

Docket No. 09-1968

In The
United States Court of Appeals for the Ninth Circuit

DEBRA RUBIN and THE HORSE PEOPLE,
Appellants,

vs.

KEN SALAZAR and ROBERT ABBEY,
in their official capacities for the Department of the Interior and the Director of the
Bureau of Land Management, respectively,
Appellees.

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

Brief for Appellees

Team 13

QUESTIONS PRESENTED

- I. WHETHER THE DISTRICT COURT ERRED WHEN RULING THAT THE HORSE PEOPLE FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM UNDER THE WILD FREE-ROAMING HORSES AND BURROS ACT.**
- II. WHETHER THE DISTRICT COURT ERRED WHEN RULING THAT THE HORSE PEOPLE FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.**
- III. WHETHER THE DISTRICT COURT ERRED WHEN RULING THAT THE BALANCE OF HARDSHIPS DID NOT FAVOR THE HORSE PEOPLE.**

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OPINIONS BELOW

The Appellants, Debra Rubin and The Horse People, filed action for a preliminary injunction against Appellees to prevent the Bureau of Land Management ("BLM") from implementing the Gather Plan. (R. at 3.) The Appellees, Ken Salazar and Robert Abbey in their official capacities as the Secretary of the Department of Interior and the Director of the BLM, respectively, planned to use the Gather Plan to reduce the number of wild horses on the Rafiki Mountain Wild Horse Range ("RMWHR"). The purpose of this was to prevent further deterioration of the range and possible famine amongst the wild horses. The United States District Court for the Eastern District of California, Sacramento Division, dismissed The Horse People's claims under the Wild Free-Roaming Horse and Burros Act ("Wild Horse Act") and the National Environmental Protection Act ("NEPA"). (R. at 1.)

STANDARD OF REVIEW

All three issues in this case present questions of law and should be reviewed by a de novo standard of review. A district court's interpretation of statutes should also be reviewed de novo. Parola v. Weinberger, 848 F.2d 956, 958 (9th Cir.1988). By applying a de novo standard of review this Court should uphold the district court's decision to deny The Horse People's motion for a preliminary injunction.

STATEMENT OF THE CASE

The Secretary of Interior created the RMWHR by order in 1969. (R. at 2.) The designation set aside 36,000 acres "to protect this irreplaceable herd of wild horses of Spanish lineage and to protect native wildlife and the local watershed." (R. at 2.) The Rafiki Mountain herd currently consists of approximately 190 wild horses. (R. at 2.) In 1992, the BLM determined the appropriate management level ("AML") or the optimum

number of horses for RMWHR is between 85 and 105 horses. (R. at 2.) Although the precipitation level in 2008 and 2009 was far above average, between 1993 and 2005 the RMWHR suffered from years of drought, which significantly compromised the security of the herd's food supply. (R. at 2; E.A. at 2.) In response, the BLM concluded 100 of the 190 Rafiki Mountain horses were excess. (R. at 2.)

In August 2009, the BLM devised the Gather Plan which provides for the round-up of all the wild horses on the RMWHR and ultimately remove 100 of the 190 horses. (R. at 2.) Data from the Natural Resource Conservation Services *Rafiki Mountains Wild Horse Range Survey and Assessment* (2004) and the *Interagency Rafiki Mountains Wild Horse Range Evaluation* (February 2006) demonstrate that the RMWHR does not have the capacity to sustain the current wild horse population over the long-term in a manner that is conducive to healthy rangelands or ecological conditions. (E.A. at 2.) The Gather Plan calls for the initial capture of all 190 wild horses, each of which will then have its blood drawn; this procedure will enable the BLM's scientists to determine the horses' genetic profiles. (R. at 3.) After the tests are conducted, ninety horses deemed to have a diverse and healthy range of genetic profiles will be returned to the RMWHR within a reasonable time. (R. at 3.)

The horses will be rounded-up through the use of Long Range Acoustic Devices ("LRADs"), the Active Denial System ("ADS"), rubber bullets, and helicopter drive-trapping. (R. at 3.) Helicopter drive-trapping is an appropriate method to gather wild horses, which can be inferred from its use in 1997, 2001, and 2003. (E.A. at 1.) The excess wild horses removed will be prepared for adoption or sale. (E.A. at 1.) Twenty-

three gathers have been completed on the RMWHR in the past, and the wild horse population continues to thrive in the area. (E.A. at 12.)

As part of the Gather Plan the BLM drafted and circulated an Environmental Assessment ("EA"), and came to the conclusion that the project would not have a significant impact on the surrounding natural environment. (R. at 3.) After a thirty day public comment period, the BLM issued its Decision Record, final EA and Finding of No Significant Impact ("FONSI"). (R. at 3.) In the final EA, the BLM analyzed alternatives to the Gather Plan and resolved that if no action is taken, progress toward rangeland health standards would not be met, the wild horse population and excessive forage utilization would continue to increase causing more horses to reside outside of the RMWHR. (R. at 4-6.)

SUMMARY OF THE ARGUMENT

This Court should uphold the district court's ruling that The Horse People failed to demonstrate a likelihood of success on the merits of its claim under both the Wild Horse Act and NEPA. The BLM is not in violation of the Wild Horse Act because the BLM's findings that 100 of the Rafiki Mountain wild horses are excess is not arbitrary and capricious, the preliminary round-up of the wild horses does not constitute a removal of the all wild horses, and the BLM's Gather Plan provides for the humane treatment of the wild horses. In addition, the BLM did not violate NEPA because the BLM followed NEPA procedures when creating the EA and FONSI. The BLM took a "Hard Look" at potential environmental impacts and the BLM's actions are not arbitrary and capricious. The BLM's determination that an environmental impact statement ("EIS") was unnecessary is also proper.

The court should also find that the balance of hardships do not favor The Horse People and uphold the district court's denial of the appellants' motion for preliminary injunction. When a party seeks a preliminary injunction it must establish that the balance of equities tips in its favor and that an injunction is in the public interest. The BLM's Gather Plan is the most favorable to both the viability of the Rafiki Mountain horses and to the RMWHR; it is also in accord with the Wild Horse Act multiple-use mandate.

ARGUMENT

I. THE HORSE PEOPLE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM UNDER THE WILD FREE-ROAMING HORSES AND BURROS ACT

Congress enacted the Wild Horses Act in 1971 to protect free-roaming, wild horses and burros from "capture, 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 (2009). The statute states that "the Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, and he may designate and maintain specific ranges on public lands." 16 U.S.C. § 1333(a) (2009). The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a TNEB on the public lands. *Id.* "Secretary" means the Secretary of the Department of Interior when used in connection with public lands administered by him through the BLM. 16 U.S.C. § 1332(a) (2009). The statute provides that a current inventory of wild free-roaming horses shall be maintained and the purpose of such inventory shall be to make determinations as to whether overpopulation exists and whether action should be taken to remove excess animals. 16 U.S.C. § 1333(b)(1). The BLM shall determine AML levels

of wild horses and decide whether AMLs should be achieved by the removal or destruction of excess animals. *Id.*

The Horse People failed to demonstrate a likelihood of success because the BLM is not in violation of the Wild Horse Act. The BLM's findings that 100 of the Rafiki Mountain wild horses are excess is not arbitrary and capricious, the preliminary round-up of the wild horses does not constitute a removal of all the wild horses, and the BLM's Gather Plan provides for the humane treatment of the wild horses; therefore there is no violation of the Wild Horse Act.

A. The Bureau of Land Management's finding that 100 of the Rafiki Mountain horses are "excess" is not arbitrary and capricious.

The BLM's findings should be reviewed using an "arbitrary and capricious" standard. Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983) (holding that an agency's action should be reviewed under "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard). "The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency". *Id.* at 43. However, the judgment of the agency needs to have a "rational connection between the facts found and the choice made." Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962). In reviewing the explanation of a connection, the standard is whether there is a "clear error of judgment." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

The BLM determined that the population of wild horses exceeds the carrying capacity of the RMWHR. Carrying capacity is commonly defined as the maximum number of healthy animals that can be maintained by habitat on a given unit of land.

Kenneth P. Pitt, *The Wild Free Roaming Horses and Burros Act*, 15 Env'tl. L. 503, 508 (1985). The carrying capacity of a range is limited by its winter food supply and the availability of water. *Id.* at 512. When an area reaches its carrying capacity a "boom or bust" cycle often occurs. The area may support an excessive amount of animals for a period of time but eventually the population will drastically decrease from starvation and disease because of the limited resources available. The number of animals after a "bust" is typically much less than the amount of animals the area could support. Legislative history for the Public Rangeland Improvement Act of 1978 provides that one of Congress' goals was to "deal with range deterioration in areas where excess numbers of wild-free roaming horses and burros exist." H.R. Rep. No. 1122 at 9 (1978). The House Report indicated that the Wild Horse Act has been so successful that wild horses now exceed the carrying capacity of the range and that "excess number of horses and burros pose a threat to wildlife, livestock, the improvement of the range conditions, and ultimately their own survival." *Id.* at 21. The BLM's proposed population management is to reduce the number of wild horses to the RMWHR's carrying capacity to prevent the occurrence of a "boom or bust" cycle.

If a determination is made that there is an overpopulation of wild horses, action is required based on the knowledge currently available, even if not complete. Am. Horses Prot. Ass'n v. Watt, 694 F.2d 1310, 1317-19 (D.C. 1982). Adjustments can be made later, but the endangered and rapidly deteriorating range cannot wait. *Id.* Congress directed that horses shall be removed immediately once the Secretary determines, on the basis of whatever information he has at the time of his decision, that an overpopulation exists. 16 U.S.C. 1333(b)(2).

Mandates require the BLM to look at the range as a whole when determining the number of wild horses that are excess. According to U.S.C. § 1333(a), management of wild horses should be designed in a way to achieve and maintain a TNEB on the public lands. 16 U.S.C. § 1333(a). Horses are in "excess" if they "must be removed from an area in order to preserve and maintain a TNEB and multiple-use relationship in that area." 16 U.S.C. § 1332(f).

Pursuant to 16 U.S.C. § 1333, in 1992 the BLM decided the AML for the RMWHR to be between 85 and 105 horses. The range experienced years of drought from 1993 to 2005 which significantly compromised the security of the herd's food supply. In response to the significant deterioration that occurred by leaving the excess horses on the range the BLM constructed the Gather Plan and determined 100 of the Rafiki Mountain Horses to be excess. However, before the drought occurred, the AML was set. The data used to determine the AML and the data collected during the time of drought are completely independent of one another. Therefore, the determination of the AML is not flawed because the data used to set the AML is appropriate.

The 2009 decision to remove the excess animals is appropriate because the RMWHR is significantly deteriorating. Even though the range is currently no longer experiencing a drought, the reoccurrence of another drought is always plausible. More than 100 wild horses died of starvation during the winter of 1977-1978 in the Buffalo Hills of Nevada, after three years of drought. Bureau of Land Mgmt., U.S. Dep't of the Interior, *Our Public Lands* at 11 (1980). While there has been a high level of precipitation between 2008 and 2009 it would be inappropriate to find that the excess animals need not be removed simply because of current precipitation levels. Weather is

cyclical in nature and it is highly unlikely the precipitation levels will persist. In Dahl v. Clark the Nevada district court found that one reason the BLM's reliance on data was flawed was because there had been high precipitation during the time period on which the BLM relied for its determinations. Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984). Therefore, it would be inappropriate for the BLM to rely on data collected over the past two years since it is established that recent precipitation levels are far above average and the reoccurrence of drought is foreseeable.

In determining the number of excess wild horses, the BLM used valid scientific evidence, an evaluation of the range conditions, and observations of the horse population to determine the number of horses that are excess. There is no "clear error of judgment" between the facts found and the decision made by the BLM. The connection made by the BLM is reasonable therefore the BLM's finding that 100 of the Rafiki Mountain horses are excess is not arbitrary and capricious and the agency's judgment should be preserved.

B. The preliminary round-up of the Rafiki Mountain wild horses does not constitute a "removal" of all the wild horses.

By gathering all 190 wild horses from the range to conduct blood tests, the BLM is not "removing" all of the wild horses because ninety of the horses will be released back onto the range. In 16 U.S.C. § 1333 Congress provided that when it is determined an overpopulation exists and action is necessary to remove excess animals, the excess animals should immediately be removed. Congress does not provide specific methods to determine which horses should be removed. However, it mandates an order of actions to be taken when it is concluded there is an excess population. First, old, sick, or lame animals should be destroyed in the most humane manner. Second, if an adoption demand exists the horses should be humanely captured and removed. Finally, for the excess

horses in which an adoption demand does not exist they shall be destroyed in the most humane and cost effective manner possible. 16 U.S.C. § 1333(b)(2). The legislative history for the Wild Horses Act gives a great deal of discretion to the Secretary for the purposes of protection, management, and control of wild free-roaming horses on the public lands." Wild Free Roaming Horses and Burro Act of 1971, Pub. L. No. 92-195, 1971 U.S.C.C.A.N (85 Stat. 717) 2160.

The Supreme Court held that when a statute is ambiguous the court should defer to the agency's interpretation as long as the interpretation is reasonable. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The initial inquiry under Chevron is whether Congress has directly spoken to the precise question at issue. 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on permissible construction of the statute." Id. at 843. When an agency is charged with enforcing a statute, the agency's construction is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

The BLM determined the best method to identify which horses are the unhealthiest and have the least diverse genetics is to round-up all the wild horses to perform blood tests. Congress has not spoken to whether all horses may be gathered to determine which horses should be removed. Even so, it is clear that Congress intended that excess horses be removed but did not give any guidance for selecting the excess

animals other than requiring lame, sick, and old horses to be the first category chosen as excess and destroyed. Since the statute is silent as to this issue, the agency's action should be deferred to. The BLM interpreted the statute to allow for the gathering of all the wild horses to determine which of the horses will be permanently removed. This interpretation is reasonable because the end result is that ninety wild horses will be removed which is what the statute requires the BLM to do. In addition, the BLM is following Congress' requirement to include lame, sick and old horses in the group of "excess" horses which will not be returned to the range. Gathering all of the horses and then conducting tests is the best way for the BLM to determine which horses are lame, sick, and old. Congress did not want the excess horses to be chosen at random. Without gathering all of the horses, it would be very difficult for the BLM to choose the horses which are the healthiest and most genetically diverse. The purpose of this selection process is for the sole benefit of the future of the Rafiki Mountain wild horse herd.

In Colorado Wild Horse & Burro Coal., Inc. v. Salazar, the court held that the removal of an entire herd of wild horses was outside the BLM's authority under the WFHBA because none of the horses had been determined to be "excess animals". Colo. Wild Horse & Burro Coal., Inc. v. Salazar, 639 F. Supp. 2d 87 (D.D.C. 2009). This is distinguished from the present case because the BLM determined 100 of the Rafiki Mountain horses to be an excess. There is no statutory procedure for gathering non-excess animals; therefore the BLM should not be prohibited from gathering and temporarily holding all of the wild horses to determine which horses will be released. Only the amount of horses that are deemed excess will be removed.

C. The Bureau of Land Management's Gather Plan provides for the humane capture of the wild horses.

Congress contemplated that management of the wild horse herds through natural means and fertility control is not always enough to manage herd populations in a manner consistent with maintaining an ecological balance on public lands. The 1971 act originally mandated that "no wild free-roaming horse or burro shall be ordered or destroyed because of over population unless in the judgment of the Secretary such action is the only practical way to remove excess animals from the area." Pub. L. No. 92-195, supra. Because of a continuous increase in the population of wild horses Congress amended the legislation in 1978. Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514 (92 Stat. 1808) (amending 16 U.S.C. § 1333(b)(3)). The statute now states the Secretary shall "determine whether AMLs should be achieved by the removal or destruction of excess animals." 16 U.S.C. § 1333(b)(3). Ultimately, there are two primary solutions for population control of wild horses. The first is provided by humane and flexible methods administered by the BLM and the harsh alternative is overgrazing, sickness, famine, and possible starvation.

The BLM's proposed action provides for humane gathering of the Rafiki Mountain wild horses. 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 (2009). Although some stress is inevitable when gathering wild horses, the BLM's Gather Plan will not cause "unnecessary" stress or suffering.

The use of the ADS creates a "non-lethal, directed energy" that produces a focused beam. (E.A. at 3). The LRAD is also non-lethal method that transmits a highly

directional beam which emits a loud noise. (E.A. at 3.) Because the beams emitted are directional and focused, the risk of exposing non-targeted animals or bystanders is greatly reduced. (E.A. at 3.) Both ADS and LRAD systems have been used as crowd control devices. (R. at 7.) Rubber bullets are non-lethal as well and only trained sharpshooters will be firing the rubber bullets so as to avoid hitting sensitive areas of the horses. (R. at 4.) The rubber bullets predominantly startle the horses and only cause momentary pain. In addition, the use of helicopters is specifically addressed in 43 C.F.R § 4740.1 (2009), which states that helicopters may be used for the purpose of herding wild horses. The planned methods to gather the wild horses do not violate the Wild Horse Act and will only produce stress that is necessary to herd the horses.

It would be inhumane for the BLM not to gather the wild horses. Inhumane treatment means any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse. 43 C.F.R. 4700.0-5(f). If the BLM does not gather the wild horses there will be a "failure to act" that causes "undue suffering" because leaving the wild horses will likely lead to a continued decrease in food supply and potential famine amongst the wild horses.

II. THE HORSE PEOPLE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The Horse People's second alleged cause of action arose under NEPA, claiming that the BLM violated the law in drafting the EA and FONSI. However, the BLM met all procedurally required elements of NEPA and as such should be permitted to proceed with the Gather Plan. The purpose of the 1970 enactment of NEPA as stated by Congress is to

“To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts

which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321 (2009).

Congress' standard for a reviewing court states that “the reviewing court shall decide all relevant questions of law” and “set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A) (2009).

A. The Bureau of Land Management properly followed National Environmental Policy Act procedures when preparing the Environmental Assessment and determining a Finding of No Significant Impact.

The Supreme Court held that the purpose of NEPA is to accomplish twin aims: 1) It requires an agency to consider all "significant aspect(s) of the environmental impact of a proposed action," and 2) "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983). The purpose of NEPA is to ensure that environmental concerns are known by the agency and the public before beginning the project. Chem. Weapons Working Group Inc. v. U.S. Dep't of Army, 935 F. Supp. 1206 (D. Utah 1996). NEPA creates a vehicle for an agency to internalize a procedure which assures environmental protection. Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973). Therefore, once an agency considers information determining the impact of its proposed action, the procedural aspects of NEPA are satisfied. Knowles v. U.S. Coast Guard, 924 F. Supp. 593 (S.D.N.Y. 1996).

An EA must include brief discussions of the need for the proposal, alternatives, and the environmental impacts of the proposed action and alternatives. 40 C.F.R. §

1508.9(b) (2009). One purpose of the EA is to aid an agency's compliance with NEPA when no EIS is necessary. 40 C.F.R. § 1508.9(a)(2). The Supreme Court held that "once an agency makes a decision subject to NEPA's procedural requirements, the only role for the court is to ensure that the agency considered the environmental consequences," therefore while NEPA may require a process it cannot demand particular results.

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). To prevent delay, an agency shall use a FONSI when an action will have no significant effect on the human environment and is therefore exempt from requirements to prepare and EIS. 40 C.F.R. § 1500.5 (2009). A FONSI report should briefly present the reasons why an action will not have a significant effect on the human environment and need not repeat any of the discussion in the EA. 40 C.F.R. § 1508.13 (2009).

The BLM stated that its goal for implementing the Gather Plan would be to reduce the herd to the AML and achieve a TNEB. (E.A. at 2.) In determining the best way to achieve an AML and reduce the herd size, the BLM prepared the EA. The EA outlined other alternatives considered which includes the following: a no action alternative; the use of fertility control alone; a bait, trap, gather method; selective removal of wild horses; a gate cut gather; natural management (proposed by The Horse People); the removal of twenty wild horses (proposed by The Horse People); and the alternative proposed by the Rafiki Mountains Wild Mustang Center.

The BLM considered environmental concerns in the decision making process. The Gather Plan does not threaten to violate federal, state, or local law imposed for the protection of the environment or adversely affect endangered or threatened species (FONSI at 4). Individual animals of other species could be displaced during the gather

operation but would most likely be only for a few days. (E.A. at 10.) The gather operations would effect the visibility of wild horses; however the view shed and overall health of horses will likely suffer if no action is taken. (E.A. at 11.) The EA analyzed the cumulative impacts and found that the combination of the past, present, and reasonably foreseeable future actions, along with the proposed action, should result in more stable wild horse populations, healthier rangelands, healthier wild horses, and fewer multiple-use conflicts. (E.A. at 14.)

In addition, the BLM considered the potential impacts to the wild horses. The BLM determined that the Raffiki Mountain wild horses have an aging population trend that needs to be addressed. (E.A. at 7.) The proposed action corrects this problem by removing many of the aging horses while at the same time returning enough young horses to the range to maintain a sound breeding population and provide for the widest genetic diversity. This action likely leads to a greater exchange of genetic material due to the more frequent interchange of mares. (E.A. at 8.) The BLM noted that horses may be subjected to an increased, but necessary, stress level as a result of the gather methods. A decrease in herd growth may occur intermittently depending on the responses of individual animals. (E.A. at 7.) The BLM determined that some wild horses may be affected adversely, but such affects are not as substantial as the negative impacts of taking no action.

The BLM outlines the need for the Gather Plan, alternatives considered, and all relevant impacts of the proposed action in the EA. The FONSI avoids repeating discussions in the EA as required by 40 C.F.R. § 1508.13 and presents brief reasons as to why the proposed action has no significant impacts on the human environment. As such,

the BLM fulfilled the procedural requirements of NEPA and satisfied its twin aims.

B. The Bureau of Land Management demonstrated that it performed the "Hard Look" test and therefore proceeding with the Gather Plan is not arbitrary and capricious.

The Court must first conduct a "Hard Look" test before determining if an agency has made a decision that the court views as arbitrary or capricious. Baltimore, 462 U.S. at 97. A reviewing court must find an agency's action to be arbitrary and capricious to set the action aside. Motor Vehicle, 463 U.S. at 41. The BLM's decision to proceed with the Gather Plan is appropriate because the BLM performed a "Hard Look" by evaluating the alternatives and therefore the BLM's actions are not arbitrary and capricious.

i. The BLM took a "Hard Look" at possible environmental impacts.

The Supreme Court held that Congress' intention in passing NEPA is for an overseeing agency to take a "Hard Look" at the environmental consequences before taking a major federal action. Baltimore, 462 U.S. at 97. A "major federal action" is one which "includes actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. § 1508.18 (2009). The "Hard Look" test mandates that the agency scrutinize other options or environmental impacts when evaluating the consequences of a proposed action, it does not require that all possible contingencies be contemplated when preparing a report. Davison v. Dep't of Def., 560 F. Supp. 1019, 1025 (S.D. Ohio 1982). Therefore, an agency is not forced to run a sweeping examination and opine on every conceivable effect of a given project, even if that proposal is detrimental in some way to the surrounding environment. Swain v. Brinegar, 517 F.2d 766, 775 (7th Cir. 1975).

The BLM listed alternatives in the EA, examined the alternatives and provided reasons why the Gather Plan would be a more effective proposal. The BLM stated that the no action alternative would not achieve the goals needed by the proposal. This alternative would not reduce the number of horses on the RMWHR; in contrast, the BLM states that if no action is taken that the wild horse numbers would continue to increase causing the areas of excessive forage utilization to become larger as well as the number of horses residing outside of the RMWHR. (E.A. at 4). The use of fertility control alone was rejected because it would not lead to an immediate reduction in the population in order to achieve the TNEB. This alternative would also not balance the sex ratios, preserve age classes, or collect genetic data, which all would be incorporated in the Gather Plan. (E.A. at 4-5). The bait and trap alternative was rejected because only excess horses would be captured. (E.A. at 5.) The BLM determined that this alternative is more appropriate when herds are grossly above the AML and that the Gather Plan would be more suitable because it returns the fittest and most genetically diverse horses to the range.

The BLM also evaluated proposals given by The Horse People and the Rafiki Mountains Wild Mustang Center. Natural management was rejected for reasons similar to that of the no action alternative, it would not reduce the number of wild horses to the AML. The removal of twenty wild horses would not meet the objectives of the proposal for the same reasons as the bait and trap alternative. The alternative proposed by the Rafiki Mountains Wild Mustang Center was similar to that of using fertility control alone, which would maintain a population greater than the AML and not in accordance with a TNEB. By considering the alternatives proposed by the BLM, The Horse People,

and the Raffiki Mountains Wild Mustang Center the BLM demonstrated that it fulfilled the “Hard Look” test.

ii. The Gather Plan is neither arbitrary nor capricious.

An agency's action may be set aside if the court decides the action to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Motors Vehicle, 463 U.S. at 41. The scope of this review is narrow and the court shall not substitute its judgment for that of the agency's. Id. at 43. The court must instead determine if the agency examined relevant data and whether the agency's description of its ultimate decision is satisfactory. Id. The court should grant deference to an agency when reviewing that agency's assessment. Baltimore, 462 U.S. at 103. The decision must be reached by the agency using relevant factors and can only be supplanted by the court when there is a clear error of judgment, or if the determination is so fantastic when compared to the reasoning that it invalidates the agencies expertise. Motor Vehicles, 463 U.S. at 43. The Supreme Court stated it is not within the discretion of a court to come to a conclusion about the action which it believes the agency should take; rather the court should come to a conclusion about whether the agency considered appropriate alternatives and determine if there is a nexus between the conclusions the agency made and the proposed plan. Baltimore, 462 U.S. at 88. NEPA provides for substantial environmental goals that agencies must comply with; however, NEPA does not usurp agencies decision making powers. Davison, 560 F. Supp. at 1024.

The BLM stated that its goal for implementing the Gather Plan would be to reduce the herd to the AML and achieve a TNEB. The AML is determined through BLM’s planning process and is in accord with maintaining a TNEB and ensuring

multiple-use relationships. The Rafiki Mountains Herd Management Plan and the Hawk Lake Resource Area Management Plan ("HMAP") were initially drafted in 1984 and revised in July 1992. There is soil erosion and over-grazing in the RMWHR, as such, the objectives of the HMAP are to provide for an upward trend in range health. The BLM met the requirements of the "Hard Look" test and therefore the BLM's decision is not arbitrary and capricious.

The EA discusses the environmental impacts of the proposed plan against the no action alternative. There is an increased risk to rangeland if the Raffiki herd is allowed to grow and continually exceed the AML. The BLM states that stud horses will begin to protect positions at water sources which will heighten the injury rate of the horses and surrounding areas close to water would experience severe degradation. If the no action alternative is implemented the wild horse population would continue to expand further than the habitat provides for. The number of Raffiki horses residing outside the boundaries of the range would increase beyond the twenty-nine horses that are currently believed to make up this cohort. The no action alternative would not provide for the health of the herd population as a whole, prevent deterioration of the RMWHR, or provide for a TNEB.

The EA cites the *Raffiki Mountains Wild Horse Range Survey and Assessment* prepared in 2004 and the *Interagency Rafiki Mountains Wild Horse Range Evaluation* prepared in 2006 as showing that the RMWHR does not have the capacity to sustain the current wild horse population over the long term in a manner that is conducive to healthy rangelands or ecological conditions. The RMWHR evaluation conducted in 2008 displays a trend of deterioration of low elevation desert areas of the range. This

downward trend is caused by drought along with the overpopulation of the Raffiki herd and can be demonstrated by examining the mid-elevation areas included in the range, which by contrast have received little use by the wild horse population and have displayed an upward trend in range health.

The BLM conducted a thorough investigation into alternatives other than that of the Gather Plan. The scientists at the BLM concluded that to achieve the goal of a TNEB, a reduction of the herd size was needed to stop resource damage in the low elevation desert areas and sub-alpine meadows of the RMWHR. It was decided by the agency that the best course of action to sustain the TNEB would be the proposed Gather Plan.

The BLM's investigation into the health of the RMWHR is not arbitrary and capricious. The data used by the agency was relevant and the description of the ultimate decision is in accord with that data; therefore, the court below properly deferred to the BLM's findings.

C. The Bureau of Land Management properly decided that an Environmental Impact Statement need not be prepared.

NEPA requires federal agencies to prepare an EIS for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Something is "major federal action" if it is potentially subject to federal control and that actions include new or continuing activities including projects or programs. 40 C.F.R. § 1508.18. The BLM's gather plan is likely major federal action but whether an EIS is needed depends on if it is an action that will "significantly effect" the human environment.

An effect is determined to be "significant" based on the severity of the effect, considering the context and intensity of the proposed action. 40 C.F.R. § 1508.27. The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. 40 C.F.R. § 1508.27(a). The intensity of the effect focuses on the severity of the impact. 40 C.F.R. § 1508.27(b). In Hanley v. Kleindienst the court considered two factors to be relevant in defining "significantly:" the extent to which an action would cause a greater degree of adverse environmental effects in a particular area, and the quantitative effects, including the cumulative harm of the proposed action added to the existing adverse conditions. Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). The "human environment" includes the natural and physical environment. 40 C.F.R. § 1508.14. Economic and social effects are not intended by themselves to require an EIS. Id. There are ten aspects that may be evaluated when determining intensity. 40 C.F.R. § 1508.27(b).

The BLM considered both the context and intensity of the proposed action. In evaluating the context of the proposed action the BLM concluded that the action results in achieving the TNEB and maintaining a multiple-use relationship, which is necessary for the BLM to be in conformance with the law. (FONSI at 3.) Nine of the ten aspects from 40 C.F.R. § 1508.27(b) were evaluated and briefly described in the FONSI and found to have no or only minimal impact. (FONSI at 4.) The only aspect that was not discussed is the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places; however, none of these listed items are on the RMWHR and need not be evaluated. The BLM evaluated the potential impacts and found the degree of adverse

environmental impacts is minimal and the Gather Plan will assist in rectifying the existing adverse conditions as opposed to adding to the adverse conditions. In evaluating the potential impact the BLM correctly concluded that if any impacts occur it will not "significantly effect" the human environment and therefore the preparation of an EIS is unnecessary.

III. THE BALANCE OF HARDSHIPS AND CONSIDERATION OF THE OVERALL PUBLIC INTEREST TIPS IN FAVOR OF THE BUREAU OF LAND MANAGEMENT

If preliminary injunctive relief is sought by a party, the court must find that the party is likely to succeed on the merits, that the party will suffer some kind of irreparable harm if no relief is granted, that the balance of equities tips in the party's favor, and that the injunction is in the public's interest. Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. at 374. These four factors can be create a sliding scale; for instance, if a party is less likely to show that it would succeed on the merits or that there would be some kind of irreparable harm, the more it must show that the balance of equities tip in its favor. The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008). Injunctive relief is an "extraordinary and drastic remedy" that may not be granted based on the possibility of some irreparable harm, but instead is to be granted based on a clear showing that the party is entitled to such a relief. Mazurek v. Armstrong, 520 U.S. at 972.

Preliminary injunctive relief should only be granted when the court determines that an extraordinary remedy is required. The BLM's scientists established that there is only an "outside chance" that the gather would affect the herd's genetic diversity. The hypothetical concerns of The Horse People are not enough to warrant preliminary

injunctive relief; therefore, The Horse People have failed to demonstrate that the balance of hardships tip sharply in its favor.

A. The Bureau of Land Management's position is the one most favorable for the wild horses and the Rafiki Mountain Wild Horse Range.

The Supreme Court held that in each case, Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Amoco Prod. Co. v. Gambell, 480 U.S. 531 (1987). The BLM concluded that some of the wild horses could starve if left on the range due to food shortages. In addition, the BLM detailed other risks to the environment posed by an overpopulation of horses, such as overgrazing and soil erosion. The BLM took an extra step to ensure that the wild horses left on the RMWHR are healthy and genetically diverse by providing for scientific assessments of the entire herd.

The BLM determined that the Raffiki Mountain wild horses have an aging population trend that needs to be addressed. The proposed action would correct this problem by removing many of the aging horses while at the same time returning enough young horses to the range to maintain a sound breeding population and provide for the widest genetic diversity. The proposed action would most likely lead to a greater exchange of genetic material.

The BLM established that if The Horse People's natural management alternative is followed the population would increase since wild horses tend to have long life spans and predation is not likely to reduce or regulate population levels. (E.A. at 5.) However, over time there would be a reduction in population due to starvation. (E.A. at 5.) The BLM states that stud horses will begin to protect positions at water sources which will heighten the injury rate of the horses and areas close to water would experience severe

degradation. The number of Raffiki horses residing outside the boundaries of the range would increase.

The other alternative proposed by The Horse People to remove only twenty horses would not provide for the health of the herd population as a whole in conjunction with preventing deterioration of the RMWHR. There is an increased risk to rangeland if the Raffiki herd is allowed to grow and continually exceed the AML. The BLM's Gather Plan is the position most favorable to the wild horses and the RMWHR because it prevents unnecessary suffering due to a lack of food supply promotes the restoration and TNEB of the RMWHR.

B. The Bureau of Land Management's Gather Plan complies with the multiple-use mandate.

The BLM is mandated to remove excess animals from an area in order to preserve and maintain multiple-use relationship in that area. 16 U.S.C. § 1332(f). One of the objectives of the Wild Horse Act is "management of wild horses and burros as an integral part of the natural system of the public lands under the principle of multiple-use." 43 C.F.R. § 4700.0-2 (2009). "Multiple-use" is defined as "the management of the public lands . . . that takes into account the long-term needs of future generations...including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c) (2009). The BLM has an obligation to consider the multiple users of the range in preserving the natural environment and the range. The consideration of alternatives which have a broad significance is central to NEPA. Swain, 517 F.2d 766. Congress intended for NEPA to effect the environment on a large scale focusing on the "big picture." Id. at 775.

The EA cites the *Rafiki Mountains Wild Horse Range Survey and Assessment* prepared in 2004 and the *Interagency Rafiki Mountains Wild Horse Range Evaluation* prepared in 2006 as showing that the RMWHR does not have the capacity to sustain the current wild horse population over the long term in a manner that is conducive to healthy rangelands or ecological conditions. The BLM's Gather Plan provides for the well-being of the Rafiki Mountain wild horses as well as other users of the range. Mandates require the BLM to consider all users of the RMWHR. If the BLM does not maintain the wild horses at or below the range's carrying capacity then other species and users of the RMWHR will likely be negatively impacted, therefore the balance of hardships do not fall in The Horse People's favor.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request that this Court uphold the decision of the United States District Court for the Eastern District of California, Sacramento Division to deny The Horse People's request for a preliminary injunction because of its failure to demonstrate a likelihood of success under the merits of its claim under the Wild Horse Act and NEPA as well as its failure to show the balance of hardships tipped in its favor.

Respectfully submitted,

Team 13
Counsel for Appellees