Civ. App. No. 09-1968

UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

DEBORAH RUBIN, an individual, and **THE HORSE PEOPLE**, a California not-for-profit corporation

Plaintiffs – Appellants

v.

KEN SALAZAR, in his capacity as Secretary of the Department of the Interior, and **ROBERT ABBEY**, in his capacity as the Director of the Bureau of Land Management

Defendants – Respondents

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION
THE HONORABLE SYBIL K. MALI

BRIEF FOR RESPONDENTS

Team 17

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QUESTIONS PRESENTED

1. Did the court below err when it held that Appellants failed to show a likelihood of success on the merits that BLM's wild horse gather plan violates the Wild Free-Roaming Horse and Burro Act?

2. Did the 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?

3. Did the court err when it held that the balance of hardships did not favor Appellants?

JURISDICTION

Appellants brought this case under the Wild Free-Roaming Horse and Burro Act (WHA or "the Act"), 16 U.S.C. § 1331 *et seq.*, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 706. The district court had original jurisdiction under 28 U.S.C. § 1331 and on October 1, 2009 denied Appellants' motion for a preliminary injunction. *Rubin v. Salazar*, Civ. No. 09-1968 (E.D. Cal. 2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

In 1969 the Secretary of the Interior designated 36,000 acres in northeastern California and northwestern Nevada as the Rafiki Mountain Wild Horse Range (RMWHR). EA at 2.[1] In 1992, pursuant to the Wild Free-Roaming Horse and Burro Act the Bureau of Land Management (BLM) determined that the optimal population for that area is between 85 and 105 horses. *Id.* at 1. By 1993, the RMWHR was experiencing a major drought, which significantly compromised the herd's food supply. *Id*. at 2. The herd has grown to 190 horses, and its continued grazing has

[1] "EA" refers to the Environmental Assessment DOI-BLM-CA-C051-2009-72-EA, which has been submitted to this Court as part of the administrative record.

increased the effects of the drought. *Id.*

Acting pursuant to the WHA, and to prevent further deterioration of the range, the BLM now plans to remove 100 horses for adoption or sale. The BLM will gather the horses using helicopter drive trapping, Long Range Acoustic Devices (LRAD), rubber bullets, and the Active Denial System (ADS). *Id.* at 3-4. The BLM plans to gather the entire herd and select 100 horses which are best suited for permanent removal. *Id*. at 3. The entire herd will be *temporarily* detained at the Richfield Corrals Facility so that BLM scientists can determine each member's genetic profile and ensure that the 90 horses selected for return to the range will be self-sustaining. *Id.*

Pursuant to the National Environmental Policy Act, the BLM prepared an environmental assessment (EA), assessing the environmental impacts of the gather and removal. The EA culminated in a Finding of No Significant Impact (FONSI), and the BLM determined that a more-detailed Environmental Impact Statement (EIS) was not necessary. DR at 3.[2]

In September 2009, Appellants—The Horse People and Deborah Rubin, president of the Horse People—filed this action under the APA to enjoin the gather and removal, which is scheduled for February 2010. Appellants allege violations of the WHA and NEPA and request a preliminary injunction. The district court denied Appellants' request, finding that Appellants were not likely to succeed on the merits of either claim and that the balance of hardships did not tip sharply in their favor.

SUMMARY OF THE ARGUMENT

Appellants are unlikely to succeed on the merits of the WHA and NEPA claims and an preliminary injunction is unavailable. First, this Court should reject Appellants' claim that the

[2]"DR" the Decision Record and Finding of No Significant Impact, CA-C010-2009-035, which has been submitted to this Court as part of the administrative record.

BLM's gather plan is an illegal "removal" under the WHA. The plain language of the Act, using the term "remove" consistently to refer to permanent action and as a remedy for overpopulation, shows that the term refers only to permanent action. The Court should also reject their challenge to the BLM's methodology for determining excess numbers. Appellants' claim that BLM ignored current climatic data, but the Agency reasonably based its decision on the area's long-term trend, well within its discretion. Likewise, the Court should reject Appellants' claim that the use of helicopter drive trapping, rubber bullets, ADS, and LRAD is inhumane under the Act. The WHA does not require the most humane form of capture and seeks a compromise between the needs of government and the sensitivities of the animals themselves. As such, the trial court did not abuse its discretion to refuse relief.

Second, the EA complies with NEPA and the finding of no significant impact is not arbitrary and capricious. The EA's purpose and need is reasonable, and the EA appropriately narrows a wide range of alternatives by applying the purpose and need. Then, the EA takes the requisite "hard look" at the proposed action's cumulative impacts and effects, including the effects of the LRADs and ADS. The BLM's ultimate decision that the proposed action will not have a significant affect on the environment is not arbitrary and capricious.

Finally, the district court erred by applying the "serious-questions-plus-sharply-tipped-balance-of-hardships" standard rather than the standard set out in *Winter v. Natural Resources Defense Council*, --- U.S. ----, 129 S.Ct. 365 (2008). Nevertheless, this was not reversible error because the court denied relief by a more lenient standard than is required and the judgment should be affirmed.

ARGUMENT

I. <u>Standard of Review.</u>

The district court's denial of preliminary relief is reviewed for abuse of discretion. *The Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (*en banc*). A district court "abuses its discretion in denying a preliminary injunction if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact." *Id.*

A preliminary injunction is an "extraordinary and drastic remedy[;] it is never awarded as of right." *Munaf v. Geren*, --- U.S. ----, 128 S.Ct. 2207, 2218 (2008) (internal quotation omitted). To obtain a preliminary injunction, the plaintiff must make a "clear showing" that he is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, --- U.S. ----, 129 S.Ct. 365, 374, 376 (2008). The plaintiff must establish a true "likelihood" of success; it is not sufficient that the legal issues presented are "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Munaf*, 128 S.Ct. at 2219 (internal quotation omitted).

Regarding whether Appellants are likely to succeed on the merits, agency action under the WHA and NEPA is reviewed under the APA, 5 U.S.C. § 706(2)(A). *Animal Protection Institute v. Hodel*, 860 F.2d 920, 922 (9th Cir. 1988) (WHA); *Lands Council*, 537 F.3d at 988 (NEPA). Under the APA, agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5. U.S.C. § 706(2)(A). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one[; t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other*

grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977); *accord Lands Council*, 537 F.3d at 988. As such, refusal to enjoin agency action may be reversed only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made," then the court must uphold the agency's action. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *see City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004).

Further, the court generally must be "at its most deferential" when reviewing scientific judgments and technical analyses within the agency's expertise. *See Balt. Gas & Elec. Co.*, 462 U.S. at 103. It should not "act as a panel of scientists that instructs the [agency] . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty." *See Lands Council*, 537 F.3d at 988. The court should also "conduct a 'particularly deferential review' of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Id.* at 993 (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C.Cir. 2006)). And " '[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" *Lands Council*, 537 F.3d at 1000 (*quoting Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

II. <u>Legal Framework.</u>

The Secretary of the Interior, through the BLM, "manage[s] the public lands under

principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). In 1971, Congress passed the Wild Free-Roaming Horse and Burro Act charging the Secretary to manage wild horses in "a manner[ ]designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a). The WHA was originally enacted to preserve dwindling populations, which by 1971 had suffered greatly from human depredation. To that end, the WHA provides criminal penalties for illegal "capture, branding, harassment, or death," and states that the Secretary's management activities should be at the "minimal feasible level." 16 U.S.C. §§ 1331, 1333(a). However, recognizing that herd numbers had bloomed, and overpopulation had substantially harmed the range, Congress amended the WHA in 1978 to give the Secretary greater discretion to manage wild horses for the benefit of other use-values. *See* H.R. Rep. No. 95-1122, at 23 (1978).

To maintain appropriate, non-detrimental populations, the BLM manages wild horses in localized herd management areas (HMAs), which are "established in accordance with broader land use plans." *Fund for Animals v. U.S. BLM*, 460 F.3d 13, 15 (D.C.Cir. 2006), *citing* 16 U.S.C. § 1332(c); 43 C.F.R. § 4710.3-1.[3] For each HMA, the BLM sets an "appropriate management level" (AML), defined to be the "optimum number of wild horses which results in a thriving natural ecological balance and avoids deterioration of the range." *Animal Protection Institute of America*, 109 I.B.L.A. 112, 119 (1989) (internal quotes omitted).[4] The Secretary is afforded great deference in defining AMLs and in determining when excess numbers of wild horses exist. *See* 16 U.S.C. § 1333(b)(2)(iv). Excess horses are defined in part as those "which

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[3]*See also Cloud Foundation, Inc. v. Kempthorne*, 2008 WL 2794741, at *10 (D.Mont. July 16, 2008).

[4]The Interior Board of Land Appeals is established in 43 C.F.R. § 4.1(b)(3) and "embraces the final decisionmaking authority with respect to appeals from decisions of BLM regarding the use of the public lands and their resources." *Animal Prot. Inst. of Am.*, 118 I.B.L.A. 20, 25 n.3 (1991). Interpretations issued by the IBLA in the course of adjudication are given the degree of deference afforded under *Chevron , U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Akootchook v. U.S.*, 271 F.3d 1160, 1166 n.32 (9th Cir. 2001).

must be removed from an area in order to preserve and maintain a thriving ecological balance and multiple-use relationship in that area." *Id.* § 1332(f). When wild horses exceed the carrying capacity of the range, the BLM "shall immediately" remove them and cannot allow the range to further deteriorate. *Id.* § 1333(b)(2); 43 C.F.R. § 4710.3-4.

Before removing excess horses pursuant to an AML, the BLM must comply with the NEPA. NEPA was passed to: "(1) insure that agencies carefully and fully contemplate the environmental effects of their actions, and (2) insure that the public has sufficient information to participate in the agency's decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's mandate is procedural; the statute "does not contain substantive environmental standards, nor does the Act mandate that agencies achieve particular substantive environmental results." *Bering Strait Citizens v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008).

NEPA requires federal agencies to prepare an environmental impact statement before undertaking a major federal action that will have a significant affect on the quality of the human environment. 42 U.S.C. § 4332(2)(C). If an agency is uncertain whether an action will have a significant affect on the environment, the agency may begin the environmental review process by preparing an environmental assessment. 40 C.F.R. §§ 1501.3, 1508.9. If the conclusion of the EA is that the action will not have a significant affect on the environment, then the EA should culminate in a finding of no significant impact. *Id.* §§ 1501.4(e), 1508.13. Otherwise, an EIS must be prepared. *Id.* § 1501.4(c).

III. Appellants Have Failed to Make a Clear Showing That They Will Likely Succeed on The Merits of Their Wild Horses Act Claims.

Appellants advance three arguments that the BLM's gather plan violates the WHA. In each, they fail to clearly show that they will likely succeed on the merits.

A. Appellants Have Not Shown That the BLM's Plan to Temporarily Detain the Rafiki Herd at the Richfield Facility is a "Removal" Under the WHA.

The WHA directs the BLM to "immediately remove excess animals from the range." 16 U.S.C. § 1333(b)(2). Conversely, the WHA does not expressly allow the BLM to remove non-excess horses. Appellants allege that the BLM's plan to gather the Rafiki Herd in a temporary holding area, including those which will return to the range, contravenes the WHA. Appellants rely in part on *Colorado Wild Horse and Burro Coalition, Inc. v. Salazar*, 639 F.Supp.2d 87 (D.D.C. 2009). *See Rubin*, No. 09-1968, slip op. at 6. However, interpretation "begins with the plain language of the statute," and, when clear, this Court "must enforce it according to its terms." *Jimenez v. Quarterman*, --- U.S. ----, 129 S.Ct. 681, 685 (2009). The WHA does not define "remove," but its plain language shows that the word refers only to permanent elimination from the range.

Significantly, the WHA nowhere uses the term "remove" to refer to *temporary* restraint. Instead, it consistently uses the term to refer to permanent elimination from the range, the WHA's primary method for attaining a thriving ecological balance. In particular, 16 U.S.C. § 1333(b)(2) provides, referring to the BLM's mandate to remove excess horses, that "[s]uch *action* shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving ecological balance to the range…." *Id.* § 1333(b)(2)(iv). That "order and priority" is the *destruction* of old, sick, or lame animals; the "capture and remov[al]" of additional excess animals for *adoption*; and the *destruction* of the remainder of excess animals that are not adoptable. *Id.* § 1333(b)(2)(iv)(A)-(C). Here, Congress associated the word "remove" with actions of permanent elimination, indicating that it does not refer to temporary detention. *See Sierra Club v. U.S. Forest Service*, 93 F.3d 610, 613 (9th Cir. 1996) ("Under the doctrine of *noscitur a sociis*, a word is known by the company it keeps ... This rule

we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.") (internal quotations omitted). Similarly, removal in general, like destruction and adoption, is consistently referred to as a method to attain appropriate management levels, which requires permanent elimination. *See e.g.* 16 U.S.C. § 1333(b)(1) (AML's are to be "achieved by" removal.).

In addition, the Act expressly contemplates capture and detention of wild horses off-range short of removal. The Act permits actions "*such as* sterilization," which requires capture and detention for a considerable time and removal from the range to perform the procedure.[5] The BLM's plan to detain the herd to obtain genetic profiles is a natural extension of that open-ended authority, which includes management of genetic health. *See* 43 C.F.R. § 4700.0-6(a) (stating that BLM will manage herds as "self-sustaining populations."); *Wild Horse Organized Assistance*, 172 I.B.L.A. 128, 135 (2007). (Interpreting the phrase "self-sustaining" to include the concept of "management-induced" genetic diversity.).[6]

Finally, Appellants' reliance on *Colorado Wild Horse* is misplaced. There, the district court held that the BLM could not place non-excess horses in "private adoption or long-term care." *Colorado Wild Horse*, 639 F.Supp.2d at 96 (quoting federal defendant's answer). For the court, the BLM's statutory authority to "manage" wild horse populations pursuant to 16 U.S.C. §

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[5]*See* BUREAU OF LAND MANAGEMENT, BUREAU OF LAND MANAGEMENT WILD HORSE AND BURRO PROGRAM: ALTERNATIVE MANAGEMENT OPTIONS 9 (2008), *available at* www.equinewelfarealliance.org/uploads/BLMFOIA.pdf (last visited 12-29-09) (Noting that sterilization involves removal of wild horses from their range and return after the procedure).

[6]The herd will be detained at the Richfield Corrals Facility, which may be off its historic range. *See* EA at 4. This superficially implicates the WHA's prohibition that "[n]othing in [the Act] shall be construed to authorize the Secretary to *relocate* wild free-roaming horses … to areas of the public lands where they do not presently exist." 16 U.S.C. § 1339 (emphasis added). However, "relocate" means "*establish* or lay out in a new place," which, again, implies permanent removal. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1919 (2002) (emphasis added). And legislative history confirms. Section 1339 bolsters the Act's mandate that wild horses 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 (emphasis added). These provisions together represent Congress' initial rejection of a range "set-aside" concept, where horses would have been permanently managed in refuges segregated from their original range. *See* S. Rep. No. 92-242, at 3 (1971).

1333(a) is not so broad to permit permanent removal outside the "order and priority" prescribed by 16 U.S.C. § 1333(b)(2)(iv)(A)-(C) and described above. However, assuming that *Colorado Wild Horse* was correct, that still leaves the question of what is a removal in the first place. *Colorado Wild Horse* does not answer that question and Appellants' reliance is inappropriate.

B. The BLM Did Not Violate the WHA When it Relied On Long-Range Data Material Because It Need Not Seek Further Information to Make an "Excess" Determination.

Second, Appellants allege that the BLM acted arbitrarily and capriciously when it found that 100 members of the Rafiki Herd are "excess" because that was "based on an outdated study and is unsupported by the present condition of the range." *Rubin*, No. 09-1968, slip op. at 6. (referring to studies from 2002 and 2003). However, the BLM based its decision on long-term climatic data, and the district court did not abuse its discretion by deferring to that methodology.

First, the bare fact that the BLM relies on studies from 2002 and 2003 does not render its decision arbitrary and capricious. The WHA outlines the information that the BLM may rely on to determine excess numbers, and it expressly does *not* mandate that any *must* be used. Specifically:

> Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning … ; (iii) information contained in court ordered environmental impact statements … ; and (iv) such additional information as becomes available to him from time to time, including that information developed in the research study mandated by this section, *or in the absence of the information contained in (i-iv) above on the basis of all information currently available to him, that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals*, he shall immediately remove excess animals from the range so as to achieve appropriate management levels.

92 Stat. 1809 § 14(b)(2); 16 U.S.C. § 1333(b)(2) (emphasis added). The plain language of this section shows that while the BLM must consider the enumerated information if available, "in the final analysis" its decision rests "on the basis of whatever information [it] has at the time of [its] decision." *American Horse Protection Association, Inc. v. Watt*, 694 F.2d 1310, 1318 (D.C.Cir.

1982). As such, while the BLM's *reasoning* is evaluated under the APA, it "may not be ordered to undertake further fact-investigation or engage in further fact-finding." *Id*. at 1319 n.42.

Second, the district court did not abuse its discretion when it held that the BLM reasonably relied upon the information available. The BLM consistently states that removals "must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors." *Thomas M. Berry*, 162 I.B.L.A. 221, 224 (2004). Further, removals must be pursuant to an AML initially set and reasonably supported to achieve a thriving natural ecological balance. *See Dahl v. Clark*, 600 F.Supp. 585, 595 (D.Nev. 1984). However, interpreting its mandate to immediately remove excess horses, the BLM has stated that it need not "wait until the range is damaged before it takes preventive action; proper range management dictates herd reduction before the herd causes damage to the rangeland[and] if the record establishes current resource damage or a *significant threat* of resource damage, removal is warranted." *Redwing Horse Sanctuary*, 148 I.B.L.A. 61, 64 (1999) (emphasis added).

Here, the BLM's gather plan will achieve herd numbers set by the Rafiki Mountains Herd management Plan and the Hawk Lake Resource Area Management Plan, designed to manage for a slight upward trend in range health. EA at 1. Further, the BLM explains that "[t]he area has experienced years of drought; between 1993 and 2005, only four years had above average precipitation levels." EA at 2, *citing* RMWHR Evaluation 2008, Western Regional Climate Center 1993-2005. During these years, wild horses were allowed to remain on the range and exacerbated its deterioration, which would otherwise have occurred at a slower rate. EA at 2. The BLM has documented that as of 2006, current data showed that the range did not have the capacity to sustain the current population over the long term. *Id*. (citing Data from the Natural

Resource Conservation Service's *Rafiki Mountains Wild Horse Range Survey and Assessment* (2004) and *Interagency Rafiki Mountains Wild Horse Range Evaluation* (February 2006)). As of 2007, a downward trend in ecological condition was documented in the lower areas of the range, and heavy forage consumption continues to be documented. EA at 2.

Appellants correctly point out, and the BLM acknowledges, that precipitation in 2008 and 2009 have experienced significantly above average precipitation. *Id*. However, consistent with its mandate to ensure a "thriving" ecological balance, the BLM's methodology is to manage the range for long-term health. *See Animal Protection Institute of America*, 118 I.B.L.A. 63, 74-75 (1991) ("Past experience in range management demonstrates that … it is often necessary to reduce animal population to below that which could be supported by the remaining forage to give the range an opportunity to recover from the damage."). Consistent with long-term planning, the BLM here relies on the area's decennial climatic trend and not current, outlying data. Finally, the district court was correct not to upset this methodology; under the APA, a court should not "'make fine-grained judgments" about the worth of scientific studies. *Lands Council*, 537 F.3d at 981. For that reason, its judgment should be upheld.

C. Helicopter Drive Trapping, ADS, LRAD and Rubber Bullets Are Not Inhumane Methods of Capture Because They Cause Temporary Distress.

Finally, Appellants allege that helicopter drive trapping and rubber bullets, and the Active Denial System and Long Range Acoustic Devices, are inhumane means of capture and violate the Act. While the BLM has discretion to manage excess wild horses, it cannot capture them in an inhumane way. *See* 16 U.S.C. §§ 1333(b)(2)(B), 1338a. However, Appellants did not persuade the district court that they will likely succeed, and the court did not apply an erroneous legal standard or base its decision on clearly erroneous findings of fact.

Helicopter drive trapping consists of herding horses with a helicopter into chute-traps and

is considered more humane than alternatives such as bait trapping. *See American Horse Protection Association v. Frizzell*, 403 F.Supp. 1206, 1218 (D.Nev. 1975); EA at 5 (describing methods). Appellants are concerned that animals may be injured or experience "capture myopathy," a feeling of despondence, and these risks are real. *Rubin*, No. 09-1968, slip op. at 8. However, the Act expressly provides that, "[i]n administering this chapter, the Secretary may use or contract for the use of helicopters . . . ." 16 U.S.C. § 1338a. Further, that use is exempted from 18 U.S.C. § 47(a), otherwise prohibiting the use of "aircraft or[ ]motor vehicle[s] to *hunt*, for the purpose of *capturing or killing*, any wild unbranded horse, mare, colt, or burro running at large on any of the public lands . . . ." 18 U.S.C. § 47(a) (emphasis added). In short, Congress addressed, and accepted, the effects of drive trapping and Appellants' concerns are moot.

As for the use of ADS, LRAD, and rubber bullets, the BLM's use of helicopters, to which these devices will be attached, is restricted only in that it be "in accordance with humane *procedures* prescribed by the Secretary." *Id*. (emphasis added). Like all gathers, the BLM will follow its Standard Operating Procedures: it will scout the terrain prior to the gather to determine if the presence of a veterinarian is needed; the animals will not be driven to exhaustion and runs will be paced to ensure that foals are not left behind and orphaned; and if animals are injured they will be restrained and treated, or humanely euthanized.[7] The BLM will employ trained sharpshooters to ensure that rubber bullets do not harm sensitive areas. EA at 4.

Appellants understandably fear the direct effects of ADS, LRAD and rubber bullets. ADS is a technology that uses millimeter wave energy to produce a transient, intolerable heat sensation that prompts a universal flee-response. EA at 3; SUSAN LEVINE, THE ACTIVE DENIAL SYSTEM: A REVOLUTIONARY, NON-LETHAL WEAPON FOR TODAY'S BATTLEFIELD (2009),

[7]For one of various summaries of the BLM's Standard Operating Procedures, see http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/nepa/wild_horse_and_burros/calico.Par.39880.Fil.dat/Appendix A Gather Operation SOPs.pdf (last visited Jan. 1, 2009).

available at https://www.jnlwp.com/public_affiars/adspaper.pdf (last visited Dec. 23 2009) [hereinafter LEVINE, THE ACTIVE DENIAL SYSTEM]. However, millimeter waves are incapable of penetrating the body and can be focused to effect only small areas. *Id.* at 6. As well, long-term effects are well documented in humans and primates; ADS has an almost null chance of prolonged surface irritation, has no effect on the eyes, and does not cause cancer or harm reproductive organs. *Id.* The sensation ends almost immediately at the end of exposure, and it is a less intrusive management tool than other forms of herding, such as helicopter-assisted roping, where animals may be physically restrained for up to an hour.

Similarly, LRAD is a technology that "transmit[s sound] in a highly directional beam." EA at 3. It is capable of transmitting incredibly loud noises, and in this case it will be used to transmit a tone similar to a loud smoke detector. EA at 4. As the BLM has explained, LRAD would be used much like a helicopter itself in drive trapping; it would scare the animals to flee in the direction of a trap. *Id*. However, there is no indication that LRAD, unlike a helicopter, would need to be used to continuously distress the animals during the roundup.

The district court held that the temporary effects of ADS and LRAD do not likely violate the standard of care mandated by the WHA, and this is supported by the WHA. *Rubin*, No. 09-1968, slip op. at 6. While the WHA does not define humane treatment, the BLM provides that it "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(e). The Agency has subsequently made clear that this does not preclude experimental practices. *See American Horse Protection, Inc.* 134 I.B.L.A. 24, 35 (1995) (Approving the BLM's use of experimental microchip instead of lip tattoo.). As such, the district court correctly focused on the level of "harassment," which includes the concept of stress and which—though

nowhere defined—Congress has indicated means "substantial harm" or activity that, "although not immediately causing substantial harm, would have a *cumulatively* detrimental effect on the health and welfare of the animals." H.R. Rep. No. 92-681, at 2 (1971) (Conf. Rep.) (emphasis added). Consistent with this, the court found that these technologies are not likely prohibited because they "do not cause the animals more than momentary distress." *Rubin*, No. 09-1968, slip op. at 8.

As well, the district court reiterated Congress' admonition that the Rafiki horses are wild range animals, and their standard of care must be less receptive to ordinary notions of kindness. *Id.*[8] Indeed, Congress has never prescribed a universal standard for humane treatment of animals, preferring isolated standards that balance the needs of government and industry against the sensitivities of the animals themselves. *See e.g.* 7 U.S.C. § 2132(g) (Excluding "horses not used for research purposes" from Animal Welfare Act); *id.* §§ 1901-1906 (Humane Slaughter Act, excluding chickens and other birds); 16 U.S.C. § 80502 (permitting confinement of animals in commercial transit for up to 28 hours, but no more); *id.* § 742j-1(b)(1) (Excluding federal wildlife and land management programs from prohibition on airborne hunting and capture). The same is true of the WHA. While the Act requires the BLM management actions to be at the "minimal feasible level," it expressly does *not* require the most humane level of capture available. *See* 16 U.S.C. § 1333(2)(A),(C) (mandating destruction "in the *most* humane manner possible.") (emphasis added); *cf. id.* § 1333(2)(B) (requiring only that capture be "humane."). For these reasons, the district court did not base his holding upon an erroneous legal standard, and it did not make clearly erroneous findings of fact.

[8] *See* S. Rep. No. 95-112, at 23 (1978) (While "callous," "[m]an's dominant presence and alterations of nature in almost all areas of the globe have necessitated that he control certain wildlife populations to prevent habitat destruction and promote a balanced, if artificial, environment.").

IV. <u>The BLM Complied with NEPA</u>.

The BLM produced a thorough, fourteen-page EA plus a well-reasoned four-page Decision Record and FONSI. The EA identifies the purpose and need of the project and considers eight alternatives for achieving the purpose and need. After narrowing the alternatives to the proposed action, the EA takes a hard look at the action's effects and cumulative impacts. In light of the effects and cumulative impacts, the BLM decided that the proposed action will not have a significant affect and issued a FONSI. Appellants are not likely to succeed on the merits of their NEPA claim because the EA complies with NEPA and the BLM's decision to issue a FONSI is not arbitrary and capricious.

A. The EA's Purpose and Need is Reasonable

A NEPA analysis must identify the project's purpose and need. 40 C.F.R. § 1502.10, .13. The court evaluates "an agency's statement of purpose and need under a reasonableness standard." *Nat'l Parks and Conservation Ass'n v. BLM*, 586 F.3d 735, 746 (9th Cir. 2009) (internal quotations omitted). "Agencies enjoy considerable discretion to define the purpose and need of a project." *Id.* (internal quotations omitted).

The EA explains that the purpose and need of the project is "to immediately manage for" a thriving natural ecological balance (TNEB) "over the next several years," EA at 2, and the Decision Record further explains that the "[e]xcess wild horses need to be removed from the RMWHR to achieve a TNEB between wild horse populations, wildlife, vegetation, and available water, and to maintain multiple use relationships," DR at 1. The purpose and need of achieving a population that is consistent with the TNEB not only is reasonable but also is mandated. Section 3(b)(2) of the WHA requires the BLM to "immediately remove excess animals from the range so as to achieve appropriate management levels" where the BLM "determines . . . that an overpopulation exists on a given area of the public lands and that action is necessary to remove

excess animals." 16 U.S.C. § 1333(b)(2). Further, such action must be taken "until all excess animals have been removed so as to restore a thriving natural ecological balance to the range[] and protect the range from the deterioration associated with overpopulation." *Id.* This statutorily-mandated purpose and need is reasonable: causes of an imbalance—excess horses in this case—must be removed to achieve a thriving, balanced ecosystem.

Additionally, the BLM's selection and analysis of data, which led to the conclusion that the RMWHR is overpopulated with horses, is entitled to deference. As the district court acknowledged, the BLM used its expertise to decide that its data—derived from the study conducted in 2002 and 2003—remains relevant. This Court's role is not to "act as a panel of scientists that instructs the [agency to] . . . choose among scientific studies." *Lands Council*, 537 F.3d at 988. Thus, the purpose and need should be upheld because it is mandated as well as reasonable and because it is supported by the BLM's expert selection and analysis of data.

B. Based on the Purpose and Need, the EA Correctly Limited the Alternatives to the Proposed Action

NEPA requires agencies to consider all reasonable alternatives to the proposed action as well as the alternative of no action. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14(a), (d). "[F]or alternatives which were eliminated from detailed study, [agencies must] briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). "The stated goal of a project necessarily dictates the range of reasonable alternatives." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp'n*, 123 F.3d 1142, 1155 (9th Cir. 1997). Failure to consider minor variations of an identified alternative does not render a NEPA analysis inadequate. *Brooks v. Coleman*, 518 F.2d 17, 19 (9th Cir. 1975). In the WHA context, the requirement that agencies consider all reasonable alternatives in detail must be balanced against the requirement that the BLM act immediately to remove excess horses. *See Watt*, 694 F.2d at 1319.

The BLM thoroughly explored all alternatives and explained why non-viable alternatives were eliminated. The BLM considered a total of eight alternatives, two of which were suggested by Appellants and one of which was suggested by the Rafiki Mountains Wild Mustang Center. EA at 3-6. Unfortunately, most of the alternatives had to be eliminated because they did not meet the project's purpose and need due to failing to reduce the horse population, failing to achieve a vibrant horse population as a result of indiscriminately selecting horses for removal, failing to achieve a TNEB immediately, or failing to achieve a healthy rangeland. Only the proposed action—gather of all horses and ultimate removal of the 100 horses with inferior genetic profiles—satisfied the project's purpose and need. As evidence of the BLM's thorough exploration of all alternatives, Appellants have failed to identify for this Court an alternative that satisfies the purpose and need and that the BLM did not consider.

C. The BLM Took the Requisite Hard Look at Effects and Cumulative Impacts

To determine whether actions will significantly affect the environment, agencies are required to consider the direct effects, indirect effects, and cumulative impacts of the proposed action. 40 C.F.R. § 1508.3, .8., .27(b)(7). Cumulative impacts are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. A BLM guidance document provides further explanation:

> The scope of the cumulative impact analysis is related to the magnitude of the environmental impacts of the proposed action. Proposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant environmental impacts over a large area. Proposed actions that are typically finalized with a finding of no significant impact usually involve only a limited cumulative impact assessment to confirm that the effects of the proposed

action do not reach a point of significant environmental impacts.[9]

Agencies are required to take a "hard look" at the effects and cumulative impacts of an action. *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 982 (9th Cir. 1993).

The EA discusses the effects and cumulative impacts of the proposed action in thorough fashion spanning eight full pages. EA at 6-14. The EA considers the effects of the action on wild horses, rangeland health, noxious and invasive plants, riparian areas and surface water quality, wildlife, special status plants and animals, wilderness, cultural resources, and recreation. *Id.* at 6-12. The cumulative impact analysis was equally comprehensive: the EA reviews past actions such as droughts and previous horse gathers; current actions, including current conditions and ongoing efforts to sell captive horses; and future actions, such as the need to continue to monitor and manage the wild horse population. *Id.* at 12-14. Also, the cumulative impact analysis was reasonably limited to the RMWHR, the rangeland where nearly all of the horses live and which is the focus of the BLM's restoration efforts. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (explaining that choice of analysis area is subject to arbitrary and capricious standard because the choice requires agency expertise).

Appellants might argue that the limited information regarded LRADs and the ADS render the effects analysis inadequate. Although limited information is available, the BLM satisfied its requirement to take a "hard look" by (1) identifying the probable causes of negative effects, (2) extrapolating the likely effects based on testing on other animals, and (3) thoroughly discussing the indirect effects.

First, the EA acknowledges that negative effects may result from the loud noise of LRADs and the millimeter waves of the ADS. Second, the EA points out that the effects of the

[9]Memorandum from James L. Connaughton, Chairman, Council on Envtl. Quality, Guidance on Consideration of Past Actions in Cumulative Effects Analysis, to the Heads of Fed. Agencies 3 (June 24, 2005), available at http:// ceq. hss. doe. gov/ *1245 nepa/ regs/ guidance_ on_ ce. pdf.

noise and heat likely are minor considering that only temporary effects were exhibited in smaller mammals—humans. Further, the EA incorporates by reference an article that describes the effects of the ADS on humans and primates. LEVINE, THE ACTIVE DENIAL SYSTEM; *see* 40 C.F.R. § 1502.21 (providing for incorporation by reference). The EA also incorporates an article[10] that discusses the biological and physiological effects of acoustic weapons including LRADs. Additionally, the EA references American Technology Corporation's website, which includes videos demonstrations of the effects of LRADs on animals. *See* American Technology Corporation, www.atcsd.com (last visited Jan. 1, 2010). Based on the effects of LRADs and the ADS on other animals, the BLM was able to extrapolate the likely effects on horses. *See National Parks and Conservation Association v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (suggesting extrapolation, when data is unavailable, to satisfy NEPA requirements); *Village of False Pass v. Watt*, 565 F.Supp. 1123, 1148 (D.C. Alaska 1983) (upholding NEPA analysis in which effects were extrapolated from studies on other species).

Third, the EA thoroughly describes the indirect effects of LRADs and the ADS: the EA acknowledges that these devices might result in stress, which can cause nervous agitation, physical distress, separation of members of individual bands, social displacement, increased conflict such as biting and kicking which can result in traumatic injury, reduced reproduction rates, and even mortality. The BLM has calculated that 6-10 horses might die during capture, processing, and transportation. This in-depth analysis constitutes a "hard look" and thereby complies with NEPA. *See Inland Empire Public Lands Council*, 992 F.2d at 982.

D. The BLM's Conclusion That the Proposed Action Will Not Significantly Affect the Environment Is Not Arbitrary and Capricious

Appellants are likely to argue that the limited information regarding LRADs and the ADS

[10]Roman Vinokur, *Acoustic Noise as a Non-Lethal Weapon*, SOUND AND VIBRATION, Oct. 2004, at 19, *available at* http://www.sandv.com/downloads/0410vino.pdf.

make the proposed action significant under one of the factors for finding significance: "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). Appellants also are likely to argue that the proposed action will have significant affects because 190 horses will be temporarily removed and 100 horses will be permanently removed.

This Court should reject Appellants' argument that limited information regarding LRADs and the ADS create sufficient uncertainty to make the affects of the proposed action significant. First, the BLM acknowledged and accounted for the uncertainty in the effects of LRADs and the ADS: "The effects of the use of [LRADs and the ADS] are currently unknown because they have never been utilized in this manner." Second, as explained above, the BLM extrapolated the probable effects on horses based on studies regarding other animals, and the BLM provided a detailed analysis of the indirect effects. Ultimately, the BLM decided that although some uncertainty exists, this does not make the proposed action's affects significant. *See Native Ecosystems Council v. USFS*, 428 F.3d 1233, 1240 (9th Cir. 2005) (uncertainty "does not necessarily raise a substantial question about the significance of a project's environmental effects."). This decision is not arbitrary and capricious and should be upheld. The fundamental question under NEPA is whether the agency took a "hard look" at the action's environmental consequences; an action does not necessarily have a significant affect because the agency "acknowledges information favorable to a party that would prefer a different outcome." *Id.*; *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (upholding EA in which NMFS's extrapolation was sufficient to compensate where "the Service . . . concede[d] that the effectiveness of the mitigation measures is uncertain" and "it is . . . clear that there is little data available to analyze the[] effects [on harbor seals]").

The temporary removal of 190 horses and the permanent removal of 100 horses does not

make the affects of the proposed action significant. The BLM will temporarily remove all 190 horses from the RMWHR, conduct genetic testing on each horse to determine its genetic profile, return 90 horses with an optimal range of genetic profiles, and permanently remove up to 100 horses. EA at 3. The genetic testing and sorting based on genetic profile will be performed on site. *Id.* Thus, the duration of the removal of all 190 horses will be minimal and should only last a few days, though the ultimate duration may vary. *Id.* at 10; *Rubin*, No. 09-1968, slip op. at 3. The temporary removal in this case pales in comparison to the removal in *American Horse Protection Association v. Frizzell*—involving 400 horses and approximately a two year duration—which the *Frizzell* court determined would not have a significant affect. 403 F.Supp. at 1210, 1222 nn.9-10. Similarly, this Court should uphold the BLM's decision that the smaller temporary removal in this case will not have a significant affect.[11]

Nor will the permanent removal of 100 horses have a significant effect. Again, this case is similar to *Frizzell*. Although the removal is permanent in this case instead of approximately two years in duration as in *Frizzell*, only 100 horses will be removed in this case compared to 400 horses in *Frizzell*. *American Horse Protection Association v. Andrus*, which lies at the other end of the spectrum, is very different from this case. 608 F.2d 811 (9th Cir. 1979). In *Andrus*, the Ninth Circuit rejected a jurisdictional argument and remanded for the district court to determine whether the permanent removal of 3,500 to 7,000 horses would have a significant effect. However, the *Andrus* Court suggested how the district court should resolve the issue: "we

[11]Appellants might attempt to distinguish *Frizzell* based on the following quote from that case: "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." 403 F.Supp. at 1219. In other words, the Court suggested that its holding might be different if the 400 removed horses constituted all of the horses in the area. Appellants could argue that 190 horses constitutes all of the horses in the RMWHR. However, the *Frizzell* court made this statement in the context of a removal that would last approximately two years, as opposed to a few days as in this case. The *Frizzell* court explained that it was worried about depriving the public of knowing that horses remain on public lands for their "enjoyment, both for eyewitness observation and as elements of our national heritage, available for television documentaries and other public interest programs." *Id.* The effect of the temporary removal in this case—lasting only a few days—is *de minimis* and does not implicate the interests about which the *Frizzell* court was concerned.

would point out that the roundup in Frizzell was of 400 horses rather than 3,500 to 7,000." By contrast, this case involves even fewer horses—190—than *Frizzell*, and far less than *Andrus*. *Andrus* and *Frizzell* provide guidelines for determining which horse removals have significant affects; compared to the facts in *Andrus* and *Frizzell*, the removal of 100 horses in this case would not have a significant affect.[12] Accordingly, this Court should uphold the BLM's decision because it is not arbitrary and capricious.

V. <u>The Preliminary Injunction Should be Denied.</u>

A. Appellants Must Make a Clear Showing That They Are Likely to Succeed on the Merits Rather Than That Serious Questions Have Been Raised.

To obtain a preliminary injunction, Appellants must make a "clear showing" that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, *and* that an injunction is in the public interest." *Winter*, 129 S.Ct. at 374, 376 (emphasis added). This standard supercedes the one previously used in the Ninth Circuit, requiring, in the alternative, "a likelihood of success on the merits and the possibility of irreparable injury" or "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Lands Council*, 537 F.3d at 988, 1004 (Defining "serious questions" as posing a "fair chance of success."). In *Winter*, the Court rejected the first half of this test because it does not require a clear showing of entitlement. 129 S.Ct. at 375.

After *Winter*, the Ninth Circuit has repeatedly held that, "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, *or even viable*." *Am. Trucking Assn., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (citing *Lands Council*,

[12]Additionally, removal of horses might not even implicate NEPA. NEPA only applies where agency action significantly affects the *human environment*. As the District of Montana noted in *Cloud Foundation*, 2008 WL 2794741, at *2, there is room for debate as to whether actions that impact horses effect the human environment.

537 F.3d 981, as an example) (emphasis added); *accord Stormans v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). And while the Ninth Circuit has not clearly addressed the viability of the second half of the balance, the majority of district courts in this Circuit have noted that it relaxes the drastic nature of the remedy too much. *See e.g. Small v. Swift Transp. Co., Inc.*, 2009 WL 3052637, at *5 (C.D.Cal. Sept. 18, 2009) (Ninth Circuit's sliding scale test is inconsistent with *Winter's* admonition that a preliminary injunction is an "extraordinary remedy" issued only upon a "clear showing" of entitlement.).[13] Because the Ninth Circuit's old test is inconsistent with *Winter*, it should now be wholly and clearly abandoned.

Nonetheless, the district court's denial of an injunction should be affirmed because the district court's denial under the more-lenient Ninth Circuit standard rather than the *Winter* standard is not a reversible error. *Am. Trucking Assn.*, 559 F.3d at 1052.

B. Assuming Arguendo that Appellants Will Likely Succeed on the Merits, the Balance of Hardships Does Not Favor Appellants.

The third element of *Winter*—the balance of equities in favor of plaintiffs—requires the court to "engage in the traditional balance of harms analysis, even in the context of environmental litigation" because "[i]njunctive relief is an equitable remedy." *Lands Council*, 537 F.3d at 1005 (internal quotation omitted). Further, "in a case such as this one where the purpose of the challenged action is to benefit the environment, the public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002).

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[13] *See also Timbisha Shoshone Tribe v. Kennedy*, 2009 WL 3615971, at *6 (E.D.Cal Nov. 3, 2009); *Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 1636169, at *1 n.1 (D.Ariz. June 10, 2009); *Matthews v. Legrand*, 2009 WL 3088325, at *3 n.1 (D.Nev. Sept. 22, 2009); *G. v. Hawaii, Dept. of Human Services*, 2009 WL 2877597, at *3 n.2 (D.Hawaii Sept. 4, 2009) (noting that the "serious question" standard is "questionable" in light of *Winter*); *but see Greater Yellowstone Coalition v. Timchak*, 323 Fed.Appx. 512, 514 n.1 (9th Cir. 2009) (holding that Winter did not abrogate second half of Ninth Circuit's standard but failing to cite Ninth Circuit precedent after *Winter*); *accord Save Strawberry Canyon v. Department of Energy*, 613 F.Supp.2d 1177, 1180 n.2 (N.D.Cal. 2009).

Even if this Court determines that Appellants made a clear showing that they will likely succeed on the merits of their WHA and NEPA, the public interest does not favor an injunction. While the WHA was originally passed to protect dwindling populations, the Act was later amended and Congress specifically charged the BLM to "immediately remove" excess horses and forbade it to permit further deterioration to the range. 16 U.S.C. § 1333(b)(2). This "made clear that while "[a]djustments can be made later,[ ]the endangered and rapidly deteriorating range cannot wait." *Blake v. Babbitt*, 837 F.Supp. 458, 459 (D.D.C. 1993). Thus, Congress clearly has established that the public interest embodied in the WHA does not favor an injunction in this case. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497 (2001) (providing that a courts' assessment of the public interest in injunction context is circumscribed where Congress has established a national policy, i.e., "order of priorities"). Here, the range continues to deteriorate and Appellants request should be denied. Further, the district court has already determined that the balance of equities tips in favor of the BLM. *Rubin v. Salazar*, No. 09-1968, slip op. at 12 (E.D. Cal. Oct. 1, 2009) ("The balance of equities . . . in this case tips in favor of the BLM."). This decision should be affirmed because the district court did not abuse its discretion in reaching it. *Lands Council*, 537 F.3d at 986.

CONCLUSION

For the foregoing reasons, Appellants have failed to establish a likelihood of success on the merits of their claims and the balance of hardships does not tip in their favor. Respondents respectfully ask this Court to affirm the district court's denial of the preliminary injunction.

Respectfully submitted this 4th day of January, 2009.

Team 17