Civil Action No. 09-1968 (SKM)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE HORSE PEOPLE, et al.,

Plaintiffs - Appellants

v.

KEN SALAZAR,
Secretary of the Department of the Interior, et al.,

Defendants - Appellees

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

January 4, 2010

BRIEF FOR APPELLANTS

Team 15

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STATEMENT OF JURISDICTION

Plaintiffs-appellants Deborah Rubin and The Horse People brought this action in the United States District Court for the Eastern District of California. Plaintiffs' suit alleged that the BLM's proposed collection and removal wild horses from the Rafiki Mountain Wild Horse Range (the Rafiki Range) violates the Wild Free-Roaming Horses and Burros Act (WFHBA) 16 U.S.C § 1331 *et seq.* and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* The district court's jurisdiction rested upon 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346 (federal defendant). The district court denied preliminary injunctive relief. Plaintiffs filed a timely notice of appeal. This court's jurisdiction is based upon 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Did the District Court err when it ruled that Plaintiffs failed to demonstrate a likelihood of success under the WFHBA when BLM's plan fails to identify excess horses prior to removal and seeks to use harassing round-up methods?

II. Did the District Court err in when it ruled that Plaintiffs failed to demonstrate a likelihood of success under NEPA when BLM failed to investigate the impacts of using experimental weapons, relied on stale data and, consideration of alternatives was inadequate?

III. Did the District Court err when it held that the balance of hardships did not favor Plaintiffs when the court failed to consider procedural injuries and misjudged the weight of direct hardships?

STATEMENT OF THE FACTS

Plaintiffs' action concerns the wild horse herds living in the Rafiki Mountain Wild Horse Range ("RMWHR") of the Rafiki Mountains. The horses occupy 36,000 acres of public lands designated "to protect this irreplaceable herd of wild horses…and to protect native wildlife and the local watershed. *The Horse People v. Salazar*, (E.D. CA 2009)(hereinafter "Opinion") at 2. In September 2009, the Bureau of Land Management

(BLM) circulated a draft Environmental Assessment (EA) for the RMWHR wild horse roundup and removal plan (the Gather Plan). *Id.* at 3. BLM issued its final decision after thirty days of public comment, including its Decision Record (DR), final EA, and Finding of No Significant Impact (FONSI).

The Gather Plan is scheduled to begin in February 2010. The method of capture would include the use of the Active Denial System (ADS), Long Range Acoustic Devices (LRADs), rubber bullets, and helicopter drive-trapping. EA at 3. ADS, LRADs and rubber bullets have never been used or tested for rounding up horses or for any other form of animal control. *See* Opinion at 7. However, the ADS has been tested on animals and shown to be capable of causing permanent injury and the LRAD can be dangerous to auditory and respiratory systems and cause panic. EA at 3, n.1 and n.2.

Under the EA, an estimated 100 wild horses – 52.6% of the current total population of 190 wild horses – will be removed from the RMWHR, the most significant decrease in the number of wild horses from this range since before the passage of WFHBA. *Id.* at 2-3.

Under the WFHBA, Congress declared that wild free-roaming horses "are living symbols of the historic and pioneer spirit of the West…fast disappearing from the American scene," and "shall be protected from capture, branding, harassment, or death…" 16 U.S.C. § 1331.

STANDARD OF REVIEW

This standard of review for an order denying a preliminary injunction is abuse of discretion. *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc)(hereinafter "*Lands Council II"*). A court abuses its discretion if it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Earth Island Inst. v. U.S. Forest Serv.*

(Earth Island Inst. II), 442 F.3d 1147, 1156 (9th Cir. 2006). A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation." *Walczak v. EPL Prolong, Inc.,* 198 F.3d 725, 730 (9th Cir. 1999) (citation omitted). Conclusions of law are reviewed de novo. *Lands Council II*, 537 F.3d at 986. A district court's factual findings will not be overturned unless "clearly erroneous." To be clearly erroneous there must be a definite and firm conviction that a mistake has occurred. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

Authority to review decisions under NEPA and WFHBA is derived from the Administrative Procedure Act (APA) which states that reviewing courts may set aside agency actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency decision is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider; entirely failed to consider an important aspect of the problem; offered an explanation that runs counter to the evidence before the agency; or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *North Carolina* v. *EPA,* 531 F.3d 896, 906 (D.C. Cir.2008)

In order to determine whether an agency has exceeded its statutory authority under the APA, a Court must engage in the two-step inquiry required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct.2778 (1984). If the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron,* 467 U.S. at 842-43. If the statute is silent or

ambiguous, the court must determine whether the agency's action is based on a permissible construction of the statute. *Id.* at 843.

SUMMARY OF THE ARGUMENT

The district erred in finding plaintiffs could not demonstrate likelihood of success under the WFHBA and NEPA. Plaintiffs show a likelihood of success under the WFHBA because BLM's plan to remove the entire heard from the Rafiki Range instead of identifying "excess" animals prior to a removal, as required by the WFHBA and supporting regulations, is not "in accordance with law" as required by 5. U.S.C. § 706(2)(A). The methods proposed by BLM constitute harassment and are inhumane and therefore precluded by the WFHBA and regulations.

Plaintiffs also show a likelihood of success under NEPA because BLM failed to investigate the impacts of using experimental weapons to round up horses, relied on stale data and the agency's consideration of alternatives was inadequate.

The district court's review of the agency EA was overly deferential and misapprehended the law related to the requirements of both statutes. Both procedural and direct hardships favor injunctive relief for plaintiffs. The district court made a clear error of judgment in evaluating the balance of hardships.

ARGUMENT

A preliminary injunction is appropriate when the moving party can show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that a balance of equities tips in the favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 129 S.Ct. 365, 376 (2008). As directed by this court, only the likelihood of

success on the merits and the balances of equities are addressed in this brief. (Briefing Order at 1).

I. PLAINTIFFS SHOW A LIKELIHOOD OF SUCCESS UNDER WFHBA

The District Court erred when it ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the Wild Free-Roaming Horses and Burros Act ("WFHBA"), 16 U.S.C. §§ 1331 *et seq.* Plaintiffs' request for injunctive relief is supported by the WFHBA, its implementing regulations found at 43 C.F.R. § 4700 *et seq.*, and the Administrative Procedure Act found at 5 U.S.C. § 706(A), (C), and (F).

The WFHBA declares that wild horses and burros "are to be considered in the area where presently found as an integral part of the natural system of public lands" and as a part of the "thriving natural ecological balance." 16 U.S.C. § 1331(a). In addition, BLM's regulations state that wild horses and burros are to be protected "from unauthorized capture, branding, harassment or death" and provided with "humane care and treatment." 43 C.F.R. § 4700.0-2. BLM may remove some horses in order to restore a natural ecological balance for public lands, but the agency is prohibited from removing an entire herd. Under the statute, BLM is authorized to remove some wild horses from a herd if there is "overpopulation," and in those circumstances, they may only remove those animals deemed to be in "excess." 16 U.S.C. § 1333(b)(2). In this case, BLM has interpreted their discretion under WFHBA to mean that they may remove the entire RMWHR herd *before* determining which animals are in excess. EA at 3. This interpretation is contrary to the plain language of the WFHBA and affords overbroad authority to the BLM.

BLM also proposes to use round-up methods that will cause the horses unnecessary suffering, inhumane treatment, harassment, and potentially death in violation of the statute

and its implementing regulations. BLM proposes to use experimental weapons that are designed for use in riot control and military combat scenarios that have never been used or tested for rounding up horses or any other form of animal control. Opinion at 7. All the proposed methods may cause psychological harassment prohibited under the statute and regulations and LRADs, the ADS and rubber bullets are specifically designed to cause physical and psychological harassment.

BLM has no legal authority to remove an entire wild horse herd using harassing and inhumane round-up methods; therefore, the FONSI allowing the agency to remove all RMWHR horses using these methods is in violation of WFHBA and BLM's own regulations.

Plaintiffs demonstrated a likelihood of success on the merits because BLM's proposed Gather Plan violates the WFHBA. Specifically, BLM has not determined which horses are in excess according to the prescribed categories authorized by Congress in the WFHBA before it begins its proposed gather. 16 U.S.C. § 1333(b)(1)-(2). BLM's indiscriminate capture of the RMWHR wild horses also subverts BLM's policy that these wild horses be managed by BLM with the goal of "maintaining free-roaming behavior." 43 C.F.R. § 4700.0-6(c). BLM's actions exceed its express statutory mandate and contradict legislative history.

A. BLM's Plan To Remove The Entire Herd Violates The WFHBA

Congress has spoken directly to the question at issue in this case. The WFHBA states that wild horses are to be protected from "capture, branding, harassment, or death" by being "considered in the area where presently found as an integral part of the natural system of public lands." 16 U.S.C. § 1331. Under WFHBA, the Secretary is authorized to "protect and manage wild free-roaming horses and burros as components of the public lands…in a manner

that is designed to achieve and maintain a thriving natural ecological balance." 16 U.S.C. § 1333(a). BLM may remove some horses in order to restore a natural ecological balance for public lands deemed in "excess," but this discretion has limits and may be overturned if arbitrary. *Am. Horse Prot. Ass'n v. Watt,* 694 F.2d 1310, 1319 (D.C. Cir. 1982). The WFHBA requires that BLM's management activities be at the "minimal feasible level." 16 U.S.C. § 1332(a), (c). Removal is authorized only for animals after a pre-determination that they are "excess." The WFHBA specifically defines excess animals as those that "must be removed so as to restore a thriving ecological balance to the range and protect the range from the deterioration associated with overpopulation." 16 U.S.C. § 1332(b)(2). "Excess" animals can be "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).

There is a specific process required by the WFHBA in determining whether action should be taken to remove excess animals. In the case at hand, BLM has not determined which horses are in excess according to the proscribed categories authorized by Congress before it begins its proposed gather. BLM intends to round up all of the horses located in the RMWHR, remove them from their habitat, and collect them for later determination of which animals are excess. However, before BLM may begin to gather these horses, the agency must first make the determination that each individual horse gathered falls into one of the three contemplated categories of "excess." 16 U.S. C. § 1333(b)(2). The statute and regulations do not permit this analysis to take place from inside the holding pens after the horses have been gathered. Contrary to BLM's determination, the legislative history of the WFHBA indicates

that "caution must be exercised in determining what constitutes excess numbers." H.R. Rep. No. 95-1737, at 4131 (1978). The Secretary must "maintain a current inventory of wild free-roaming horses" and base appropriate management levels ("AMLs") on this current inventory. 16 U.S.C. § 1333(b)(1). The purpose of the inventory is to determine whether overpopulation exists and whether action should be taken to remove excess animals such that the decision is not arbitrary. *Id.* The BLM has not made the determination to remove 100 horses in accordance with Congressional intent under the bill by maintaining this inventory. In contrast, the BLM has decided to initially remove the entire herd and determine at a later date which animals will be returned to the RMWHR. EA at 3.

Management activities provided by the WFHBA do not include any reference to the removal of non-excess animals and there is no detailed statutory procedure for this kind of removal. Congress intended to eliminate any discretion to destroy non-excess animals when it repealed the original provision of the act by providing that power and replaced it with provision speaking only to BLM's authority to remove and destroy excess animals. 16 U.S.C. § 1333(a), (b)(1), (b)(2)(A-C); *see also* H.R. Rep. No. 95-1737, at 14 (1978) ("The conferees further agreed to retain the House bill's mandate to the Secretaries to remove *excess* wild horses and burros from the public lands."). Without a procedure provided by the statute for removing non-excess animals, BLM's proposed roundup is illegal because it removes horses before a determination is made as to which horses are excess.

The D.C. Circuit has held that the BLM lacks the inherent authority to remove an entire herd of wild horses under the WFHBA. Similar to the case at hand, in *Colorado Wild Horse and Burro Coalition, Inc. v. Salazar*, the BLM also took the extreme position that it was within their discretion to remove the entire West Douglas herd of wild free-roaming

horses from the West Douglas Herd Area in Colorado. The District Court specifically found that "Congress intended to protect non-excess wild free-roaming horses and burros from removal, and that the BLM's removal authority is limited to those wild free-roaming horses and burros that it determines to be 'excess animals" within the meaning of [the Act]." 639 F.Supp.2d 87, 97 (D.D.C. 2009). The BLM's decision to remove an entire herd of non-excess wild free-roaming horses was an impermissible construction of the act under step two of *Chevron*. *Id. (*citing *Chevron v. Natural Resources Def. Council*, 467 U.S. 487 (1984)). The court determined that since there is no specific procedure entailed by the statute for removing non-excess animals, "the only plausible inference to be drawn from the omission of any procedure for non-excess animals is that Congress did not intend for BLM's management authority to be so broad." *Id.* at 98. The court pointed out that "upon removal… the [removed herd] would forever cease to be 'wild free-roaming' horses 'as components of the public lands' contrary to Congress's intent to protect the horses from capture." *Id.* at 88. Congress did not authorize BLM to manage horses in this manner and such methods are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law as articulated in 16 U.S.C. § 1331 *et seq.* As the D.C. Circuit pointed out, "Congress did not authorize BLM to 'manage' the wild horses by corralling them for private maintenance or long-term care as non-wild free-roaming animals off the public lands." *Id.* at 97.

In support of the WFHBA, legislators expressed that the purpose of the bill was to "emphasize protection rather than intensive management." H.R. Res. 9890, 117 Cong. Rec. 34780 (1971). The agency's goal should be to "protect the range from deterioration associated with overpopulation of wild horses and burros." H.R. Rep. No. 95-1737, at 4131 (1978). Removing 52.6% of the population far exceeds what is necessary to prevent

overpopulation in the RMWHR. This management activity is far from the "minimal feasible level" that the statute specifically requires.

BLM is not authorized to remove any non-excess wild horses from RMWHR, and this removal is an abuse of BLM's discretionary management authority under the WFHBA. Plaintiffs respectfully seek immediate injunctive relief because the roundup is scheduled for February 2010.

B. BLM's Round-Up Methods Violate The WFHBA

The objectives of the BLM's regulations are to protect wild horses and burros "from unauthorized capture, branding, harassment or death" and provide them with "humane care and treatment." 40 C.F.R. § 4700.0-2. Legislative history indicates that removing the wild horses should not be done indiscriminately by "using airplanes, helicopter gunships, or from vehicles." H.R. Rep. No. 95-1737, at 4131 (1978).

The BLM's proposed round-up methods for the RMWHR herd include capturing the entire herd of wild horses by utilizing LRADs, which emit an extremely loud and piercing noise, the ADS, which emits electromagnetic radiation that induces a intolerable searing heat sensation, rubber bullets, and helicopter drive-trapping to herd them into traps of portable panels. EA at 3. Gathers conducted in this manner are dangerous and inhumane to the animals being captured, and cause injury or death to a number of wild horses in the herd. In particular, these methods will ultimately lead to the inhumane treatment and death of old, sick, or lame horses that are more vulnerable to injury during these roundups.

These injuries are contrary to the humane treatment contemplated by the statute and regulations. 16 U.S.C. § 1333(b)(2)(A). The chasing of wild horses by helicopter for the purposes of capture is an inhumane method beyond the required "minimal feasible level" of

management, and does not fall under any of the BLM's authorized management activities. These activities are contrary to the definitions of humane and inhumane treatment, which are defined within the BLM's regulations:

(c) 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.

(f) Inhumane treatment means any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community. 43 C.F.R. §4700.0-5.

BLM is not authorized to conduct a helicopter chase of horses not individually identified as excess because it is inhumane, constitutes harassment, and is an abuse of BLM's discretionary management authority under the statute and regulations. While Congress has authorized the use of helicopters for the purposes of the "transportation of captured animals," the statutory language does not contemplate the herding of wild horses to be captured into pens via helicopters, which causes a great deal of stress, suffering and harm to wild horses. EA at 3, n.1 and n.2; *see also* 16 U.S.C. § 1338(a). The round-up methods used by the BLM violate the requirement that these herds will be managed "with the goal of "maintaining free-roaming behavior." 43 C.F.R. § 4700-0.6. These actions must be set aside under the APA because they are arbitrary, capricious, and an abuse of discretion.

In addition, WFHBA instructs BLM that excess horses "shall" be removed by the following means and in the following order and priority: the destruction of old or sick horses, the adoption of as many healthy horses as possible, and the destruction of any remaining healthy horses "in the most humane and cost efficient manner possible." 16 U.S.C. §

1333(b)(2)(A)-(C). BLM will not humanely euthanize excess horses from the RMWHR that are not adopted or sold, but instead will collect them in long-term holding. EA at 1. WFHBA does not permit this holding of the horses by BLM. Specifically, the statute includes this explicit prohibition: "Nothing in this chapter shall be construed to authorize [the agency] to relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist." 16 U.S.C. § 1339. BLM's relocation of excess horses to facilities for indefinite holding periods violates the plain language of Section 1339.

In addition, BLM's use of long-term holding facilities runs counter to the statute's mandate that the agency's management of wild horses occur at the "minimal feasible level." 16 U.S.C. § 1331(a). Long-term maintenance of these horses in holding pens constitutes invasive management that was not contemplated by Congress when WFHBA was passed. Congress noted that "the management of wild free-roaming horses and burros [should] be kept to a minimum…An intensive management program of breeding, branding, and physical care would destroy the very concept that this legislation seeks to preserve." S. Rep. No. 92-242, at 3 (1971). BLM's proposed confinement of these horses in long-term holding facilities subverts the unambiguous intent of Congress expressed in statutory text and legislative history.

BLM's proposed methods would violate the WFHBA and the supporting regulations and therefore are not in accordance with law as required by the APA. The district court abused its discretion because it misapprehended the law with respect to these underlying issues. *Walczak,* 198 F.3d at 730.

II. PLAINTIFFS SHOW A LIKELIHOOD OF SUCCESS UNDER NEPA

The district court abused its discretion when it found that plaintiffs did not demonstrate a likelihood of success because they failed to make the proper inquiry into the basis of the agency's decision. Had the district court made the proper inquiry, it would have found that BLM's decision was arbitrary and capricious because the agency failed to take the required "hard look" at the potential impacts of the plan and its consideration of alternatives was arbitrary and capricious.

Courts do not employ a probability requirement to determine whether plaintiffs have demonstrated a likelihood of success, but rather it is ordinarily enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation. *Monument Realty LLC v. Washington Metro. Area Transit Auth.*, 540 F.Supp.2d 66, 76 (D.D.C. 2008). The record reveals that plaintiffs raised such questions here.

Under NEPA, an agency must perform an environmental impact statement (EIS) unless the agency determines that the proposed action will have no significant impact on the environment. 40 C.F.R. § 1501.4(b). An EA that forms the basis for a FONSI still requires the agency to examine the need for the proposal, alternatives, environmental impact analysis of the proposed action and alternatives, and a listing of agencies and persons consulted. 40 C.F.R § 1508.9(a), (b).

The Supreme Court characterizes these statutory and regulatory provisions as requiring agencies to take a "hard look" at the environmental consequences of the proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976). This circuit says that the hard look test mandates that an agency base its decision on a consideration of the relevant factors

and provides a "convincing statement of reasons to explain why a project's impacts are insignificant." *Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1239 (9th Cir.2005).

An agency may not avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 864 (9th Cir.2005). If an agency opts not to prepare an EIS, it must put forth a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir.1998) (quoting *Save the Yaak Comm. v. Block,* 840 F.2d 714, 717 (9th Cir.1988)).

By focusing agency attention on environmental effects of a proposed agency action, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 (1989).

A. The District Court's Inquiry Was Inadequate And Overly Deferential

District courts reviewing an agency decision must make a "searching and careful inquiry" in order to assure that the agency considered the relevant factors and whether there has been a clear error of judgment. *Marsh,* 490 U.S. at 378. If an agency fails to make a reasoned decision based on an evaluation of the evidence, the agency has acted arbitrarily and capriciously. *Id.*

The district court did not make a "searching and careful inquiry" into the agency's determination that no EIS was required. Instead, the district court accepted BLM's conclusory assertions that the proposed action would have no significant effect on the environment. The district court reached its conclusion by confusing deference owed to an

agency in areas of scientific uncertainty with areas where agencies rely on stale or insufficient evidence.

While the court may not substitute its own judgment for that of the agency, the court is not free to accept the judgment of the agency without proper analysis. Otherwise, the statute would guarantee a rubber stamp of approval to any proposal an agency claims to be compliant with the law. *See Lands Council II*, 537 F.3d at 987.

1. BLM Failed To Consider Impacts of Experimental Methods

The district court abused its discretion by misapprehending the burden of production under NEPA. Opinion at 11 ("Plaintiffs have presented no solid scientific evidence to support these claims"). This reasoning stands NEPA on its head and compels plaintiffs to provide scientific evidence supporting their claims rather than requiring the agency to take the "hard look" as required by the statute. *Kleppe*, 427 U.S. at 410. *See also City of Davis v. Coleman*, 521 F.2d 661, 670-71 (C.A. Cal. 1975) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.").[1] Under *Lands Council II*, the agency does not "have the burden to anticipate questions that are not necessary to its analysis, or to respond to uncertainties that are not reasonably supported by any scientific authority." *Id*. at 1002. But here the impacts from LRADs and the ASD are squarely necessary to the analysis and the uncertainties raised by the plaintiffs are supported by the very authority cited by BLM as explained infra.

[1] The issue in *Coleman* was plaintiff's standing under NEPA but the court's observation is relevant here where it said that "to agree with the district court that a NEPA plaintiff's standing depends on "proof" that challenged the federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *Id*.

In contradiction of NEPA, the district court accepted as a sufficient "hard look" BLM's analysis of the LRAD and the ADS that concluded "to date, there have been no scientific studies analyzing the effect of either the LRAD or the ADS on horses or other wild animals…[and their effects]…are believed to be temporary in humans." EA at 7.

Allowing BLM to rely on conclusory assertions that there will be no substantial environmental impacts from the LRAD and the ADS without any evidence is rejected in this circuit. *Ocean Advocates,* 402 F.3d at 870 (EA was inadequate where Army Corps provided only perfunctory findings and failed to provide quantified or detailed information). BLM's "analysis" does not rise to the level of a "convincing statement of reasons" to explain why a project's impacts are insignificant as required in *Blackwood. Blackwood,* 161 F.3d at 1212.

Far from convincing, BLM's assertions that "there have been no scientific studies analyzing the effect of either LRADs or the ADS on horses or other wild animals is extremely misleading, if not false. EA at 7. The website cited by BLM in footnote one on page three of the EA provides a link to an independent assessment of the safety of the ADS.[2] (hereinafter called "HEAP"). This document discusses the observed permanent damage to the eyes of rabbits as well as damage to the eyes of Rhesus monkeys caused by the ADS. HEAP at 15. To suggest that because the rabbits and monkeys used in the ADS study are not "wild animals" and therefore the assertions made by BLM are technically correct would be disingenuous in the extreme.

Similarly, documentation cited by BLM regarding the LRAD includes a paper by Roman Vinokur explaining that "in the short run, high-intensity noise is dangerous to the auditory and respiratory systems and provokes negative psychological effects (fear and

[2] Independent doctors from a variety of academic institutions contributed to the Human Effects Advisory Panel (HEAP) that investigated the effects of the ADS, see https://www.jnlwp.com/misc/documents/HEAP.pdf

panic) and that ear drum rupture occurs at approximately 160 decibels. EA at 3 n.2 (Roman Vinokur, *Acoustic Noise as a Non-Lethal Weapon*, SOUND AND VIBRATION, Oct. 2004, at 20). This description is related to the effects of the LRAD on humans but it raises obvious questions about the effects on horses and other animals that BLM admits it has not studied. In addition to the effects of the LRAD on horses, the effect of the LRAD on other animals like bats in the RMWHR could be enormous but were left unaddressed in the EA beyond the non-substantial impact assumed by the agency.[3]

By focusing agency attention on environmental effects of a proposed agency action, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh,* 490 U.S. at 371. Here BLM is acting on incomplete information. No reasoned analysis of the use of LRAD or the ADS occurred because the agency did not collect any evidence to analyze. While agencies do have the discretion to rely on their scientists in areas of scientific dispute, extending that discretion to allow agencies to employ methods without any basis to suppose insubstantial impact contravenes the purpose of the statute. This is not about scientific uncertainly discussed in *Lands Council II*, this is about a failure to provide to the public any relevant information regarding these experimental weapons and a failure to consider any of their potential impacts. The impacts of the ADS and the LRAD on horses (or any other part of the environment) are completely absent from BLM's cumulative impact analysis in the EA and the FONSI. This court should not allow BLM to make an end run around the statute by simply failing to study at all the impacts of experimental weapons it plans to use.

[3] According to BLM's final EA, the Rafiki Mountains support on the of the most diverse distributions of bat fauna in the Western united States (EA at 10).

2. BLM's Reliance On Stale Data Violates NEPA

The court also overextended *Lands Council II* when it found that, despite doubts about the data underlying the agency's calculation of the AML, potential destabilization of the horse population was an insufficient concern due to BLM's judgment that the "new population" would fall within the AML. Opinion at 10. NEPA does not ask the court to interpret scientific data but it does require the court to assure that an agency's reliance on data is reasonable and that the data itself is of high quality. 40 C.F.R. 1500.1(b).

This circuit found other impact analyses inadequate when agencies relied on stale data. In *Lands Council v. Powell,* the court found the Forest Service's impact predictions were inadequate because they were based on stale habitat data. *Lands Council*, 395 F.3d 1019, 1032 (9th Cir. 2005)(*Lands Council I*). The court in *Lands Council I* did not require that all data relied upon by the agency be immediate, but concluded that the six-year-old fish count was too outdated to carry the weight assigned to it. *Id*. The survey data relied on by BLM in this case is of the same stale vintage – six to seven years old. (opinion at 6) *See also Seattle Conservation Soc. v. Espy,* 998 F.2d 699, 704 (9th Cir. 1993) (because EIS rested on "stale scientific evidence" and contained an incomplete discussion of environmental effects and false assumptions, it was proper to set aside the EIS).

Lands Council II leaves undisturbed the holding of both *Lands Council I* and *Espy* to the extent those cases deal with stale data. *Lands Council II* 395, F.3d at 1001. *See also* Keith G. Bauerle, The Ninth Circuit's "Clarifications in Land's Council v. McNair: Much Ado About Nothing?, 2 Golden Gate U. Envtl. L.J. 203, 232 (2009). The *Lands Council II* court clarified that NEPA does not require courts to choose among scientific studies nor does it require agencies to explain every possible scientific uncertainty. *Id*. at 988. Unlike *Lands*

Council II, this case is not about disputed science and competing expert studies and plaintiffs to not ask the court to weigh the substance of science on each side. *Id*. at 1002. Instead, the question in this case is whether it was reasonable for the agency to rely on stale data when more recent data taken after the drought ended would have been relevant. This court should follow this circuit's precedent and reject BLM's reliance on stale data.

3. BLM Failed To Conduct A Proper Alternatives Analysis

BLM's consideration of alternatives was arbitrary and capricious. While an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS, an EA still must still include a brief discussion of reasonable alternatives. *Native Ecosystems Council,* 428 F.3d at 1246; 40 C.F.R. § 1508.9(b). Alternatives are judged by the reasonableness of their substance vis-à-vis the purpose of the proposed action. *Id*.

In this case, BLM's stated purpose is the "immediate reduction in herd size in order to preserve a TNEB, balance sex ratios, preserve age classes, and collect genetic data." EA at 5. Even if such a narrow purpose is valid under the WFHBA, the alternatives analysis was still insufficient.

BLM claimed that using the very same method it successfully used just three years ago – bait trapping – did not meet the purpose because it would take "several months." *Id*. While it may take several months to capture *all* the horses, a reduction in herd size *would* occur immediately. It would begin as soon as the very first horses were captured.

In addition, the agency gave no consideration at all to using helicopter drive trapping exclusively – a method BLM also used successfully during three different captures over the past 12 years. EA at 1. Nor did BLM consider using riders on horseback which has apparently worked for decades. *Id*. While the use of helicopters is problematic due to the

unnecessary stress they cause, the fact that BLM did not consider their exclusive use or combined with bait-trapping or traditional horseback roundups is indicative of the lack of serious consideration BLM gave to alternatives.

The reason stated for rejecting bait trapping is not reasonable. Additionally, the agency's failure to consider the obvious alternatives of proven past methods was arbitrary and capricious. Instead, the agency opted to defend the use of experimental military technology never before used in this type of application and did not attempt any analysis of the potential impact. The use of new and untested technologies is a relevant factor in a NEPA analysis. See *Winter v. NRDC, Inc*., 129 S. Ct. at 376 ("We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment").

The deference owed to agencies in the consideration of alternatives even in areas of agency expertise is not unlimited. *Brower v. Evans,* 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt,* 958 F.Supp. 670, 679 (D.D.C.1997)). Deference is not owed when the agency has, as BLM has here, completely failed to address some factor, consideration of which was essential to making an informed decision. *Id.*

III. BALANCE OF HARDSHIPS FAVORS OF PLAINTIFFS

Plaintiffs demonstrated that the balance of hardships tips in their favor, indicating that this Court should issue injunctive relief. *Lands Council,* 537 F.3d at 1003. The district court abused its discretion in denying the injunction due to the court's clear error in judgment regarding the balance of hardships in this case.

Both procedural and direct hardships weigh in favor of the plaintiffs and against those hardships claimed by the BLM. All of the hardships weighing in favor of the plaintiffs are imminent because the Gather Plan is scheduled to begin in February of 2010.

A. Procedural Hardships Favor Injunctive Relief For Plaintiffs

Injunctive relief is necessary and proper to prevent BLM's Gather Plan from proceeding because the plan, as proposed, violates WFHBA, NEPA and the supporting regulations for both statutes. These procedural injuries, while not considered by the district court, are substantial as they provide critical context in which the direct injuries to the horses and other animals in the Rafiki Range should be considered. To allow the agency to rely on the argument that injunctive relief issued now (in response to the agency's failures) would balance the hardships in their favor frustrates congressional intent in both statutes, and creates a perverse exception to compliance essentially manufactured by the agencies own inadequate planning.

Congress passed the WFHBA explicitly to protect the wild horse population from the kinds of harassment that would result from the BLM plan as described supra. Injury to the horses would be extended to all Americans because those horses enrich the lives of all Americans as symbols of the historic and pioneer spirit of the West and they contribute to the diversity of life forms within the Nation. 16 U.S.C. § 1331. Permitting BLM to violate the WFHBA is nothing less than an injury to the rule of law.

Similarly, the procedural injury implicit in the agency's failure to prepare an EIS is the creation of a risk that serious environmental impacts will be overlooked. *Coleman*, 521 F.2d at 671. As evidence of the court's warning in *Coleman*, violating NEPA poses a special problem here because it makes the direct hardships harder to weigh. Not all of the potential

direct injuries are known due to BLM's failure to investigate all the impacts of LRADs and the ARD in the first place.

Allowing BLM to escape its duty under NEPA and thereby also escape a full balancing of the hardships for an injunction undermines the purpose NEPA and makes it more likely that BLM will "act on incomplete information, only to regret its decision after it is too late to correct." *Marsh,* 490 U.S. at 371.

According to the Supreme Court, "a district court cannot…override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. *United States v. Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711, 1721 (2001). "Once Congress… has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." *Id*. (citing *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194 (1978). Courts of equity cannot consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction," *Id*. Just as in the Controlled Substances Act considered in *Oakland Cannabis* and the Endangered Species Act considered in *Tennessee Valley Authority*, Congress has already struck the balance in the WFHBA and NEPA – harassment of the horses, improper removal and the failure to submit an EIS when required are behaviors prohibited by Congress. The court is not free to disregard those requirements in considering equitable relief.

B. Direct Hardships Favor Injunctive Relief For Plaintiffs

Balancing hardships in the NEPA context was recently examined by the Supreme Court in *Winter v. Natural Res. Def. Council, Inc.,* 129 S.Ct. 365, 376 (2008). In *Winter*, the court found that the Navy's interests in being prepared for war strongly outweighed the

plaintiffs interest in protecting various marine species. But the weighty considerations of war and technologies "essential to national security" are not at issue in this case as they were in *Winter*. *Id*. at 378. Nor has the CEQ granted the BLM an emergency exception to NEPA's requirements as it did for the Navy in *Winter*. *Id*. at 367. Nor have the methods proposed by BLM here been in use for 40 years like the sonar at issue in *Winter*. *Id*. at 381.

In stark contrast, the hardships resulting from an injunction here include potential degradation of the Rafiki Range, soil erosion and possible starvation if forage is permitted to decline to the extent the horses cannot find sufficient food to support their numbers. Opinion at 11-12. These harms are not quantified, not certain to occur and not necessarily a consequence of injunctive relief.

Starvation was only mentioned in the EA in relation to the "no action" alternative. EA at 7-8. This hardship is speculative and assumes that an injunction now means that no gather plan will ever be implemented before horse populations grow so large as to exceed carrying capacity. This is unrealistic. Plaintiffs are not opposed to *any* management of the horses. The question in this case is whether BLM can use harassing experimental weapons without any study of their potential effects to prematurely remove horses from the range before excess animals have been properly identified. An injunction would not preclude the agency from using alternatives that do not require an EIS or actually performing the required EIS for the alternatives the agency prefers. There is no evidence in the record to suggest that in the time it would take to pursue either of those options, the Rafiki Range would see significant increase in damage to rangeland, erosion of soils or that a single horse would die of starvation.

The balance of hardships on the Plaintiffs' side strongly favors injunctive relief. The horses protected by the WFHBA will be subjected to "intolerable searing heat sensations" and be exposed to focused sound waves designed to instill panic. EA at 3, n.1 and n.2. In addition to these certain consequences, the LRADs and the ADS can cause permanent damage to the eyes and are dangerous to respiratory systems and ears. *Id*. If this Court does not grant an injunction, the BLM will be forced to place these horses in long-term holding facilities in direct violation of WFHBA and the public interest. 16 U.S.C. § 1331(a); S. Rep. No. 92-242, at 3 (1971); *see also Colorado Wild Horse and Burro Coalition, Inc. v. Salazar,* 639 F.Supp.2d at 97. The Field Manager of the RMWHR estimated that up to six horses could die during the capture operation at issue here. Opinion at 8.

In addition, the illegal removal of these horses will greatly impair the ability of Plaintiffs and others to observe the herd in their natural surroundings when all the horses are removed during the proposed gather. Plaintiffs do not base their injury on economic loss but on their aesthetic ability to enjoy wild, free-roaming horses in their natural surroundings. A person who observes a particular animal threatened by a federal decision is facing perceptible harm since the very subject of his interest will no longer exist. *Colorado Wild Horse,* 639 F.Supp.2d 87, 92 (D.D.C. 2009) (*citing Lujan v. Defenders of Wildlife,* 594 U.S. 555, 566 (1992).

The combination of these procedural and direct hardships tips the balance in favor of an injunction. The district court erred because of its error in judgment in assessing this balance and should be reversed.

CONCLUSION

This court should reverse the district court on each issue presented and enjoin BLM from proceeding with the Gather Plan as currently drafted.

Respectfully submitted,

Team 15

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January 4, 2010