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## JURISDICTION

Because the claims in this case arise under the Administrative Procedures Act and federal statutes, the District Court had jurisdiction as a Federal Court of the United States pursuant to 5 U.S.C.§ 702 and federal question jurisdiction. This Court has jurisdiction as a Federal Appellate Court of the United States pursuant to 5 U.S.C. § 702 and federal question jurisdiction. There is no dispute as to jurisdiction at issue in this case.

## ISSUES PRESENTED FOR REVIEW

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

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

III. Did the District Court err when it ruled that the balance of equities and consideration of the overall public interest in this case tips in favor of the BLM?

## STATEMENT OF THE CASE

### I. Proceedings and Disposition in the Court Below

Appellant, a non-profit animal protection organization and its president, brought suit in federal district court seeking a preliminary injunction to prevent the Bureau of Land Management ("BLM") from moving forward with a wild horse removal plan, contending that the removal plan violates both the Wild Free-Roaming Horses and Burros

Act ("WFHBA") and the National Environmental Policy Act ("NEPA"), and is otherwise arbitrary and capricious and therefore violates the Administrative Procedure Act ("APA"). The District Court denied the motion, concluding the palintiffs were unlikely to win their case on the merits under either the WFHBA or the NEPA, and that the balance of equities and consideration of the overall public interest in this case tips in favor of the BLM. Deborah Rubin and the Horse People appeal that decision.

## II. Statement of Facts

Appellants/plaintiffs are Deborah Rubin and the Horse People. Ms. Rubin is president of the Horse People, a California non-profit corporation dedicated to protecting wild animals living on the open range and preventing the extinction of the wild horse. *Rubin* at 1.

Appellee/defendant Ken Salazar is the Secretary of the Interior and is responsible for overseeing the BLM's management of wild horses. *Id*. Defendant Robert Abbey is the Director of the BLM and is responsible for implementing management decisions for wild horses in accordance with the WFHBA. *Id*. at 1-2.

The Rafiki Mountain Wild Horse Range ("RMWHR") is the home of one of California's only remaining herds of wild and free-roaming horses. The RMWHR was created by an order of the Secretary of the Interior in 1969 in response to public outcry over BLM plans to remove wild horses from the Rafiki Mountains and sell them for slaughter. 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." Gather Plan at 2.

In 1992 the BLM set the "appropriate management level" ("AML") – the optimal number of horses – for the RMWHR at between 85 and 105 horses. Gather Plan at 1. The BLM admits that at that time it had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability. *Rubin* at 2. In 1999, a BLM Field Manager wrote a letter expressing concern for the genetic viability of the Rafiki herd due to "dangerously low numbers" of horses on the range. The Rafiki Mountain herd today consists of approximately 190 wild horses. *Id*.

The BLM has removed a substantial number of wild horses from ten Western states since 2004. *Rubin* at 2. These removal projects are ongoing; more than 30,000 wild horses are currently in short- and long-term holding facilities. *Id*. The range suffered a major drought in recent years, significantly compromising the herd's food supply security. Gather Plan at 2. In response, the BLM determined that 100 of the 190 Rafiki Mountain horses were "excess." *Rubin* at 2. In August 2009 the agency devised a plan to round up and remove them from the RMWHR ("Gather Plan").

The Gather Plan calls for the capture of all 190 horses currently on the range, each of which will then have blood drawn in order for BLM scientists to determine the horses' genetic profiles. Gather Plan at 3. Once this process is complete, the BLM will return the ninety horses which have a diverse and healthy range of genetic profiles "within a reasonable time" to the RMWHR. *Rubin* at 3. The BLM asserts this method will ensure the healthiest possible herd remains on the range. *Id*. The ultimate reduction of the herd by 100 horses will result in the most significant decrease in the number of wild horses from this range since before passage of the WFHBA in 1971. *Id*. The BLM plans to round up the horses through the use of Long Range Acoustic Devices ("LRADs"), the

Active Denial System ("ADS"), rubber bullets, and helicopter drive-trapping. Gather Plan at 3.

LRADs would be used to transmit a loud noise (like a smoke alarm, but louder) in a directional beam, inducing the horses to flee the piercing noise. Gather Plan at 2-3. The ADS is a "non-lethal, directed-energy" device which "projects a focused beam of millimeter waves to induce an intolerable heating sensation on an adversary's skin." Both devices would be mounted on a helicopter, and used to induce the horses to run into traps. *Id*.

The BLM drafted and circulated a draft Environmental Assessment as part of the Gather Plan, and found the proposed project would have no significant impact on the natural environment. *Rubin* at 3. Following thirty days of public comment, including submissions by Appellants, the BLM issued its Decision Record ("DR"), final Environmental Assessment ("EA), and Finding of No Significant Impact ("FONSI"). *Id.*

The round-up was scheduled to begin a few days after the issuance of the DR, EA, and FONSI in September 2009, but budgetary problems later forced the BLM to delay the project until mid-February 2010. *Id*. Appellants filed the initial lawsuit immediately after the BLM finalized plans to round up the horses in September 2009. *Id*.

## III. Standard of Review

A "plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

The standard of review for a District Court denial of preliminary injunction is *clearly erroneous*. *American Horse Prot. Ass'n, Inc. v. Andrus,* 608 F.2d 811, 815 (9th Cir. 1979).

## SUMMARY OF THE ARGUMENT

### A. WFHBA Claim

The district court erred when it ruled the plaintiffs were unlikely to succeed on the merits of their claim under the WFHBA. First, the lower court imbues the term "remove" with a meaning greater than the Act itself, the established case law, or even the use of the term by the BLM. In doing so, the memorandum opinion holds that the BLM is not removing horses which are not excess. When the term is used consistently with the Act, with the case law, and with its Standard English meaning, the BLM is in fact removing all 190 horses from the range. Some 90 of these horses are *not* excess under the meaning of the WFHBA, and thus the BLM exceeds its authority under the Act.

Second, the BLM failed to take into consideration all the facts at its disposal in classifying 100 of the horses as "excess". While precedent is to defer to agency expertise in matters such as these, here there has been no explanation as to why the AML has remained the same since 1992, despite the availability of additional information concerning the range, as well as increased agency understanding of a herd's genetic viability since that time.

The BLM proposes to use technologies during their roundup that are untested on animals of any kind, and which are intended as *weapons* for use in crowd control. The agency has a duty to employ the most humane methods possible in managing wild horses under the WFHBA. *American Horse Protection Ass'n, Inc. v. Frizzell* 403 F.Supp. 1206,

1218 (D.C. Nev. 1975). In that the agency cannot possibly assess the impact of these new technologies on wild horses when they are used for roundup purposes, as compared with other feasible methods, the agency is shirking its duty to employ the most humane methods possible.

**B. NEPA Claim**

The District Court erred in ruling that the BLM did not violate NEPA by failing to prepare an Environmental Impact Statement for the "gather plan" of the Rafiki wild horse herd. The District Court ruled this way because the gather plan removes a number of horses to achieve a population that falls within the AML. Therefore, the District Court determined that there was no significant impact because the horse population resulting from the gather and removal would fall within the projected population that was appropriate from the BLM's findings. However, serious questions have been raised regarding the significant impact that gathering and capturing the entire herd of wild horses will have upon the horses that are returned to the range, and the accuracy of the AML to support the viability of the herd. The gather of the entire herd and the permanent removal of more than half of the current herd's population has raised issues regarding consequences associated with the gather and capture of wild horses. The exposure of the entire herd to consequences such as decreased breeding and injury raises serious questions concerning the significant impact that this action will have on the entire herd, and therefore requires that the BLM prepare an environmental impact statement.

Additionally, the untested methods that will be used to gather the horses requires the preparation of an EIS because the risks and consequences of using riot control weapons to gather an entire herd of wild horses are unknown. The District Court erred in

ruling that because there was no information available either way, that the BLM was exempt from preparing an analysis of the weapons' effects on the horses. Because the risks associated with using these weapons is unknown, an EIS is required in order to fully assess the effect that their use will have on the horses.

**C. Serious questions were raised on the merits of the claims and the balance of hardships tips sharply in the appellant's favor.**

The balance of hardships tips sharply in the Appellant's favor because the damage that will be incurred should the gather plan be allowed to go forward cannot be undone. There are serious questions raised by the gather of the entire herd, removal of over half the horses, and the exposure of riot control weapons on the herd. Should the issues raised in these questions come to fruition and result in adverse consequences on the viability of the herd, possibly eradicating the herd, that damage cannot be undone. The Rafiki wild horses cannot be restored if the gather results in sterility, disruption of social bands, a decrease in breeding, and/or death to the horses.

## ARGUMENT

### I. The District Court erred when it ruled that the plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the Wild Free-Roaming Horses and Burros Act.

#### A. The District Court clearly erred in ruling that the BLM plan does not constitute "removing all 190 wild horses as the WFHBA uses that term."

The Wild Free-Roaming Horses and Burros Act of 1971 ("WFHBA") authorizes the Secretary to remove excess wild horses from the range to achieve appropriate management levels. 16 U.S.C. § 1333(b)(2). "Secretary" means the Secretary of the

Interior when used in connection with public lands administered by him through the Bureau of Land Management. 16 U.S.C. § 1332(a). "[E]xcess animals" means wild free-roaming horses or burros (1) which have been removed from an area by the Secretary pursuant to applicable law or, (2) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area. 16 U.S.C. § 1332(f).

A District Court found that Congress clearly intended to protect non-excess wild horses from removal in the 1978 amendments to the WFHBA, and that BLM authority is limited to only removing such horses as it deems "excess". *Colorado Wild Horses and Burros Coalition, Inc. v. Salazar*, 639 F.Supp.2d 87, 95-96 (D.D.C. Aug 05, 2009). In a case remarkably similar to ours, the court granted a preliminary injunction based on the BLM plan to round up *all* the horses on a range rather than only the number deemed "excess" under the WFHBA. *Id*. at 98.

It is clear from the plain text of the act itself, as well as the case law, that the BLM would be in violation of the act to remove wild horses that are not deemed "excess". The BLM's gather plan acknowledges that only 100 of the estimated 190 horses currently on the range are "excess" per the AML. Gather Plan at 3. Therefore, if the BLM plan is to remove more than the 100 horses deemed excess, it violates the act.

The District Court in our case infers a meaning for the term "removing" within the WFHBA which conflicts with our implied meaning. "Plaintiff is unlikely to succeed on the merits, however, because the BLM is not "removing" all 190 horses as the WFHBA uses that term." *Rubin v. Salazar*, 6 (E.D. Cal. 2009). However, they cite no authority for their meaning, and give no explicit definition. The memorandum opinion

implies that the term as used in the act would be more accurately written as *permanently removing*, and that the BLM plans to eventually return 90 horses to the range means they are not "removing" more than 100 wild horses, and are thus not in violation of the act. We assert that "removing" and "permanently removing" are not synonymous.

First, while the text of the act itself defines a number of terms as used in the act, the terms "remove", "removing" and "removed" are not defined. In contrast, 6 other terms ("Secretary", "wild free-roaming horses and burros", "range", "herd", "public lands", and "excess animals") are explicitly defined. 16 U.S.C. § 1332(a-f). We infer from this that the act intended the term "remove" and its other forms to be consistent with its normal English meaning: "To take away and place elsewhere". WILLIAM COLLINS SONS & CO., COLLINS ENGLISH DICTIONARY, COMPLETE AND UNABRIDGED 6TH EDITION 2003 (HarperCollins Publishers). Nowhere in the definition is any implication of permanence, either in the English definition or the act itself. Where the words "remove" and "removed" appear in the act, it is always in referring to *excess* animals. 16 U.S.C. § 1332(f). As the gather plan clearly states the intention to take the horses from the range and place them elsewhere (Richfield Corrals), it is clear the BLM intends to remove all 190 horses from the range. Gather Plan at 1, 3.

Further, the BLM gather plan itself refers to each of the horses individually as "removed" when describing how they will be genetically tested. Gather Plan at 1, 3. As the plan also distinguishes the 100 excess horses as being "permanently remove(d)", we assert the BLM itself does not use the term "remove" synonymously with "permanently remove", but distinguish between them. Gather Plan at 1, 3, 4. FONSI at 1. Likewise, the Gather Plan distinguishes between all 190 horses and the 100 "excess" wild horses

throughout the document. Were the BLM to intend to only *gather* the wild horses, since they use the term "gather" distinctly from "remove", we can infer that their intent is not to merely *gather* the horses, but to *remove* them. We therefore assert the BLM itself intends to remove all 190 horses from the range, as the word is used by both the BLM and the WFHBA. As nearly half that number are not excess, and the agency does not have authority to remove non-excess wild horses, this proposed action would clearly violate the WFHBA.

Finally, we look at the intent of the WFHBA: "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture…", and "All management [by the Secretary] activities shall be at the minimal feasible level". 16 U.S.C § 1333(a). As capture is a component of removing the horses, Congress appears to have intended to protect wild horses from the individual elements of removal which are harmful to them. Prohibiting the act of *removal* of wild horses (as distinct from *permanent removal*) is consistent with that intent. The court in *Colorado Wild Horses and Burros Coalition* found similarly that it was Congress' intention to protect wild horses from at least one of the individual elements of removal (i.e. – capture). *Colorado Wild Horses and Burros Coalition* at 95-96. Their use of the term "removed" is consistent with our understanding of the term (as distinct from *permanent removal*), and inconsistent with the inference of the memorandum opinion. *Rubin* at 6.

**B. The District Court clearly erred in ruling that the BLM correctly found that 100 of the horses were "excess".**

"BLM's findings of wild horse overpopulations should not be overturned quickly on the ground that they are predicated on insufficient information." *American Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1318 (D.C. Cir. 1982).

The memorandum opinion cites *Watt* as its primary authority in supporting the BLM finding. While this case supports giving deference to agency findings, the details of the case do not support the District Court's conclusion.

In *Watt* the D.C. Circuit was (in 1982) reviewing a District Court decision to not dissolve a 1976 injunction enjoining the BLM from conducting a proposed roundup. In 1978 the WFHBA was amended to provide the Bureau to determine whether there is an overpopulation of horses "on the basis of all information currently available." 16 U.S.C. § 1333(b)(2). As Chief Judge Spottswood noted in dissent, the BLM still had not given adequate consideration to the alternative of restricting cattle grazing on the rangeland in question. To allow the BLM to act without this consideration, when the information was available, was a mistake. *Watt* at 1320-1321.

We assert the District Court in the immediate case is making the same mistake in misreading *Watt* and the 1978 amendments. The BLM in the present case picks and chooses the information they base their decision (to deem 100 horses *excess*) on. While the thrust of the 1978 amendments was that the Bureau need not undertake additional fact finding, here the Bureau has information available that clearly does not support the decision to move forward with the proposed gather plan. "The BLM's decision was based on valid scientific evidence and a reasoned consideration of the range conditions, as well as the population and distribution of the horse population." *Rubin v. Salazar*, 7 (E.D. Cal. 2009). Yet the District Court acknowledges that

> "the drought ended three years ago, and Defendants do not dispute that unusually heavy amounts of precipitation have filled the range with significant water stores since 2006, greatly improving vegetation on the range, as well as the stability of the range substrate. In reaching its conclusion that the range was in a deteriorating condition in 2009, the agency relied on a study that was conducted during 2002 and 2003, the worst two years of the entire drought." *Id.* at 6.

It is not that the Bureau predicates their decision on insufficient information; it is that they provide no rational support for their decision based on the information at hand. "Section 1333(b)(2) cannot reasonably be construed to permit the Bureau to engage in an arbitrary reasoning process with impunity." *Watt* at 1323. At the very least, we urge the court here to remand to the District Court for a reasoned explanation from the BLM on why they made their decision in the face of the facts above.

Finally,

> "In 1992, the BLM determined that the "appropriate management level" ("AML") – the optimal number of horses – for the RMWHR was between 85 and 105 horses. At that time, BLM admits it had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability." *Rubin* at 2.

We would like to assume the BLM has gained additional knowledge in the area of wild horse genetics in the 17 years since setting the initial AML, and an appropriate AML today would reflect that knowledge.

### C. The District Court clearly erred when they ruled that the roundup methods proposed by the BLM do not violate humane standards under the WFHBA.

The BLM has a duty to use the most humane roundup methods possible, and must use more humane methods in rounding up wild horses when possible. *American Horse Protection Ass'n, Inc. v. Frizzell* 403 F.Supp. 1206, 1218 (D.C. Nev. 1975).

In contrast to *American Horse Protection Ass'n., Inc. v. Frizzell*, where there were more humane methods considered but not possible, it is not possible to compare other humane methods of roundup in the immediate case because the potential impact of the LRADs and the ADS is unknown. *American Horse Protection Ass'n., Inc. v. Frizzell* at 1218, *Rubin* at 7. In *American Horse Protection Ass'n., Inc. v. Frizzell* the BLM director

acknowledged that a helicopter roundup would be more humane than the water trapping method proposed, but was illegal at the time under 18 U.S.C. § 47. *Id*. In our case, the BLM has alternatives to the use of LRADs and the ADS, but has no way of assessing which alternatives represent a more humane roundup method owing to the fact that these two devices have never been tested on animals. *Rubin* at 7. At the very least, this raises serious questions as to whether the proposed roundup methods violate the WFHBA.

## II. The District Court clearly erred when it ruled that the BLM was not required to prepare an Environmental Impact Statement on the environmental effects of the gather plan under NEPA.

The National Environmental Policy Act (NEPA) requires agencies of the Federal Government to provide an environmental impact statement (EIS) for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The EIS acts as a mandatory procedural requirement that ensures the agency is basing their decision on valid information, and gives the public an opportunity to comment on the action. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). "NEPA 'promotes its sweeping commitment' to environmental integrity 'by focusing Government and public attention on the environmental effects of proposed agency action...[b]y so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after its too late to correct." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008), (quoting, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)). The agency must prepare an EIS if its action is found to have a significant impact, regardless of the long-term benefits of the project, or the risk in delaying the

implementation of the project. *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 373 F.Supp. 2d 1069 (E.D. Cal. 2004). "An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

In order to determine if an environmental impact would be significant the court looks to whether the effects "are likely to be highly controversial", if the effects are "highly uncertain or involve unique or unknown risks", whether it will "establish a future precedent for future actions with significant effects", and whether the individual actions result in "cumulatively significant impacts...[i]f any of these factors is present, the preparation of an EA or EIS is required." *Greenpeace USA v. Evans*, 688 F.Supp. 579, 582 (W.D. Wash. 1987), citing 49 Fed.Reg. 29647 (1984).

The District Court held that the BLM did not violate NEPA by failing to prepare an EIS because the reduction of the size of the herd would fall within the AML, and because there was not "solid scientific evidence" to show that the use of the LRAD's and the ADS would affect the herd. *Deborah Rubin v. Ken Salazar*, 9-11 (E.D. Cal. 2009). Therefore, the District Court held that the plaintiffs were not likely to succeed on the merits of the NEPA claim, and declined to grant a preliminary injunction. *Rubin* at 9-11.

In *American Horse Protection Ass'n v. Andrus*, 608 F. 2d 811 (9th Cir. 1979), this court stated, "By congressional finding, as we have noted, wild free-roaming horses contribute to the diversity of life forms within the Nation and enrich the lives of the American people, and are to be considered as an integral part of the natural system of public lands." *Id.* at 5 (quoting 16 U.S.C. §1331). In that the horses are considered "an

integral part of the natural system of public lands", it follows that if the removal and gather plan will have a significant effect on the Rafiki horses, then the BLM is required to prepare an Environmental Impact Statement to consider the effects. Although the district court ruled that there would not be a significant environmental impact on the Rafiki horses, the district court clearly erred in not considering the full impact of the plan. The BLM action will significantly impact the horse population by the (purportedly temporary) removal of all 190 horses from the range, by the ultimate reduction in the herd by 100 horses, and by the untested methods used to round up all 190 horses.

**A. The District Court erred in determining that the removal of 190 horses and the ultimate reduction in the herd by 100 horses does not significantly affect the environment.**

In *Fund for Animals v. Frizzell*, 402 F.Supp. 35 (D.C.D.C. 1975) the court held that the agency was not required to prepare an EIS because the EA had sufficiently raised the pros and cons of the proposed action and offered adequate convincing information that the environmental impact would not be significant. In that case, the court discussed the extensive process that the agency had undertaken in determining that there would be no significant impact, "[t]he regulations are the product of a year-long process, including air and ground surveys, data analysis, Flyway Council meetings, Canadian and State wildlife management agencies' recommendations, and review by the Waterfowl Advisory Committee." *Id.* at 37-38.

Additionally in *American Horse Protection Ass'n., Inc. v. Frizzell*, 403 F.Supp. 1206 (D. Nevada 1975), the court held that an EIS was not required when the agency considered the effects of the removal of 400 horses on various aspects of the environment, and determined that there would not be a significant impact on the

environment or the population of the horses in the range. In that case 600 horses would be left in the Stone Cabin Valley, the court stated that "This may have been a different case had plaintiff been able to satisfy the Court that the proposed round up would extinguish the wild horse population in Stone Cabin Valley." *Id.* at 1219.

Here, the removal of all of the horses could cause a drastic reduction in the genetic viability of the herd because the gather *will* affect the entire herd. Not only will the horses that are being permanently removed suffer the adverse consequences of the gather, but the horses that are eventually returned to the range to ensure the survival of the Rafiki wild horse population will suffer consequences from the gather and capture. The Gather Plan notes that these effects include a decrease in live births, injuries, separation of social groups, and psychological consequences. Gather Plan at 7. The culmination of these effects could result in a significant decrease in the population of the herd, and therefore the District Court's finding that the plan does not raise a question that the Rafiki horses will be significantly affected because it places the horse level at the AML is not accurate, and was erroneous.

Unlike *Fund for Animals v. Frizzell*, the gather plan here did not produce convincing evidence that the gather of all 190 horses would not significantly impact the survival of the herd. Rather, the Gather Plan acknowledges that there will be adverse consequences to the gathered horses, and dismisses the need to provide a EIS with little explanation as to why there is not a significant effect on the horses that will be returned to the range. The district court dismissed the claim that there would be a significant effect due to the removal of all of the horses on the grounds that the removal of the "excess" horses would place the wild horse level at the AML. However, the district court

stated itself that in 1992 when the BLM set the AML, "[a]t that time, BLM admits it had little knowledge of wild horse genetics and the need to maintain minimum numbers of breeding individuals to ensure herd viability." *Rubin* at 2. The district court failed to discuss the impact that the indefinite removal of all 190 horses from the range, and the permanent removal of certain horses, would have on their viability. In dismissing the argument based on the fact that the ultimate removal of the 100 horses would place the horse population in the AML, the court failed to even consider whether the removal of *all* of the horses might have an impact on the population and breeding capabilities of the 90 horses eventually returned to the range, unlike *Fund for Animals v. Frizzell* and *American Horse Protection Ass'n, Inc. v. Frizzell.* The Gather Plan itself states "Horses might also suffer some degree of stress during capture, processing, and transportation... [t]he intensity of these impacts would vary by individual and would be indicated by behaviors ranging from nervous agitation to physical distress." Gather Plan at 7. Further, the Gather Plan states that 6-10 horses could die during the gather, and that there might be an adverse effect of separating certain bands of horses by the selection of the 100 horses for permanent removal. Gather Plan at 7. These indirect impacts occurring from the separation and stress involved in the gather can also cause a decrease in herd growth and number of live births within the population. Gather Plan at 7. Therefore, this could result in a decrease in the population of the horses that are returned to the range and would have a significant impact on the herd's viability and ability to reproduce. Unlike *American Horse Protection Ass'n, Inc. v. Frizzell,* in which 600 horses were returned to the range, this gather plan returns less than half of the population of the horses to the range and raises a serious question of whether the herd will continue to be viable after the

entire herd suffers the consequences of capture and separation. Because there will be a significant impact on the horse population that is returned to the range from the adverse effects of the gather of all of the horses and the removal of over half of the herd, an EIS is required to further assess the BLM's action. The district court clearly erred in ruling there was no serious question raised on the merits of the claim when the gather of the entire herd and the ultimate removal of 100 horses could significantly affect the genetic viability of the herd. The BLM failed to show how there would not be a significant effect on the herd, and there was a serious question raised on the merits to support a finding of a preliminary injunction.

**B. The District Court erred in determining that the methods used for the round up do not significantly affect the environment.**

In *Greenpeace USA v. Evans,* 688 F.Supp. 579 (W.D. Wash. 1987), the court held that an EIS was required because there was not an adequate consideration of the risks of long-term effects on an animal population. In that case, the National Marine Fisheries Service had issued permits for scientists to collect blubber samples from whales by dart biopsies after public comments were very adverse to this practice. *Id.* The court held in that case that because there were unknown risks to the whales by this process, the National Marine Fisheries Service had violated NEPA by failing to prepare an EIS on the effects of the whales of these biopsies. *Id.*

Further, in *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service,* 373 F.Supp. 2d 1069 (E.D. Cal. 2004), the court held that the Forest Service was required to prepare an EIS when there was a lack of information about how the implementation of a watershed improvement project would affect a threatened species of owl. The court held

that because there were uncertainties in the way that the project would affect the species of owl, that an EIS was required to fully assess the impact. *Id.*

The District Court erred in ruling that the methods proposed of using riot control weapons for the round up would not significantly affect the horse population. The court effectively said that because there was no evidence available to show the effects on the horses, whether they be adverse or non-adverse, that there was no requirement to file an EIS. *Rubin* at 11. This is clear error because that is *precisely the purpose* of the requirement of preparing an EIS; to allow the agency to proceed with accurate information on the environmental effects of their action. Stating that the agency is not required to prepare an EIS because there is inadequate information of the adverse or non-adverse effects of the methods used is contrary to the purpose behind NEPA's EIS requirement. As in *Greenpeace USA v. Evans* and *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, little is known about how these devices will impact the Rafiki wild horse population, other than that they will likely cause stress which reduces the number of live births in any mammalian population. *Rubin* at 11. The very fact that the consequences and risks of these devices are unknown requires that the BLM inquire into the effect that they will have on the animals. *See Greenpeace U.S.A. v. Evans*, 688 F.Supp. 579, 582 (W.D. Wash. 1987), citing 49 Fed.Reg. 29647 (1984). The fact that these devices will be used on the *entire* population of the wild horses, with unknown consequences, weighs heavily in requiring a deeper inquiry into their effect on the horses before the action is implemented and the damage cannot be undone.

The effect of the removal of the 90 horses, the reduction in the herd size by 100 horses, and the methods used for the round up all result in action that will significantly

affect the environment, and therefore, the agency action is invalid because the BLM failed to comply with NEPA's requirement of filing an EIS. The BLM should be required to file an EIS to examine the effect that the removal, reduction, and gather methods will have on the horse population before undertaking any further action in the gather of this herd of wild horses.

**III. Serious questions were raised on the merits of both the WFHBA and NEPA claims and the balance of hardships tips sharply in the appellant's favor.**

A preliminary injunction may be granted if the moving party "demonstrates that it is likely to succeed on the merits and may suffer irreparable injury, or that serious questions exist on the merits and the balance of hardships tips in its favor." *Self-Realization Fellowship Church v. Ananda Church of Self-Realization,* 59 F.3d 902, 913 (9th Cir.1995). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.,* 762 F.2d 1374, 1376 (9th Cir.1985). "Where a party can show a strong chance of success on the merits, he need show only a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor." *Bernard v. Air Line Pilots Ass'n, Int'l, AFL-CIO,* 873 F.2d 213, 217 (9th Cir.1989).

In *Winter v. Natural Resources Defense Council, Inc*., 129 S.Ct. 365 (2008), the Secretary of the U.S. Navy appealed a lower court's temporary injunction. A number of animal protection groups had sued the Secretary, seeking this injunction against the use of mid-frequency active (MFA) sonar during training exercises off the coast of southern California. *Id.* at 366. MFA sonar is used in antisubmarine warfare, one of the Navy's

highest priorities. *Id*. The animal protection groups asserted that the sonar caused serious injury to some of the 37 species of marine mammals in these waters, while the Navy noted that they had been conducting similar exercises in the same area for 40 years without any documented sonar-related injury to a marine mammal. *Id*. The Court in *Winter* reversed the lower courts and vacated in part the preliminary injunction that had been issued. *Id.* at 382. Chief Justice Roberts noted that the balance of equities and public interest weighed in the Navy's favor. *Id.* at 367.

We contrast our immediate case with *Winter* in 2 ways: First, whereas the Navy had a 40 year history of using MFA sonar in proximity to marine mammals with no documented injury as a result, the BLM acknowledges the complete lack of any sort of exposure of wild horses (or any other animals) to the LRAD or ADS planned for use in the roundup. *Rubin* at 7. Therefore, the risk of harm to the horses in the immediate case is much higher than in *Winter* owing to the uncertainty and lack of information. It is also worth noting the LRAD and ADS devices are intended as riot control and military combat devices, in contrast to sonar, which is used as a detection tool. Second, the public interest is higher in *Winter* than the present case. Without dismissing the importance of healthy rangeland on the 36,000 acres in question, national security as ensured in part by the Navy's antisubmarine program is a compelling public and state interest. *Id* at 382.

We assert serious questions have been raised as to the impact of the LRAD and ADS on the humane treatment of the horses. The District Courts own statement "The use of experimental weapons such as LRADs and the ADS does not necessarily violate humane standards" acknowledges in using the word "necessarily" that serious questions have been raised. *Rubin* at 8. As the balance of equities and public interest in our case tip

in favor of the appellants based on the analysis above, we conclude that a preliminary injunction enjoining the BLM from executing the proposed gather is appropriate.

We further assert the District Court has an altogether unrealistic view of the behavior of wild horses that colors its ruling regarding roundup methods. In the statements "one could argue that these methods make more serious, and potentially lethal, weapons unnecessary", and "[w]e must keep in mind that these are *wild* horses", the District Court appears to infer that these horses are somehow dangerous to the humans conducting the roundup. *Rubin* at 8. We assert the District Court errs here not only in its view of these animals as somehow dangerous, but mostly in projecting its own bias upon the fact finding which it purportedly leaves to the BLM.

Additionally, with the gather of the entire herd and eventual return to the range, should the consequences actually result in destruction of the viability of the herd, as the EA predicts as a possible consequence, the damage cannot be undone to this herd of wild horses. *See American Horse Protection Ass'n v. Watt*, 679 F.2d 150 (9th Cir. 1982). Although the District Court noted that there is no evidence that the appellant's position is in the best interests of the horses, the damage that may be caused by using *untested* methods, with no information as to the potential damage to these horses, sharply tips the balance in the appellant's favor. Although it is undisputed that there is an overpopulation of the horses, using untested methods and exposing the entire population to decreased viability without in-depth consideration does not serve the purposes of either WFHBA or NEPA. Proceeding with exposing the entire herd of horses to these methods with no knowledge of their potential effects could result in the destruction of the entire population of Rafiki horses and at the very least requires that the agency prepare an EIS to fully

evaluate the action and allow the public to comment on the use of these devices to round up the wild horse population. As was noted in *American Horse Protection Ass'n., Inc. v. Frizzell*, when action threatens the entire population of the herd, more careful consideration is required. Although 90 of the horses will be eventually released, the entire population will be affected by the consequences of the gather, and if these consequences threaten the viability of the herd, this damage cannot be undone. Therefore, at the very least, the agency should proceed with information on the effects of these devices, rather than proceeding "with incomplete information, only regretting its decision after its too late to correct". *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008), (quoting, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

The District Court asserted that the multiple use mandate of the BLM weighed the result in favor of the BLM, in considering the need for multiple uses of the range. *See* 43 U.S.C. § 1702. While the appellants do not challenge the need to satisfy the multiple use mandate, we urge that the risk of the depletion of the entire Rafiki herd weighs in favor of evaluating different methods and further evaluation of the AML in order to best determine the consideration of the horses among the multiple uses of the range.

The District Court also held that the appellants failed to show how their position would best benefit the horses; however, with the consideration of the unknown effects of the gather plan and the possibility that the herd will be depleted as a result of the gather, the balance sharply tips in favor of the appellants. Further evaluation of the methods of determining a proper AML and the most effective round up methods are necessary to protect this population of wild horses before its too late.

Because the roundup of these horses will result in "irreparable injury" that cannot be corrected after the entire herd will suffer the consequences of gather, capture, and disruption of social groups, the preliminary injunction should be granted with respect to both the WFHBA and NEPA. Serious questions are raised on the merits of both claims, and the balance of hardships tips sharply in the appellant's favor as the implementation of the gather plan and removal of the horses will cause irreparable damage to the horses. A deeper inquiry into the methods and effects of the gather plan is required to ensure that the BLM is proceeding with accurate knowledge of the effects of this plan.

## CONCLUSION

Because serious questions were raised on the merits of both the WFBHA and NEPA claims, and the balance of hardships tips sharply in the appellant's favor, the District Court clearly erred in failing to grant the preliminary injunction against the BLM's implementation of the "Gather Plan". The appellants request that this Court reverse the holding of the District Court and grant the preliminary injunction against the BLM.

**Respectfully Submitted,**

Counsel for the Appellants