agency. See id. (quoting Kleppe, 427 U.S. at 410 n.21 (1976)

In the instant case, the BLM has determined that an excess[1] of wild horses are present on the RMWHR based on wild horse census, distribution data, forage utilization, trend data and precipitation data. (E.A. at Sect. 1.1.) Therefore, BLM's proposed actions have a substantial basis in fact. See Izaak, 655 F.2d at 371-72(finding that so long as the agency's conclusions have a substantial basis in fact, the agency mandate is satisfied.) Moreover, the BLM has considered alternative actions, and found that these actions are not viable to maintain a herd strength within the established AML. (E.A. at Sect. 1.1) Therefore, the examination of the environmental effects of the alternative methods for reducing the size of the herd would be an undue burden on the BLM. See Izaak, 655 F.2d at 374 (finding that it would "certainly be a waste of agency resources to test the efficiency of an alternative which is not only beyond the agency's power, but also incapable of either fully solving the problem at hand or fulfilling the mandate of Congress."); see also Atchison, T. & S. F. Ry. Co. v. Alexander, 80 F.Supp. 980, 996 (D.C.D.C., 1979) After formulating the Gather Plan, the BLM took steps to ensure that interested parties, and the general public had the opportunity to submit comments on the proposed plan. (E.A. at Sect. 6.0-6.1.) In fact, BLM has more steps than is necessary to determine the best mode of implementing the Gather Plan. See Village of False Pass, 733 F.2d at 983 (finding that an agency cannot be said to have acted arbitrarily by not responding to criticisms the agency had not received when it approved a proposed plan.)

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[1] Excess animals are defined by statute as being the wild free roaming horses 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." Id. § 1332(f)(2).

Taking all the above factors into consideration, BLM's proposed actions are not arbitrary and capricious, and therefore the appellants will not prevail on the merits of their claim.

C. This Court Should Affirm The District Court's Finding That The Round-Up Methods Will Not Result in Unnecessary Suffering, Inhumane Treatment, Harassment, or Potential Death

An action would "jeopardize" a species if it "reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 C.F.R. § 402.02 (1984).

During the EA assessment by the BLM, it was determined that although, the horses may be subject to trauma during the gather up process, suffer minor bruises or even mortality of 6-10 horses, the no action alternative would result in greater harm because of a reduction in forage and water sources for the herd. (E.A. at Sect. 3.1.) Moreover, the EA determined that under the no action alternative, the horses were susceptible to severe trauma as a result of increased competition for decreasing forage and water resources. (Id.) Therefore, contrary to the review court's decision in Seattle Audubon, the BLM relied on reasonable scientific evidence that there is an equal opportunity at decrease in the number of horses through natural causes, as may be lost as a result of the round-up. See Seattle Audubon, 998 F.2d at 704-05 (affirming a district court opinion that an agency should reconsider its proposed plan in light of a "stale scientific evidence, incomplete discussion of environmental effects vis-a-vis other old-growth dependent species and false assumptions regarding the cooperation of other agencies and application of relevant law".)

Accordingly, the BLM's implementation of the Gather Plan will not result in extensive injury or harm to the horses of the RMWHR.

D. This Court Should Affirm The District Court's Finding That The Gather Plan Does Not Violate The Wild Free-Roaming Horses And Burros Act Because The Removal Of All One Hundred And Ninety Horses From The Rafiki Mountains Is Not Permanent

In some cases, the overall effect of a project can be beneficial to a species, even though some incidental taking may occur. See Village of False Pass, 733 F.2d at 982-83 (finding that a development of some 3000 dwelling units near San Francisco is also a habitat for three endangered butterflies, and absent the development of the project the butterfly recovery actions at suit may have never been developed; and thus, some actions may lead to a resolution of potential conflicts between endangered species and actions of private developers, while at the same time encouraging these developers to become more actively involved in the conservation of these species.) Implementation of the Gather Plan will result in only a temporary "taking" of the 190 horse from the RMWHR, as 90 of these horses will be returned to the RMWHR. (E.A. at Sect. 1.1.) Moreover, 29 of the 190 horses that are going to be rounded up perpetually reside outside the RMWHR. (Id. at Sect. 1.3.) Therefore, contrary to appellants' allegations, there is no "taking" of all 190 horses in violation of the WFHBA.

CONCLUSION

For the reasons stated above, appellees' respectfully request this court to affirm the district court's denial of Appellant's motion for preliminary injunction against the Bureau of Land Management's implementation of the Gather Plan.

Respectfully Submitted,

Team No. 9
Attorneys for Appellees

Dated: January 4, 2010

CERTIFICATE OF SERVICE

We hereby certify that on this date, the 4th of January 2010, a copy of the foregoing Brief for the Appellees was served on Appellant's counsel via e-mail and postal service.

Team No. 9
Attorneys for Appellees