NO. 09-1234

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Appellees.

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

BRIEF FOR APPELLANTS

TEAM 19

Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT AND AUTHORITIES 8

I. APPELLANTS WERE ENTITLED TO AN INJUNCTION TO PROTECT THE WILD HORSES ON THE RAFIKI RANGE 9

A. Appellants Demonstrated a Likelihood of Success on the Merits of Their Claim Under the Wild Free-Roaming Horses and Burros Act 10

1. The Wild Free-Roaming Horses and Burros Act does not authorize the Bureau of Land Management to remove all 190 horses from the Rafiki Range for evaluation and genetic testing 10

a. By requiring a determination that horses are "excess" before they are removed, the Act implicitly limits the removal of non-excess horses from the range 11

b. The Act expressly prohibits the removal of non-excess horses from the Rafiki Range even on a temporary basis 13

2. The Bureau of Land Management's finding that 100 horses are excess is arbitrary and capricious 13

3. The specific roundup methods proposed by the Gather Plan will subject the horses to unnecessary suffering, inhumane treatment, harassment, and potential death 16

a. The Long Range Acoustic Devices and Active Denial System are ill-suited for humane animal control 16

b. Rubber bullets and helicopter drive-trapping will cause the wild horses significant and unnecessary stress 18

B. Appellants Demonstrated a Likelihood of Success on the Merits of Their Claim Under the National Environmental Policy Act 19

1. The Environmental Assessment is based on conclusory assertions 20

2. The uncertainty regarding the environmental impact of the removal of 190 wild horses from the range, the ultimate reduction in the herd size by 100 wild horses or the methods used for the roundup mandates further study 21

3. The Bureau of Land Management's decision that the Gather Plan would have be beneficial is still a significant impact, requiring an Environmental Impact Statement to assess the value judgment associated with the agency's action 22

C. The Balance of Hardships Tips Decidedly in Favor of Appellants 23

1. Without injunctive relief, the wild horses and the Rafiki Range environment will suffer irreparable harm 23

2. Another delay of the Bureau's Gather Plan will not cause any serious harm 25

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES:

Alaska Ctr. for Env't v. U.S. Forest Serv.,
189 F.3d 851 (9th Cir. 1999) 21

Am. Horse Prot. Ass'n v. Andrus,
608 F.2d 811 (9th Cir. 1978) 14

Am. Horse Prot. Ass'n v. Watt,
694 F.2d 1310 (D.C. Cir. 1982) 12, 15

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987) 23, 24

Becker v. United States,
451 U.S. 1306 (1981) 24

Blue Mountain Biodiversity Project v. Blackwood,
161 F.3d 1208 (9th Cir. 1998) 20

Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,
419 U.S. 281 (1974) 9

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 8

Chevron v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 11

Colo. Wild Horse & Coal. v. Salazar,
639 F. Supp. 2d 87 (D.D.C. 2009),
appeal dismissed, 2009 WL 5125365
(D.C. Cir. Dec. 17, 2009) (No. 09-5340) 11, 12

Comm. to Pres. Boomer Lake Park v. Dep't of Transp.,
4 F.3d 1543 (10th Cir. 1993) 21

Envtl. Def. Fund v. Marsh,
651 F.2d 982 (5th Cir. 1981) 22

Gov't of Province of Manitoba v. Norton,
398 F. Supp. 2d 41 (D.D.C. 2005) 14

Greater Boston Television Corp. v. FCC,
444 F.2d 841 (D.C. Cir. 1970) 14

Idaho Sporting Cong. v. Thomas,
137 F.3d 1146 (9th Cir. 1998) 21

Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 9

Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989) 14, 19

Middle Rio Grande Conservancy Dist. v. Norton,
294 F.3d 1220 (10th Cir. 2002) 19, 20

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 8, 9

Nat'l Parks & Conservation Ass'n v. Babbitt,
214 F.3d 722 (9th Cir. 2000) 22

Natural Res. Def. Council v. Duvall,
777 F. Supp. 1533 (E.D. Cal. 1991) 20

New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,
565 F.3d 683 (10th Cir. 2009) 19

Ocean Advocates v. U.S. Army Corps of Eng'rs,
361 F.3d 1108 (9th Cir. 2004) 21, 22

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 19, 22

Sierra Club v. Bosworth,
510 F.3d 1016 (9th Cir. 2007) 23

Sierra Club v. Hodel,
848 F.2d 1068 (10th Cir. 1988) 19

S. Fork Bend Council of W. Shoshone of Nev. v. U.S. Dep't of Interior,
588 F.3d 718 (9th Cir. 2009) 24

Winter v. Natural Res. Def. Council, Inc.,
129 S. Ct. 365 (2008) 9, 23

STATUTES AND LEGISLATIVE & ADMINISTRATIVE MATERIALS:

40 C.F.R. § 1500.1(a) (1978) 19, 21

40 C.F.R. § 1502.16 (1978) 19

40 C.F.R. § 1502.22 (1986) 22

40 C.F.R. § 1508.27 (1978) 21

43 C.F.R. § 4700 (1994) 16, 17, 18

43 C.F.R. § 4770 (1994) 16

124 Cong. Rec. 19,501 (1978) 12

5 U.S.C. § 706 (2000) 8

16 U.S.C. § 1331 (2006) 10, 13

16 U.S.C. § 1332(a) (2006) 10

16 U.S.C. § 1333(a) (2006) 10, 12, 13, 16

28 U.S.C. § 1291 (2006) 1

42 U.S.C. § 4332(c) (2006) 20

OTHER AUTHORITIES:

Bureau of Land Mgmt., U.S. Dep't of the Interior,
Rafiki Mountains Wild Horse Range 2009 Gather Plan and Environmental Assessment (EA),
DOI-BLM-CA-C051-2009-72-EA ..... *passim*

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Federal Practice & Procedure (2d ed. 1995) 23

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Deborah Rubin and The Horse People, Plaintiffs in the United States District Court for the Eastern District of California and Appellants here, submit this brief on the merits in support of their request that this Court reverse the district court and enter a preliminary injunction enjoining the Bureau of Land Management from removing the wild horses from the Rafiki Mountain Wild Horse Range.

STATEMENT OF JURISDICTION

The district court entered its judgment on October 1, 2009. (R. at 1–13.) Appellants timely filed this appeal. This Court has jurisdiction under 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Did the district court err 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 when the Gather Plan would remove all wild horses from the range with the methods used for riot and military scenarios?
2. Did the district court err when it ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim under the National Environmental Policy Act when the Bureau of Land Management relied on conclusory, outdated information?
3. Did the district court err when it held that the balance of hardships did not favor Plaintiffs when the resulting environmental harms from the Gather Plan would likely be permanent and irreparable?

STATEMENT OF THE FACTS

This appeal arises from the planned removal of wild horses from the Rafiki Mountains by the Bureau of Land Management. An animal rights organization, known as The Horse People, and its President sued the Secretary of the Department of the Interior, Ken Salazar, and Director of the Bureau of Land Management, Robert Abbey (collectively referred to as the "agency," the "Bureau" or the "Bureau of Land Management").

The Origins of the Rafiki Mountain Wild Horse Range. In 1969, the public was outraged at the Bureau's decision to remove wild horses from the Rafiki Mountains and sell them for slaughter. (R. at 2.) As a result, the Secretary of the Interior responded and created the Rafiki Mountain Wild Horse Range ("Rafiki Range"). (R. at 2.) The 36,000 acres along the California-Nevada border were intended "to protect the irreplaceable herd of wild horses of Spanish lineage and to protect native wildlife and the local watershed." (R. at 2.)

The Bureau admittedly lacked knowledge of the genetics of the wild horse herd or the need to maintain minimum numbers of breeding horses to ensure herd viability. (R. at 2.) In 1992, despite this deficiency, the Bureau determined that the Rafiki Range could support between 85 and 105 horses. (R. at 2.) In 1999, concerns about the genetic viability of the Rafiki herd due to "dangerously low numbers" were expressed in a letter from the Field Manager of the Bureau's Tatu County Field Office. (R. at 2.) Today, the Rafiki Range herd is comprised of approximately 190 horses. (R. at 2.)

The Gather Plan. In recent years, the Rafiki Mountain Range suffered through a major drought, which has adversely affected the herd's food supply security. (R. at 2.) Of the current 190 horses, the Bureau of Land Management determined 100 were "excess" and therefore should

be removed. (R. at 2.) To effect this removal, the Bureau devised a Gather Plan to round up and remove these horses from the Rafiki Range. (R. at 2.)

The Gather Plan will result in the capture of all 190 horses from the range. (R. at 2.) To carry out this capture, the Bureau will use a combination of techniques, including the Long Range Acoustic Devices, Active Denial Systems, rubber bullets, and helicopter drive-trapping. (R. at 3.) Both Long Range Acoustic Devices and Active Denial Systems are commonly used for riot control and military combat scenarios, and the Bureau concedes that these techniques have never been used for any form of animal control. (R. at 7.) Once captured, government scientists would draw the horses' blood and determine the horses' genetic profiles. (R. at 2–3.) After tests are completed, the Bureau will return to the Rafiki Range ninety horses with a diverse and healthy range of genetic profiles. (R. at 3.)

The Finding of No Significant Impact. As part of the Gather Plan, the Bureau of Land Management prepared and circulated a draft Environmental Assessment, which found that the proposed project would have no significant impact upon the natural environment. (R. at 3.) After thirty days of public comment, the Bureau issued its Decision Record, final Environmental Assessment, and Finding of No Significant Impact. (R. at 3.) Because of budgetary issues, the Bureau was forced to delay the project from September 2009 until mid-February 2010. (R. at 3.)

The District Court. Immediately after the Bureau finalized the Gather Plan, Plaintiffs filed this suit, alleging that the Gather Plan violates the Wild Free-Roaming Horses and Burros Act and the National Environmental Policy Act and that the Bureau's decisions were arbitrary and capricious in violation of the Administrative Procedure Act. (R. at 3.) Plaintiffs further filed for injunctive relief to prevent the implementation of the Gather Plan, and further prevent the Bureau

from "otherwise removing, selling, adopting, or transferring any horses who are in the [Rafiki Range] or who may have been removed . . . in connection with the challenged plan." (R. at 3–4.)

On October 1, 2009, the district court denied Appellants relief on all grounds. (R. at 1–12.) In its opinion, the district court found that Appellants were unlikely to prevail on its contentions that the Gather Plan violated either Act. (R. at 8, 11.) The district court also denied Plaintiffs' request for a temporary injunction, determining that the overall public interest in the case tipped in Bureau's favor. (R. at 12.)

SUMMARY OF THE ARGUMENT

This case presents this Court with three issues relating to the protection of an irreplaceable herd of wild horses. Though Congress has provided the Bureau of Land Management discretion with respect to the horses and land they manage, this discretion was not intended to go unchecked. As a result of the district court's refusal to grant the preliminary injunction, both the Rafiki Range and the wild horses it is home to are now in danger of being irreparably harmed.

I.

The district court erroneously held that Appellants were unlikely to succeed on the merits of their claim under the Wild Free-Roaming Horses and Burros Act. By determining the Bureau of Land Management's conduct was permissible, the district court erroneously allowed for the removal of wild horses that Congress intended to protect. The Bureau erroneously determined that 100 of the 190 horses on the range were in excess and needed to be removed. To carry out this action the Bureau developed a Gather Plan, which called for the removal of all 190 horses from the Rafiki Range. Once captured, the Bureau intended to test the wild horses' blood to determine which should be returned to their home in the Rafiki Range and which should be forced to live elsewhere. The Bureau admitted that the herd would be removed from the range

for an indefinite period of time while testing was conducted. While the Act permits the removal of excess horses to curb overpopulation, nothing in the statutory language allows for the temporary or permanent removal of non-excess horses. As a result, the district court erred when it determined that the Bureau's temporary removal of all of the 190 horses from the Rafiki Range was permissible.

Additionally, the Bureau's finding that 100 horses were in excess was arbitrary and capricious. Between 1993 and 2005 the Rafiki Range suffered a drought. The agency admitted that the range had experienced increased precipitation and the range's stability was increasing. However, in assessing the stability of the range the Bureau utilized a study conducted between 2002 and 2003—the two worst years of the drought. The Bureau acted in an arbitrary and capricious manner when it acted on less than current and accurate information.

Finally, the Bureau also opted to use impermissible inhumane methods to round up the horses. The Act's plain language and the Bureau's own policies require humane treatment. Nonetheless, the Gather Plan utilizes experimental methods in the roundup, including the use of the Long Range Acoustic Devices and the Active Denial System, rubber bullets, and helicopters for drive-trapping. Neither the Long Range Acoustic Devices nor the Active Denial System has ever been used for animal control, but instead both are commonly used for riots and military combat scenarios. Furthermore, the use of rubber bullets and helicopters will result in significant stress to the animals—results contrary to the Bureau's mandate. The Bureau even admitted that as a result of the methods utilized in the roundup, as many as six horses could die. By utilizing methods that result in significant stress and harm to the horses, and even death, the Gather Plan's methods were impermissible.

Because the Bureau exceeded its authority, acted in an arbitrary and capricious manner, and attempted to implement impermissible methods to round up the horses, Appellants demonstrated a likelihood of success on the merits of their Wild Free-Roaming Horses and Burros Act claim.

II.

The district court erroneously held that Appellants were unlikely to succeed on the merits of their claim under the National Environmental Policy Act. With this Act, Congress sought to ensure that federal agencies examine the environmental impact of their decisions and any available alternatives before carrying out their actions as well as to ensure that the public has the information necessary to challenge the agency's decision. Unfortunately, the Bureau of Land Management ignored the environmental impact the Gather Plan had on the wild horses and the Rafiki Range. Instead of the cursory Environmental Assessment and Finding of No Significant Impact, the Bureau should have performed an Environmental Impact Statement. The Gather Plan plans to remove the entire herd of wild horses for an indefinite period of time and then return less than half of them to the Rafiki Range. This raises significant environmental concerns.

First, contrary to the Act's purpose, the Bureau based its Environmental Assessment on conclusory statements of the environmental impact of the agency's planned action. The Act requires that an agency's review be supported by detailed data and rigorous analysis. This allows a reviewing court and the public to challenge the agency's proposed action.

Second, the Gather Plan is based on utter speculation. The Bureau has never used the roundup methods for any type of animal control and, as a result, has no idea of how the wild horses will react. The Bureau also does not know how much stress the roundup will cause or how their reproductive capabilities will be affected. Given the uncertainties of the Bureau's

plans, an Environmental Impact Statement must be prepared to minimize any adverse environmental impact before significant governmental resources are committed to the project.

Finally, the Bureau's decision to remove the horses from the Rafiki Range was based on a value judgment. Although the Bureau determined that the removal of horses would have a significant beneficial impact, the National Environmental Policy Act intended that such value judgments to be subject to detailed study and public comment. Federal agencies must take a hard look at the environmental consequences of all significant acts, whether they regard them as beneficial or adverse.

Because the Bureau failed to adequately study the direct, indirect, and cumulative effects of the Gather Plan on the wild horse herd and the Rafiki Range, Appellants demonstrated a likelihood of success on the merits of their National Environmental Policy Act claim.

III.

The district court erroneously held that the balance of hardships tipped in the Bureau's favor. As in most environmental cases, the consequences cannot be reduced to dollars and cents. Without immediate injunctive relief, significant environmental harm will likely result to the Rafiki Mountain Wild Horse Range and the treasured animals that have inhabited it for at least a century.

The likely harm to the wild horses and their environment is staggering. The extent of the stress, the potential for permanent physical injury, and the damage to the animal's reproductive capabilities are largely unknown because of the unique nature of the Bureau's proposed action and the means it intends to use to accomplish the Gather Plan. Nonetheless, the Bureau acknowledges that, because the animals are wild, severe injuries and even some deaths are a natural consequence of the Gather Plan. And, all of this is without the detailed Environmental

Impact Statement that is, by statute, required any time a significant environmental impact is possible.

On the other hand, little harm would result from a decision to grant the preliminary injunction. During the twelve year drought, the Bureau made no attempt to manage the range in the manner it seeks to do so now. In fact, the Bureau waited until four years after the drought had ended to develop and to implement the Gather Plan. While Appellees may have an interest in preserving the range, the harm caused by carrying out the Gather Plan will be far worse than any harm caused by enjoining the agency's activities pending resolution of this case.

Because the hardships tip decidedly in favor of protecting the environment, the district court erred in not granting preliminary injunctive relief.

ARGUMENT AND AUTHORITIES

This appeal challenges the Bureau of Land Management's actions as a violation of the Wild Free-Roaming Horses and Burros Act and the National Environmental Policy Act. Because neither Act provides an independent right of action, Appellants' claims necessarily arise under provisions of the Administrative Procedure Act ("APA"). Although a court may not substitute its own wisdom, a court examining a claim under the APA must consider whether the federal agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). The agency is required to examine the relevant information and articulate a satisfactory explanation for its decision, including a "rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)). In reviewing the decision, the court must "consider whether the decision was based on a consideration of the

relevant factors and whether there was a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

This appeal also involves the denial of a preliminary injunction. A preliminary injunction should be issued if the Appellant has established "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). The denial of a preliminary injunction is reviewed for an abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). A district court abuses its discretion in denying a preliminary junction if its decision is based on an incorrect legal standard or fact findings that were clearly erroneous. *Id*. Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Id*.

I. APPELLANTS WERE ENTITLED TO AN INJUNCTION TO PROTECT THE WILD HORSES ON THE RAFIKI RANGE.

The district court should have granted a preliminary injunction to protect the wild horses in their natural habitat in the Rafiki Range. The evidence showed that Appellants showed a likelihood of success on the merits of their claim that the Bureau of Land Management violated the Wild Free-Roaming Horses and Burros Act by exceeding its statutory authority and acting in an arbitrary and capricious manner. Furthermore, the evidence showed a likelihood of success on the merits of Appellants' claim that, in preparing the Gather Plan, the Bureau of Land Management improperly elected to not publish an environmental impact statement in violation of the National Environmental Policy Act. Given the delicate nature of the wild horses' natural environment, the uncertainty associated with the Bureau of Land Management's proposed Gather

Plan, and the minimal margin of error, the hardships tip decidedly in Appellants' favor. Thus, as a matter of law, Appellants met their burden to obtain a preliminary injunction.

A. Appellants Demonstrated a Likelihood of Success on the Merits of Their Claim Under the Wild Free-Roaming Horses and Burros Act.

Appellants' first claim relates to the Bureau of Land Management's affirmative responsibilities under the Wild Free-Roaming Horses and Burros Act. The Secretary of the Interior[1] (the "Secretary") is commanded under the Act "to protect and manage wild free-roaming horses and burros as components of the public lands" and to ensure their "humane care and treatment." 16 U.S.C. § 1333(a) (2006). Although the Secretary may determine how many horses the range many safely accommodate, the Secretary is also mandated to consider the horses, where they are found, "as an integral part of the natural system of the public lands." 16 U.S.C. § 1331. As a result, the Act also specifically requires the Secretary to consider handling overpopulation of wild horses through methods such as "sterilization, or natural controls on population levels." 16 U.S.C. § 1333(b)(1).

1. The Wild Free-Roaming Horses and Burros Act does not authorize the Bureau of Land Management to remove all 190 horses from the Rafiki Range for evaluation and genetic testing.

Appellants are likely to succeed on the merits of their Wild Free-Roaming Horses and Burros Act claim because the Gather Plan exceeds the authority provided by Congress to the Bureau of Land Management. The Act allows for the removal of only horses deemed in *excess* of the appropriate management level. 16 U.S.C. § 1332(b)(1) (emphasis added). However, under the Gather Plan, the Bureau of Land Management will remove all wild horses on the Rafiki Range. (R. at 2.) In this manner, the Gather Plan is contrary to the Act's plain language.

[1] Under Section 1332(a) of the Wild Free-Roaming Horses and Burros Act, the Bureau of Land Management is to administer the decisions of the Secretary.

a. By requiring a determination that horses are "excess" before they are removed, the Act implicitly limits the removal of non-excess horses from the range.

As part of the Gather Plan, the Bureau of Land Management intends to remove all 190 horses from the Rafiki Range for an indefinite period of time. (R. at 2–3.) This is not the first time the agency claimed it had the discretion to remove an entire herd of wild free-roaming horses. *See Colo. Wild Horse & Coal. v. Salazar*, 639 F. Supp. 2d 87 (D.D.C. 2009), *appeal dismissed*, 2009 WL 5125365 (D.C. Cir. Dec. 17, 2009) (No. 09-5340). There, the Bureau of Land Management declared that the removal of horses—even those not determined to be excess animals—was inherently within its broad authority to manage horses on 123,387 acres of federal land in Northwestern Colorado. *Id.* at 95. The court rejected this position, instead observing that the Secretary's discretion was limited and that his orders were reviewable and would be overturned if his actions were found to be arbitrary. *Id.* Moreover, the court found that the Wild Free-Roaming Horses and Burros Act only permitted the removal of excess horses. *Id.*

In making its determination, the court applied the inquiry articulated by the Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The initial inquiry looks to whether Congress has spoken directly to the question at issue. *Id.* at 842. If the intent of Congress is clear, the inquiry must end. *Id.* However, if the statute is silent or ambiguous, the court must determine if the agency's response is based on a permissible construction of the statute. *Id.* In applying the analysis, the court found that the removal of an entire herd of non-excess wild free-roaming horses was an impermissible construction of the Act. *Colo. Wild Horse*, 639 F. Supp. 2d at 95–96; *see also id.* at 96 n.17 (finding in the alternative that the Bureau of Land Management's decision to remove an entire herd of wild free-roaming horses was impermissible construction of the Act under the second prong of *Chevron*). The court

explained that it would be counterintuitive for Congress to legislate for the protection of wild free-roaming horses, while simultaneously allowing the "custodian to subvert the primary policy of the statute by capturing and removing from the wild the very animals Congress sought to protect *from* being captured and removed from the wild." *Id.*

The Bureau of Land Management attempted to justify its gather plan in the *Colorado Wild Horse* case by arguing that the horses would not be eliminated, but instead would be managed through private adoption or long-term care. *Id.* The court explained that Congress had not authorized the agency to manage wild horses through private maintenance or long-term care as non-wild animals. *Id.* Moreover, the court elaborated that although Congress had not expressly defined "manage," it had provided an exhaustive list of "management activities." *Id.* (citing 16 U.S.C. § 1333(b)(1)). In each instance, Congress made specific reference to procedures relating to "excess animals," but omitted any provision to allow for the removal of non-excess animals. *Colo. Wild Horse*, 639 F. Supp. 2d at 96. Congress prescribed detailed procedures for removing animals that are determined to be excess. *Id.* The Wild Free-Roaming Horses and Burros Act's purpose was to permit the removal of excess wild horses to curb the population, not to permit the removal of an entire herd. *Am. Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1317 (D.C. Cir. 1982) (citing 124 Cong. Rec. 19,501 (1978)). Although Congress did not expressly preclude the Bureau of Land Management from removing non-excess horses, the court stated it would be illogical for Congress to provide detailed procedures for removing excess horses, but allow complete discretion in removing non-excess horses. *Colo. Wild Horse*, 637 F. Supp. 2d. at 96–97. Therefore, the Act prohibits the agency from removing non-excess horses.

b. The Act expressly prohibits the removal of non-excess horses from the Rafiki Range even on a temporary basis.

In the district court's estimation, the Bureau of Land Management was not "removing" all 190 horses as the Wild Free-Roaming Horses and Burros Act defines that term because the agency intended to eventually return 90 horses after genetic testing. (R. at 3.) The court found that ultimately the agency was only removing the 100 horses found in excess and was therefore not in violation of the statute. (R. at 3.) This interpretation fundamentally misconstrues the Act's letter and spirit.

The Wild Free-Roaming Horses and Burros Act expressly commands the Bureau of Land Management to treat wild horses as "an integral part of the natural system of the public lands." 16 U.S.C. § 1331. Congress has specifically provided a list of management activities the agency is permitted to engage in which only provides mechanisms for the agency to remove horses when they are found to be excess of the appropriate management level. 16 U.S.C. § 1333(b)(1). Nowhere within the Act has Congress authorized the removal of non-excess horses either temporarily or permanently. By attempting to remove horses that have not been determined to be in excess of the appropriate management levels—even temporarily—the Bureau of Land Management has exceeded its statutory authority.

2. The Bureau of Land Management's finding that 100 horses are excess is arbitrary and capricious.

Appellants are also likely to succeed on the merits of their Wild Free-Roaming Horses and Burros Act claim because the Bureau of Land Management made an arbitrary and capricious determination that the Rafiki Range is overpopulated by 100 horses. In making the determination that 100 of the approximately 190 horses were in excess, the agency improperly

relied on a study of the Rafiki Range that was conducted six years earlier during a severe drought.

While the court should not substitute its judgment for that of an agency's, the court is nevertheless concerned with assuring that the ultimate decision of the Security is an informed one. *Am. Horse Prot. Ass'n v. Andrus*, 608 F.2d 811, 814 (9th Cir. 1979). A court should intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 65 (D.D.C. 2005) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)). In reviewing an agency's actions, the court should consider whether the agency acted within the scope of its legal authority, whether the agency explained its decision, whether the facts on which the agency purports to have relied have some basis on the record, and whether the agency considered the relevant factors. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989).

The Rafiki Range has experienced numerous years of drought. Bureau of Land Mgmt., U.S. Dep't of the Interior, *Rafiki Mountains Wild Horse Range 2009 Gather Plan and Environmental Assessment (EA)*, DOI-BLM-CA-C051-2009-72-EA, 2 [hereinafter *Rafiki 2009 EA*]. Between 1993 and 2005, the Rafiki Range only experienced normal precipitation levels in four years. *Id.* Although the district court acknowledged that the Bureau of Land Management's decision was made in 2009 and that the agency relied on a study conducted during 2002 and 2003—"the worst two years of the entire drought"—the district court nevertheless upheld the agency's decision. (R. at 7–8.) With outdated information from the worst two years of a twelve-year drought, the decision was arbitrary and capricious.

In reasoning that the decision was not arbitrary and capricious, the district court explained that such findings were beyond the court's expertise and should instead be left to the agency's discretion. (R. at 7.) The court further declared that the decisions "should not be overturned quickly on the ground that they are predicated on insufficient information." *Id.* (citing *Am. Horse Prot. Ass'n v. Watt*, 694 F.2d at 1318). In reaching this conclusion, however, the district court improperly relied on the *Watt* decision. The *Watt* decision dealt with a fundamentally different complaint. There, the American Horse Protection Association challenged the Bureau of Land Management's decision to remove a herd of wild horses that roamed a mountain range near Challis, Idaho. 694 F.2d at 1312. As part of its complaint, the association contended that the agency was required to consider "all alternative courses of action" that would affect the horse population less severely than roundup and removal from the area. *Id.* Unlike the complaints at issue in *Watt*, Appellants here are not alleging that the Bureau of Land Management did not consider alternative management strategies, but rather that the agency violated the Wild Free-Roaming Horses and Burros Act by using an outdated study conducted six years prior to its decision to remove the wild horses in 2009. (R. at 6.) This complaint is not something on which the district court should have deferred to the agency.

Ironically, the district court recognized that current situation was very different from the situation when the Bureau of Land Management conducted the study. The drought had ended three years prior to the agency's decision—in 2006. (R. at 6.) The agency conceded that the range had experienced heavy amounts of precipitation over the last three years which has resulted in improved stability and vegetation on the range. (R. at 6.) Nonetheless, the Bureau of Land Management simultaneously concluded that the range was in a deteriorating condition in 2009 and the 100 horses were in excess of what the range could support. (R. at 6.) In reaching

its conclusion, the agency offered no explanation as to why a study conducted during 2002 and 2003 was used. Nor did it explain why it used data compiled from the worst two years of the drought. The conclusion that the range was deteriorating in 2009 was not based on a consideration of the relevant facts, but rather based on a consideration of outdated and immaterial facts. Absent the use of contemporary data, such a conclusion was arbitrary and capricious.

3. The specific roundup methods proposed by the Gather Plan will subject the horses to unnecessary suffering, inhumane treatment, harassment, and potential death.

Appellants are also likely to succeed on the merits of their Wild Free-Roaming Horses and Burros Act claim because of the Bureau of Land Management is using roundup methods in its Gather Plan. The Act directs the Secretary to ensure that the excess wild-free roaming horses are humanely captured. 16 U.S.C. § 1333(b)(2)(B). The inhumane treatment of a wild horse is an act that has been expressly prohibited. 43 C.F.R. § 4770.1 (1994). Moreover, the Bureau of Land Management has defined "inhumane treatment" as "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(f) (1994). Ultimately, the methods to be used under the Gather Plan amount to inhumane treatment, and, therefore, the agency's conduct was impermissible and violated the Act.

a. The Long Range Acoustic Devices and Active Denial System are ill-suited for humane animal control.

As part of the roundup, the Bureau of Land Management intended to use experimental methods to aid in the capture of the 190 horses. These methods included the use of Long Range Acoustic Devices and the Active Denial System. (R. at 3.) The Long Range Acoustic Devices

emit an extremely loud and piercing noise, while the Active Denial System projects electromagnetic radiation that is intended to induce a temporary searing heat sensation. (R. at 7.) Both are experimental weapons designed for use in riot control and military combat scenarios. (R. at 7.) The agency admitted that the technology had never been used or tested for the roundup of horses, nor had it been used or tested for any other form of animal control. (R. at 7.)

The Bureau of Land Management never explained why these untested methods were to be utilized for rounding up the horses or, more particularly, how the use of Long Range Acoustic Devices or the Active Denial System was a humane method for the roundup of animals. Its own procedures prohibit inhumane treatment, which includes any act that "causes stress, injury, or undue suffering . . . and is not compatible with animal husbandry practices accepted in the veterinary community." 43 C.F.R. § 4700.0-5(f). Yet, the proposed methods are intended to cause an "intolerable heating sensation on an adversary's skin" and project a "piercing noise." *Rafiki 2009 EA*, *supra*, at 3, 4. Worse, these roundup methods have never been used or tested for any type of animal control, but instead have only been used for riot control and military scenarios. (R. at 7.) By utilizing these dangerous methods that have not been accepted within the "veterinary community," the Bureau of Land Management violates its own policies. 43 C.F.R. § 4700.0-5(f).

However, the district court found these weapons permissible because their use avoided the use of more serious and potentially lethal weapons. (R. at 8.) But, in its reasoning, the district court never determined—nor did the agency explain—that these methods were humane. Without a determination that such methods were humane and acceptable practices, the district court's erred when it determined that the Bureau of Land Management's techniques were permissible.

b. Rubber bullets and helicopter drive-trapping will cause the wild horses significant and unnecessary stress.

Further, the use of rubber bullets on horses—although nonlethal—would cause pain and extreme fear, and that the use of helicopters was psychological harassment and would cause the wild horses significant stress and suffering. (R. at 7.) The district court acknowledged that wild horses are known to throw themselves against the panels of the corrals out of fear or in a desperate attempt to escape, oftentimes running headlong into the barriers and breaking their necks. (R. at 7–8.) Other horses are severely injured during the process and must be put to sleep, while other horses suffer from "capture myopathy," which causes depression and despondence over the loss of freedom and separation from other horses. (R. at 8.) The Bureau of Land Management also admitted that approximately six horses of the 190 could die during the roundup. (R. at 8.)

Again, the court erroneously held that such cruel methods were indeed permissible. The agency never qualified why the use of rubber bullets would be humane—or a necessary method for the roundup. Nor did the agency explain why the use of helicopters for drive-trapping was also permissible under the Wild Free-Roaming Horses and Burros Act. Its own policies require that the horses not be subject to "stress . . . or undue suffering." 43 C.F.R. § 4700.0-5(f). But the Bureau of Land Management failed to explain why such methods would not cause "unnecessary stress or suffering" as Appellants contended they would. 43 C.F.R. § 4700.0-5(e). The district court's analysis only explained that the use of helicopters and rubber bullets only caused momentary stress and that wild horses would undeniably be subjected to "*some* degree of discomfort" when captured, but never addressed Appellants' contention that the horses would be subjected to "significant stress." (R. at 7, 8.) Moreover, the policies define inhumane treatment as "any intentional or negligent action . . . that causes . . . injury." 43 C.F.R. § 4700.0-5(f).

Certainly a plan that results in the death and injury of wild horses and that is contrary to the express policies is impermissible. Thus, the district court erred in determining that the roundup methods were appropriate.

B. Appellants Demonstrated a Likelihood of Success on the Merits of Their Claim Under the National Environmental Policy Act.

Appellants' second claim relates to the Bureau of Land Management's affirmative responsibilities under the National Environmental Policy Act. The Act represents our nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (1978). It requires federal agencies "to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). The Act seeks to prevent environmental damage by imposing analysis and disclosure obligations on federal agencies to draw public attention to the proposed action's environmental effects. *Marsh v. Or. Natural Res. Council*, 490 U.S. at 371. "Agencies are to perform this hard look before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values." *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988). These goals ensure not only that the agency has carefully considered alternatives but also that the public has the information necessary to challenge the agency. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To evaluate a proposed action's direct, indirect, and cumulative impact on the environment, the Act mandates either an Environmental Impact Statement or an Environmental Assessment. 40 C.F.R. § 1502.16. An Environmental Impact Statement is a detailed, rigorous evaluation of all aspects of proposed action. *Id.* An Environmental Assessment is a cursory analysis to determine if a more expansive Environmental Impact Statement is necessary. *Middle Rio*

Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1224–25 (10th Cir. 2002). An Environmental Impact Statement is required for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (2006). If an agency opts not to prepare an Environmental Impact Statement, its Environmental Assessment must put forth a "convincing statement of reasons" in a Finding of No Significant Impact that explains why the project will impact the environment no more than insignificantly. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

Here, the Bureau of Land Management prepared an Environmental Assessment and a finding of no significant impact for the Gather Plan in the Rafiki Mountains Wild Horse Range. (R. at 7.) In making this determination, the Bureau overlooked the "relatively low threshold for preparation of an Environmental Impact Statement." *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991). As this Court explained,

> An Environmental Impact Statement must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." Thus, to prevail on a claim that the [agency] violated its statutory duty to prepare an Environmental Impact Statement, a "plaintiff need not show that significant effects will in fact occur." It is enough for the plaintiff to raise "substantial questions whether a project may have a significant effect on the environment."

Blackwood, 161 F.3d at 1212 (citations omitted). Because the Bureau failed to adequately address the direct, indirect, and cumulative impacts to the wild horses there, an Environmental Impact Statement is required.

1. The Environmental Assessment is based on conclusory assertions.

The Bureau's decision that no significant impact will result is not based on detailed data; rather, it is based on conclusory statements the agency's planned action. This contradicts the underlying purpose of the National Environmental Policy Act. The agency cannot avoid

preparing an Environmental Impact Statement simply by making conclusory assertions that an activity will have only an insignificant impact on the environment. *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). The agency's review must be supported by detailed data and rigorous analysis. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *see also* 40 C.F.R. § 1500.1(b) (requiring that agency evaluation rely on high quality information and accurate scientific analysis). "Unsubstantiated determinations or claims lacking in specificity can be fatal for an Environmental Assessment. Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." *Comm. to Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993). Because the Environmental Assessment lacked this necessary factual specificity, the Bureau must prepare an Environmental Impact Statement.

2. The uncertainty regarding the environmental impact of the removal of 190 wild horses from the range, the ultimate reduction in the herd size by 100 wild horses or the methods used for the roundup mandates further study.

The Bureau of Land Management's decision to forego an Environmental Impact Statement is particularly critical here because of the uncertainty regarding the impacts of the Gather Plan on the wild horses and on the Rafiki Mountain Wild Horse Range. "Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an Environmental Impact Statement." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1129 (9th Cir. 2004) (citing 40 C.F.R. § 1508.27(b)(5)). "Preparation of an Environmental Impact Statement is mandated where uncertainty may be resolved by further collection of data or where the collection of data may prevent 'speculation on potential . . . effects. The purpose of an Environmental Impact Statement is to obviate the need for

speculation.'" *Ocean Advocates*, 361 F.3d at 1129 (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2000)).

The record is replete with speculation. (*See, e.g.*, R. at 7 ("[The Bureau] concedes that the [round-up methods] have never been used or tested for rounding up horses or for any other form of animal control."); R. at 10 ("some acknowledged scientific uncertainty").) The Environmental Assessment even speculates the captured horses will cause stress and other problems that may lead to the disruption in their reproductive capabilities. *Rafiki 2009 EA, supra*, at 10. Given this profound and significant uncertainty, the Bureau must prepare an environmental impact study to conduct a more probing review to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast." *Robertson*, 490 U.S. at 349. When essential information regarding an action's impact is incomplete or unavailable, agencies must either obtain it or explain the information's absence, its relevance, and what other evidence is available to evaluate the action's impact. 40 C.F.R. § 1502.22(a), (b) (1986).

3. The Bureau of Land Management's decision that the Gather Plan would have be beneficial is still a significant impact, requiring an Environmental Impact Statement to assess the value judgment associated with the agency's action.

The Bureau of Land Management undertook this action to ensure a "thriving natural ecological balance" on the Rafiki Mountain Wild Horse Range. *Rafiki 2009 EA, supra*, at 1, 2. While the agency has decided that the effect of reducing wild horses would have a significant beneficial impact, that decision is necessarily a value judgment that the National Environmental Policy Act ("NEPA") intended to be subject to an Environmental Impact Statement. *Envtl. Def. Fund v. Marsh*, 651 F.2d 982, 993 (5th Cir. 1981) ("NEPA is concerned with all significant environmental effects not merely adverse ones" and "a beneficial impact must nevertheless be

discussed in an Environmental Impact Statement, so long as it is significant. It cannot be shielded from review under NEPA."). "The fundamental purpose of NEPA . . . is to ensure that federal agencies take a "hard look" at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007). The Gather Plan's environmental impact is plainly significant; that is precisely why the Bureau has proposed it. The fact that the Bureau has made the value judgment that proposed action is beneficial does not relieve the agency of its statutory duty to allow for further study and public comment.

C. The Balance of Hardships Tips Decidedly in Favor of Appellants.

The district court also erred in balancing the respective hardships suffered by the parties to this litigation. *See Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. at 374 (requiring plaintiff to show a likelihood of "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"). In the court's view, "the most serious realistic possible injury would be harm to a relatively small number of horses." (R. at 12.) That is a tremendous harm that was precisely why Congress passed the Wild Free-Roaming Horses and Burros Act and the National Environmental Policy Act. In determining that the balance tips in the Bureau of Land Management's favor, the district court subjected the wild horses and the Rafiki Range to irreparable harm.

1. Without injunctive relief, the wild horses and the Rafiki Range environment will suffer irreparable harm.

An injunction should be granted if the threatened harm will impair a court's ability to grant an effective remedy later. 11A Charles Wright et al., *Federal Practice & Procedure* § 2948.1, at 145–49 (2d ed. 1995). Environmental injury are fundamentally different from most economic injuries as they can rarely be remedied by monetary damages. *Amoco Prod. Co. v. Village of*

Gambell, 480 U.S. 531, 545 (1987). The resulting harm typically cannot be undone without significant time and money. *Id.* If an injury is sufficiently likely, the balance of equities generally favors the issuance of an injunction to protect the environment. *Id.*

The Gather Plan is set to be implemented in mid-February of 2010. (R. at 3.) The Bureau admitted that as many as six horses could die as a result of the roundup methods of the Gather Plan. (R. at 8.) Once the plan is carried out, the harm will be completed. Moreover, once the Gather Plan is completed the horses will have been removed from the range Appellants' appeal will be rendered moot. *See Becker v. United States*, 451 U.S. 1306, 1311 (1981) (explaining that the balance of equities tipped in favor of applicant who would be forced to turn over videotapes, thus rendering their appeal moot and also removing the right to use the tapes as a promotional device). Additionally, the horses reproductive capabilities would likely be irreparably harmed by the stress caused during the roundup. (R. at 10.)

More troubling is the fact that the Bureau really does not know the extent of the resulting environmental harm. With a strong likelihood that severe harm to the Rafiki Range may occur if the Gather Plan is carried out, an Environmental Impact Statement was required. Congress specifically intended to protect the public interest by ensuring the careful consideration of environmental impacts before federal projects may commence. *S. Fork Bend Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). If the Gather Plan is carried out, the district court will not have the ability to maintain the return the environment to its current condition. Thus, suspension of a project pending complete consideration of the full environmental consequences comports with the public interest. *Id.*

2. Another delay of the Bureau's Gather Plan will not cause any serious harm.

For years, the Bureau tolerated what it now calls an overpopulation of wild horses in the Rafiki Range. (R. at 2–3.) During severe droughts where vegetation was sparse, the Bureau did nothing. More recently, after proposing the Gather Plan, the Bureau delayed its roundup for five months. (R. at 3.) Undoubtedly, the situation is not as grave as the Environmental Assessment based on outdated information suggests. (R. at 2.) While the Bureau is directed to be mindful of the multiple use management of the public lands, Appellees failed to ensure that the Gather Plan would not ultimately affect the range, thus jeopardizing their other mandate—to preserve the range.

CONCLUSION

For these reasons, this Court should REVERSE the district court's judgment and GRANT a preliminary injunction, enjoining the Bureau of Land Management from carrying out its Gather Plan.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS