Opinions Below

The United States District Court for the Eastern District of California, Sacramento Division, dismissed Appellants' claims under the Wild Free-Roaming Horses and Burros Act and the National Environmental Policy Act. *See* Civil Action No. 09-1968(SKM).

Applicable Jurisdiction and Standard of Review

The Wild Free-Roaming Horses and Burros Act along with the National Environmental Policy Act are federal statutes, providing this Court federal question jurisdiction over these issues. 28 U.S.C. § 1331 (2009). This case presents questions of law, which are governed by a de novo standard of review; because these are questions of law this Court is not bound by the lower court's decision. *Pierce v. Underwood*, 487 U.S. 552, 584 (1988).

Statement of the Case

Appellants, Horse People and Ms. Deborah Rubin as President (collectively "Horse People"), are a California non-profit corporation for the protection and preservation of wild horses. (R. at 1.) The Appellees are Mr. Ken Salazar ("Secretary") in his capacity as Secretary of the Interior and Mr. Robert Abbey ("Director") as Director of the Bureau of Land Management ("BLM"). *Id.* Appellants bring their claims under the Wild Free-Roaming Horses and Burros Act ("Act") and the National Enviromental Policy Act ("NEPA"). *Id.* The claims are against the Secretary and Director for their respective roles in implementing a wild horse management and gather plan ("Gather Plan") under the Act. *Id.* The Gather Plan involves the removal of horses from the Rafiki Mountain Wild Horse Range ("RMWHR"). (E.A. at 1.)

With admittedly little knowledge of horse genetics and breeding requirements, the BLM determined the "appropriate management level" ("AML"), or the optimum number of horses, for RMWHR as 85 to 105 horses in 1992. *Id.* The AML was set to maintain the horse population

on the range for multiple use and to achieve a thriving natural ecological balance ("TNEB"). In 1999, the Field Manager of the BLM's Tatu County Field Office expressed concern for the genetic viability of the RMWHR herd because of "dangerously low numbers." *Id.* Today, there are approximately 190 wild horses residing on the range. *Id.* Twenty-nine of the 190 wild horses are perpetually residing outside the RMHWR. (E.A. at 2.)

The BLM has several ongoing removal projects, and is currently housing over 30,000 horses in short and long term holding facilities. (R. at 2.) RMHWR suffered from drought for years, significantly impairing the food and water supply. *Id*. The BLM determined that 100 of the 190 horses were "excess," and must be removed because the population size exacerbated the deteriorating range conditions caused by the drought. *Id.* The BLM concluded the range was deteriorating based on data from the two worst years of drought. *Id.* at 6. However, since 2006, heavy rains have restored water tables, vegetation, and substrate stability. *Id.*

In August 2009, the BLM devised the Gather Plan to round up and remove all 190 horses from RMWHR to draw blood for genetic testing, and return 90 of the most genetically viable horses to the range. *Id.* at 2-3. The BLM did not supply a time frame to define what is "reasonable," but proposed that the Gather Plan will ensure the healthiest possible horses will remain on the range. *Id.*

Summary of the Argument

The BLM plans to round up horses with Long Range Acoustic Devices ("LRAD"), the Active Denial System ("ADS"), rubber bullets, and helicopter drive-trapping. *Id.* The LRAD and ADS are experimental weapons designed for riot control and military combat. *Id.* at 7. The LRAD emits an extremely loud piercing noise while the ADS emits electromagnetic radiation inducing a temporary searing heat sensation. *Id.* The BLM admitted both the LRAD and ADS

have never been used or tested for rounding up horses. *Id.* Additionally, the Field Manager for the BLM estimated six to ten wild horses could die during the Gather Plan. (E.A. at 7.)

As part of the Gather Plan, the BLM drafted and circulated an Environmental Assessment ("EA"), and found that the project would not have a significant environmental impact. *Id.* at 3. After a 30-day public comment period, the BLM issued a final EA and Finding of No Significant Impact ("FONSI"), in lieu of an Environmental Impact Statement ("EIS"). *Id.* The final EA included a brief discussion of the direct and indirect impacts to certain portions of the affected environment, as well as cumulative impacts. (E.A. at 6.) A brief description of some alternatives that were considered but eliminated from further analysis was provided in the EA with very limited explanations for their elimination. *Id.* at 4.

The BLM's Gather Plan violated the Horse Act and NEPA, and will cause irreparable harm if an injunction is not granted. First, the Gather Plan is a violation of the Horse Act because the BLM acted beyond its scope of authority, contrary to Congressional intent and humane horse treatment. Additionally, the BLM's actions are arbitrary and capricious because the BLM has contradicted unambiguous Congressional intent. Second, the BLM violated NEPA when it provided a faulty FONSI and EA, rather than an EIS, which was arbitrary and capricious because it ignored numerous relevant aspects of the problem, and gave explanations for its decision contrary to policy, purpose, and evidence. Last, the hardships tip sharply in favor of Appellants due to serious adverse effects on horses, wildlife, habitat, and people, compared to the minimal hardship on the BLM to conduct more research and refrain from the use of weapons on horses. This appeal follows, requesting that this Court find in Appellants' favor and reverse the lower court's decisions regarding those issues, and grant the preliminary injunction.

Argument

I. THE DISTRICT COURT ERRED IN RULING AGAINST THE APPELLANTS, EVEN THOUGH THEY DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM UNDER THE HORSE ACT.

The District Court incorrectly dismissed Appellants' claims under the Act because the BLM actions were outside the scope of authority granted by Congress. Additionlly, the BLM's actions were arbitrary and capricious.

A. The BLM's Actions Were Beyond the Scope of Authority Granted to it Under the Act and the Code of Federal Regulations.

The Act unambiguously expressed Congressional intent, stating "wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and . . . [are] an integral part of the natural system." 16 U.S.C. § 1331 (2009). The purpose of the Act is to protect wild-free roaming horses found in the western United States as a living symbol of the nation's past, and it articulates the powers granted to both the BLM and the Secretary. *Id*. In fact, the BLM's own regulations regarding the Act clarify any possible ambiguities in the Act.

i. The BLM's actions were contrary to the intent of Congress to protect horses as an integral part of nature.

The Act requires the BLM to protect wild horses and Congress precepts that wild horses are an "integral" part of nature where they are found which must be protected from "capture, branding, harassment, or death." *Id*. Further, the Act allows for the removal of wild horses only when they have been deemed "excess" animals as defined under the Act. Excess animals are wild horses or burros, which (1) are removed from an area by the Secretary pursuant to applicable law or, (2) must be removed from an area in order to preserve and maintain a TNEB and multiple use relationship. 16 U.S.C. § 1332(f) (2009).

Here, the BLM has the authority to remove the twenty-nine wild horses residing outside the RMWHR if they continually stray onto privately owned lands. 16 U.S.C. § 1334 (2009). However, all other instances of management and removal must be done at the "minimal feasible" level in conjunction with wildlife agencies where the action is taking place for the purpose of protecting the TNEB. 16 U.S.C. § 1333(a) (2009). Although not defined in the Act, "minimum feasible level" should be defined as "a limitation on the use of human-induced management actions to the greatest extent possible in keeping with the other mandates provided for in the Act in order to preserve the wild . . . horses and burros." *Restoring our American Mustangs Act: Hearings on H.R. 1018 Before Subcomm. on Natural Parks, Forests and Public Lands, 111th Cong. (2009) (statement by D.J. Schubert Wildlife Biologist Animal Welfare Institute)*. Since Congress has not provided any procedures for removing non-excess animals, "the only plausible inference to be drawn from the omission" is that Congress did not intend for the Secretary's authority to be so broad. *Colo. Wild Horse & Burro Coal., Inc. v. Salazar*, 639 639 F. Supp. 2d 87 (D.D.C. 2009).

Therefore, to satisfy the intent of the Act, the removal of the remaining 131 wild free-roaming horses consistently residing in the RMWHR must be conducted with minimal impact to both the horses and their environment (such as roundup methods other than military weapons). Also, the decision to remove the horses must be done in conjunction with relevant agencies. 16 U.S.C. § 1333(a). The BLM may act singularly only when removing those horses perpetually residing outside the RMWHR, at the request of the private land owner. 16 U.S.C. § 1334. Here, the BLM single-handedly decided to gather all 190 horses without input from either the relevant California or Nevada state agencies. Since the BLM failed to operate within the limits set by

Congress under the Act, this Court should reverse the findings below and grant Appellant's preliminary injunction.

ii. The Secretary's actions contradicted its granted powers to manage wild horses with minimal intrusion and maintain a horse inventory.

The Act grants the Secretary jurisdiction over all the wild free-roaming horses and burros for the purposes of management and protection. 16 U.S.C. § 1333(a). Within the Act, Congress placed restrictions on the Secretary's discretionary management power. First, the Secretary may only carry out management activities at the "minimal feasible level" in conjunction with the appropriate state wildlife agencies to protect the ecological balance of the area. *Id.* Secondly, the Secretary shall maintain a current inventory of the number of wild horses and burros to make determinations regarding: removal of excess animals, AML, and whether AML can be achieved by removal of excess horses or other options (such as sterilization, or natural controls on population levels). 16 U.S.C. § 1333(b)(1).

The actions proposed by the BLM for the current Gather Plan violated all of the restrictions Congress placed upon the Secretary's discretion. The Secretary failed to take the "minimal feasible," or least intrusive, method to gather the herd by planning to round up all 190 horses and crowd them in containment facilities. Because the Act does not define "minimal," Congress intended the plain meaning of the word to direct the BLM's actions.

The Secretary violated his duty to keep a current inventory of the land and the horses upon the land. While the BLM admittedly knew little about wild horse genetics and viability, it approximated the AMLs based on outdated data collected during the two worst years of drought. (R. at 2, 6.) Although droughts may occur again, it is unreasonable for the agency to determine the carrying capacity of a range based on such extreme conditions. Since the drought ended in 2005, a significant amount of rainfall replenished the water table and the BLM now better

understands wild horse genetic viability. (R. at 6.) Because the Secretary's actions in the Gather Plan were contrary to the directives set forth by Congress, this Court should find the actions beyond the scope of the Secretary's authority and grant Appellant's preliminary injunction.

iii. The use of LRAD, ADS, and rubber bullets violate the humane treatment of horses mandated by the Act and the BLM's regulations.

The Secretary must ensure the humane capture and removal of excess horses, including transportation, feeding, and handling. 16 U.S.C. § 1333(b)(2)(B). In conformance with the Act's mandate for humane horse removal, the BLM defined humane treatment as, "handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse." 43 C.F.R. § 4700.0-5(e) (2009). The BLM defined inhumane treatment as "any intentional or negligent act[] or [omission] that causes stress, injury, or undue suffering to a wild horse[,] . . . not compatible with animal husbandry practices accepted in the veterinary community." 43 C.F.R. § 4700.0-5(f).

The Gather Plan proposed to use LRAD, ADS, and rubber bullets to round up the horses, two of which are military weapons. (R. at 7.) These weapons have never been used to round up horses, and their short and long term effects are unknown. The LRAD military weapon emits a loud piercing noise, forcing those within its range to move away in pain. *Id.* Horses are dependent upon their sensitive hearing for survival, and the LRAD could damage their hearing, which would significantly reduce their survival chances once reintroduced to the wild. Auditory stimuli causes greater increased heart and defecation rates in horses than do visual and olfactory stimuli, which may be useful alternatives to LRAD. Sarah Joseph, *Equine Responses to Fear-Provoking Stimuli: Implications for Feral Horse Management* (2007) (unpublished Ph.D. Thesis, University of Queensland).

The BLM also proposed to use the ADS military weapon to round up the horses. (R. at 7.) Although this weapon was designed for non-lethal use on humans, it is unknown how horses will react to such stimuli and what the long term effects will be. Joint Non-Lethal Weapons Program, *Active Denial System*, https://www.jnlwp.com/ads.asp (last visited Jan. 2, 2010). The ADS projects a focused beam of millimeter waves at a target, creating a painful searing sensation. *Id.* Horses are skittish animals that frighten easily, and the wild horses' reaction to the ADS could be fatal, due to coronary stress caused by application of the ADS.

The BLM also proposed using rubber bullets on the herd for the roundup. This could also result in wild horse fatalities. If the horse is shot on the flank, the BLM is likely correct in its assumption that bruising or a welt may occur. However, if the horse is shot in the head or soft belly area, life-threatening injuries may result. The BLM has negligently failed to address all of the potential harms that could result from the methods proposed in the Gather Plan, and this Court should reverse the decision below.

B. The BLM's Actions Were Arbitrary and Capricious due to its Clear Error in Judgment, Failure to Consider Relevant Factors, and the *Chevron* Test.

Although the interpretations of administrative regulations are a question of law, reviewed de novo, the courts typically grant the agency great deference. *Lara v. Sec'y of the Interior of the U.S.*, 820 F.2d 1535 (9th Cir. 1987). To determine whether the BLM should be granted deference, the standard of review for the Court is whether the agency's actions are arbitrary and capricious. 5 U.S.C. § 706(2)(A) (2009). The Supreme Court has defined arbitrary and capricious as an action wherein the agency failed to consider all relevant factors and there is a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). This Court also articulated that an agency's actions are arbitrary and capricious when those

actions are against the unambiguous intent of Congress and the actions are based on an impermissible construction of the statute. *Chevron v. NLRB*, 467 U.S. 837, 842-43 (1984).

i. The BLM's actions were arbitrary and capricious due to its clear error in judgment and failure to consider relevant factors.

The "Court cannot second guess the wisdom of agency actions; rather, it may only determine whether there has been a violation of law or a clear error in judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43-44 (1983). In the case at hand, the BLM showed a clear error in judgment when it failed to consider all relevant factors associated with the Gather Plan. *Cal. Energy Comm'n v. Dept. Of Energy*, 585 F.3d 1159 (9th Cir. 2009). Two relevant facts the BLM failed to consider are: first, the BLM used outdated numbers in determining the AML value; and second, the BLM failed to consider the effects of the military-grade weapons on the horses.

First, the BLM determined the number of horses to be removed from the range based on outdated data collected in extreme conditions. The Circuit Court for the District of Columbia stated that the BLM's findings of wild horse overpopulations should not be overturned by insufficient information." *Am. Horse Prot. Ass'n, Inc. v. Watt,* 694 F.2d 1310, 1318 (D.C. Cir. 1982). In this case, the BLM's numbers were based on improper, not insufficient, data. The BLM's actions were arbitrary and capricious because it failed to consider facts relevant to the Act by using inappropriately outdated date to determine the AML, rather than insufficient data.

Additionally, the BLM failed to consider short and long term effects of the Gather Plan on the herd. Horses are easily excitable and the stress of the roundup, confinement, and reintroduction could have devastating effects on the herd. This Court should find the BLM's actions arbitrary and capricious because the action is contrary to Congressional intent.

ii. The BLM's actions were arbitrary and capricious under the *Chevron* test because Congressional intent was clear and unambiguous, and the BLM impermissibly construed the Act.

The Supreme Court stated that the intent of Congress must be unambiguous in finding whether an agency's actions are arbitrary and capricious or fall within its granted scope of authority. *Chevron* 842-43. If the statute is ambiguous, the agency's action must be based on permissible construction of the statute or clarifying directive. *Id.*

a. Clear Congressional articulation of the BLM's role in wild horse management and the Secretary's management authority

The Act entrusted the BLM with the management and protection of wild horses. 16 U.S.C. § 1331 (2009). Even though Congress unambiguously stated the intent and purpose of the Act, the judiciary is the final authority on issues of statutory construction and must reject administrative constructions contrary to clear Congressional intent. *Chevron*, 467 U.S. at 843. Further, if a court employs traditional tools of statutory construction, and determines that Congress had an intention directed at that particular issue, that intention must be given effect. *Id.* In this case, Congress articulated the purpose of the Act in § 1331 and limited the scope of the Secretary's management authority in subsequent sections.

Even though the Act gave the Secretary discretionary power over herd management, Congress placed limits on the Secretary's powers. The Act refers to the Secretary's management powers, in which he must thoroughly consider the ramifications of any wild free-roaming horse removal. Congress unambiguously articulated the purpose of the BLM's role in wild horse management, and that the Secretary has management authority rather than unchecked power. Thus, this Court should find the BLM's actions arbitrary and capricious.

b. The BLM's interpretation and application of the Act is an impermissible construction

Even though Congress unambiguously expressed its intentions for the purpose of the Act, this Court should find the BLM's actions an impermissible construction of the statute. An agency must clarify any Congressionally explicit gaps in legislation, which are given controlling weight, except when "arbitrary, capricious or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843-44. Congress left no explicit gap in the Act for the BLM to fill, and the Act does not authorize the BLM to remove non-excess horses from the range. *Salazar,* 639 F. Supp. 2d 87, 94 (The BLM intended to remove the entire herd of wild horses from the range). The *Salazar* Court further limited the BLM's power of removal to only those animals determined to be "excess" within the meaning of the Act. *Id.* at 96-97. Congress' silence on the removal of non-excess horses shows a Congressional intent to limit the BLM's management authority to only excess horses. *Id.* The *Salazar* Court decision is highly persuasive because the D.C. courts hear numerous cases dealing with Administrative Agency actions. Even if this Court determines that Congress was ambiguous in delineating power to the BLM under the Act, this Court should give deference to the decision rendered by the *Salazar* Court and find that the BLM's current Gather Plan is not a permissible construction of the of the Act.

II. THE DISTRICT COURT ERRED IN RULING AGAINST APPELLANTS BECAUSE THEY DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM UNDER NEPA.

The District Court incorrectly dismissed Appellants' claims under NEPA because: first, the BLM provided a faulty EA and FONSI in lieu of a required EIS in violation of NEPA; and second, the BLM's FONSI decision was arbitrary and capricious.

A. The BLM Violated NEPA When it Provided a Faulty FONSI in Lieu of an EIS Due to its Inadequate EA.

The BLM violated NEPA because it made a faulty FONSI based on an inadequate EA. First, the FONSI and EA were deficient because the BLM incorrectly assessed the "unique risk" and "highly controversial" intensity factors. Second, the BLM failed to consider an adequate range of alternatives. Third, the BLM failed to adequately complete compliance, consultation, and coordination with others.

NEPA was created to "foster and promote the general welfare, [and] to create and maintain conditions under which man and nature can exist in productive harmony . . ." 42 U.S.C. § 4331(a) (2009). NEPA promotes the "prevention or elimination of damage to the environment" and establishes the Council on Environmental Quality ("CEQ"), authorizing it to regulate NEPA, through the Code of Federal Regulations ("CFR") and memoranda. 42 U.S.C. § 4321 (2009). NEPA requires federal agencies to prepare an EIS before taking "major federal action[s]" that may "significantly affect[] the quality of the human environment." 42 USC § 4332(2)(C) (2009). The "human environment" includes the "natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (2009). A "major federal action" occurs when effects may be major and are potentially subject to Federal control and responsibility. 40 C.F.R. § 1508.18.

A "significant" effect of a proposed action is determined based on the effect's severity in both context and intensity. 40 C.F.R. § 1508.27 (2009). The significance of an action must be analyzed in several contexts such as society as a whole, affected region, affected interests, and locality. 40 C.F.R. § 1508.27(a). The intensity of the effect focuses on the severity of direct and indirect effects and cumulative effects. 40 C.F.R. § 1508.8, 1508.25(c). The cumulative impacts

are those incremental impacts on the environment by both the BLM and other agencies or private individuals. 40 C.F.R. § 1508.7.

Two applicable considerations for evaluating intensity in this case are the effects that are (1) likely to be highly controversial, and (2) highly uncertain or involve unique or unknown risks. 40 C.F.R. § 1508.27(b)(4), (5). Agencies must "study, develop, and describe" alternatives to a plan of action, considering all which are reasonable and provide an "appropriate explanation" for those eliminated. 42 U.S.C. § 4332(2)(E); *Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1246 (9th Cir. 2005). Before making an EA, a federal agency must consult other agencies with jurisdiction or special expertise regarding the environmental impacts involved, and involve the public to the fullest extent practicable. 42 U.S.C. § 4332(C); 40 C.F.R. §§1501.4(b), 1508.9(a)(1).

i. The BLM's FONSI and EA were inadequate because the BLM incorrectly assessed the "unique risk" and "highly controversial" intensity factors.

The incorrectly assessed intensity factors were the "degree to which effects are likely to be highly controversial" and the "degree to which effects are highly uncertain or involve unique or unknown risks." The highly controversial factor is based on "substantial dispute . . . [about] the size, nature, or effect of the major federal action." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); citing *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993).

a. Removal without contraception defeats the purpose of population management and raises scientific controversy

The Gather Plan controls wild horse populations only by removal of the horses, without incorporating contraceptives. Horse populations controlled by contraceptives (population remained at 3% of objective) are more successful than control by removal alone (population

fluctuations that generally exceeded objectives by more than 20%). Jane E. Gross, *A Dynamic Simulation Model for Evaluating Effects of Removal and Contraception on Genetic Variation and Demography of Pryor Mountain Wild Horses*, 96 Biological Conservation 913 (2000).

Removal of these horses without fertility control leads to numerous gather and removal plans in the future to control the horse population. Continual removal and reintroduction of a keystone species from a location may cause ecological shock, scaring away wildlife during gathers, and displacing them upon the reintroduction of the horses. The BLM's failure to acknowledge the controversy surrounding its horse removal plan without contraception lead to a faulty EA and FONSI. Thus, this Court should find that the BLM violated NEPA.

b. The LRAD, ADS, and rubber bullet gather techniques have uncertain danger and scientific controversy

The Gather Plan "has no known effects on the human environment," but the BLM has never employed LRAD, ADS, or rubber bullets in previous roundups, and the BLM admits it had no scientific data about the effects of the LRAD or ADS on horses. (F.O.N.S.I. at 4.) Though the BLM is unaware of negative effects to horses, "[l]ack of knowledge does not excuse the preparation of an EIS; rather it requires" that the agency "do the necessary work to obtain it." *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 829 (E.D. Mich., Jul 10, 2008); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001). The agency must provide justification for why more definitive information could not be provided, which the BLM failed to supply. *Blue Mountains*, 161 F.3d 1208.

The LRAD and ADS systems are military weapons and have not been tested on horses, creating unknown and uncertain risks. The ADS can cause skin irritation and burns in people, and may be problematic for any people, horses, or other wildlife present during the roundup. Susan Levine, Ctr. For Tech. & Nat'l Sec. Policy, Nat'l Def. Univ., *The Active Denial System: A*

Revolutionary, Non-Lethal Weapon for Today's Battlefield (2009), *available at* https://www.jnlwp.com/public_affairs/adspaper.pdf. (last visited Jan. 2, 2010).

The LRAD emits a high frequency sound that can cause severe damage and hearing loss in people. Horses and other wildlife have higher sound sensitivities than humans, and may suffer more severe damage than do people. Anna Sorin, *Equus caballys*, Animal Diversity Web, http://animaldiversity.ummz.umich.edu/site/accounts/information/Equus_caballus.html. (last visited Jan. 2, 2010). The BLM did not research the effects of these systems on horses or other wildlife to determine negative impacts, nor did the BLM mention who employs these tools or the levels at which the LRAD or ADS must be set to prevent damage to horses and wildlife. Though sharp shooters will operate rubber bullet guns, causing minimal and temporary pain to horses, the BLM ignores the effects of stray bullets on wildlife. The BLM also ignores bullet collection after the roundup to prevent rubber chemical seepage into water systems and to prevent ingestion or asphyxiation by wildlife, including migratory and threatened species.

An EIS is required when uncertainty may be resolved by data collection, or where such data collection may prevent "speculation on potential . . . effects." *Nat'l Parks*, 241 F.3d at 732; *Blue Mountains*, 161 F.3d at 1213-14. Plaintiffs need not show these harms will actually occur, but only "raise substantial questions [as to] whether a project may have a significant effect." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146 (9th Cir. 1998). The BLM made hasty and uninformed conclusions about the use of these tools, due to a lack of data and failing to provide detailed methods of how these techniques will be implemented. Only speculative conclusions may be reached about the effects of the LRAD and ADS, ultimately leading to a faulty FONSI and requiring the detailed data collection of an EIS.

ii. The BLM's FONSI and EA were inadequate because the BLM did not explore an adequate range of alternatives.

The BLM violated NEPA by failing to develop alternatives to its own proposed action, and improperly rejecting a viable and relevant alternative. The agency also ignored the effects of the containment facilities, and failed to appropriately consider: (1) additional and/or combined population control methods; (2) other wildlife and their habitat; (3) habitat and wetland accessibility and quality; (4) effects on individual horses and genetic diversity. Compliance with NEPA "should not depend on the vigilance and limited resources of environmental plaintiffs," thus the agency must develop and study alternatives to its proposed action. *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). The BLM did not develop alternatives, instead relying on the alternatives posed by others, which were all rejected. Agencies must take a "hard look" at environmental consequences and prepare "up-front, coherent, comprehensive environmental analyses." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003).

a. The BLM improperly rejected a viable and relevant alternative

An EA must include discussions of alternatives and a FONSI report must "state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination." 40 C.F.R. § 1508.9(b); Memorandum from CEQ on Forty Most Asked Questions Concerning CEQ's NEPA Regulations to Fed. Agencies (March 23, 1981), *available at* http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm.

The alternative proposed by Rafiki Mountains Wild Mustang Center was rejected on improper grounds because the BLM's explanation for the rejection was contradictory and insufficient. The BLM stated that the alternative did "not meet the purpose and need" of the project because it would "maintain a population beyond what would achieve a [TNEB]." (E.A.

at 6.) However, the BLM contradicts itself because the rejected alternative management goal of 100 horses falls within the 85 to 105 deemed appropriate by its AML. (E.A. at 1, 6.) An agency's contradiction of its policy is evidence that the action was not reasonable, and therefore arbitrary and capricious. *Portela v. Pierce*, 650 F.2d 210 (9th Cir. 1981). Thus, the explanation for rejecting this alternative rests solely on the plan not meeting the purpose and need of the project, which is not a sufficient analysis under NEPA. *Envt'l Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App'x 440 (9th Cir. 2007) (the Court determined that the rejection of an alternative in an EA solely because it was not consistent with the purpose and need was insufficient).

b. Containment facilities were not referenced and four relevant factors were ignored

The BLM failed to provide a hard look at the environmental consequences by failing to consider the containment facilities in the EA, and by ignoring four highly relevant factors. 42 U.S.C. § 4321; *Ctr. for Biological Diversity*, 349 F.3d 1157. The BLM ignored the potential impacts of the gather containment facilities, focusing only on the effects of the roundup site. The containment facilities are a large component of the Gather Plan, and may have significant environmental effects for which an EA is required. The BLM also ignored four relevant factors: (1) additional and/or combined population control methods; (2) other wildlife and their habitat; (3) habitat and wetland accessibility and quality; (4) effects on individual horses and genetic diversity. Thus, the BLM did not give a "hard look" at the environmental impacts when creating the EA and FONSI, in violation of NEPA.

First, the BLM ignored a need to implement different or additional population control methods to maintain the ideal population size within the AML over the long term. The goal of the Gather Plan is to manage the horse population for the TNEB. However, the BLM did not include in its EA measurement indicators such as the expected effectiveness of the proposed

population control methods, the projected gather frequency, nor a projected amount of time in which genetically viable horses are to be reintroduced into the management area. Second, the BLM stated that the Gather Plan has no known impacts to other wildlife and their habitat. However, the BLM's EA did not acknowledge the potential competition changes for forage and water over time at the RMWHR and the containment facilities. The EA referenced a list of wildlife that may be affected by the gather. (E.A. at 10.) Yet, the BLM did not acknowledge consultation with any relevant agencies to determine if endangered, threatened, or species of special concern are present at either the herd management area or the containment facilities; instead providing a conclusory statement that "there are no known threatened and endangered species or their habitat in the Rafiki Mountains." (E.A. at 11.)

Third, impacts to vegetation/soils, riparian/wetland, and cultural resources were barely discussed in the EA. The BLM vaguely dismissed possible effects to these systems by stating how the project will help the environment, but neglecting to mention any possible detriments to these features at the containment facilities. Fourth, impacts to individual horses and the herd were inadequately considered, ignoring factors such as the potential impacts to each horse's health and condition (capture stress deaths) and the expected impacts to individual wild horses and herd social structure from future gather operations. The BLM admits it had little knowledge of wild horse genetic viability, and no knowledge of how long it will take after the horses are gathered to be reintroduced to the management area. (R. at 1, 3.) Thus, the BLM failed to provide a hard look at the environmental consequences by failing to consider the containment facilities in the EA, and by ignoring four highly relevant factors, in violation of NEPA.

iii. BLM's FONSI and EA were inadequate because the BLM failed to adequately complete compliance, consultation, and coordination.

NEPA requires that "prior to making any detailed statement, [a federal agency] shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(C). When determining whether an EIS is needed, the agency is required prepare an EA that "involve[s] environmental agencies, applicants, and the public, to the extent practicable, in preparing the EA and FONSI." 40 C.F.R. §§ 1501.4(b) (2009), 1508.9(a)(1).

Agencies with jurisdiction, such as the U.S. Forest Service and U.S. Fish and Wildlife Service, among many others, are entitled to notice of such a project, and to request cooperating agency participation. 40 C.F.R. § 1501.6(a)(1). The BLM's EA and FONSI have no record of such notice, other than a statement in its EA that it consulted with the public on July 15, 2009, and received some feedback. (E.A. at 14.) However, the July 15th hearing only focused on the use of the experimental devices and helicopters, but did not include a hearing for which another federal agency could identify major issues and factors of relevance that were ignored or overlooked by the BLM. (E.A. at 14.) These issues and factors would be determined during project planning and scoping, as guided by the BLM, adopting a U.S. Fish and Wildlife Service Guide. Bureau of Land Mgmt., Dept. of the Interior, Envtl. Assessment Dev. Guidance, Form EA-GEN (2/98), *available at* http://www.fws.gov/r9esnepa/checklists/ea_form.gen.pdf.

Even if the July 15th hearing is considered adequate consultation, the BLM is required to include in its EA "a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b); Bureau of Land Mgmt., Dept. of the Interior, *Nat'l Envtl. Policy Act Handbook,* H-1790-1 (2008). However, the BLM did not specify the particular parties who participated in the July 15th hearing. (E.A. at 14.) Appropriate parties with whom the BLM should have consulted include

agencies with statutory authority or special knowledge and expertise in the area of interest. 42 U.S.C. § 4332(C). These include, but are not limited to, the U.S. Fish and Wildlife Service, the National Park Service, the U.S. Forestry Service, the State of Nevada Commission for the Preservation of Wild Horses, the Nevada Department of Wildlife, the California Department of Fish and Wildlife, etc. The BLM also neglected to make any routine contacts with environmental organizations, livestock operators and others who make a livelihood and have an interest in the public lands on which these horses inhabit.

The BLM does not refer to the Gather Plan's conformance with Rangeland Health Standards or Guidelines, as well as other federal plans or Acts of Congress. The BLM's EA claims to conform to the Hawk Lake Resource Management Plan (RMP) of 1984. However, the BLM does not state the conforming plan objectives and applicable decisions, nor does it include a list of pertinent laws, executive orders and regulations, or a statement of how compliance is met. BLM Handbook, *supra*, at 81. These are policies and practices set forth by the BLM. *Id.* An agency's contradiction of its stated adopted policy is evidence that the agency's action was not reasonable, and thus arbitrary and capricious. *Portela*, 650 F.2d 210.

B. The BLM's Actions Were Arbitrary and Capricious for Ignoring the Numerous Relevant Aspects of the Problem and Making a Decision Contrary to Policy, Purpose, and Evidence.

The BLM's decision to issue a FONSI was arbitrary and capricious because: first, it neglected to consider numerous important aspects of the problem; and second, it gave explanations for its decision that were contrary to its own policies, the purpose of the Gather Plan, and the evidence before the agency.

A court should set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An agency

decision is arbitrary and capricious if "the agency . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Motor Vehicle*, 463 U.S. at 43. A federal agency has the discretion to conclude that an environmental impact is insignificant, particularly when the analysis requires a high level of technical expertise. *Anglers*, 565 F. Supp. 2d 812; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). However, the federal agency is entitled to this discretion only if it has made a "reasoned evaluation of the relevant factors" or a "rational basis." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Nat'l Park Concessions, Inc. v. Kennedy*, No. A-93-CA-628 JN, 1996 WL 560310, at *10 (W.D. Tex., Sep. 26, 1996). A court may consult documents outside the record to determine if the agency should have considered certain information but did not. *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980).

i. The BLM's decision to issue a FONSI was arbitrary and capricious because it failed to consider the safety of the roundup methods and the environmental impacts of the confinement facilities.

The BLM has made arbitrary and capricious conclusions in determining that the Gather Plan does not significantly affect the environment, failing to fully consider the safety of the LRAD, ADS, and rubber bullet roundup technique tools, and also the environmental impacts of the confinement facilities.

First, the BLM based its decision to use these military-grade weapons as gather tools on a lack of data supporting their safety on horses, other wildlife, and the environment. The agency admits to not knowing the effects on horses, and failed to determine how the horses or other wildlife may be affected. (R. at 7.) The BLM also failed to provide detailed methods of how these techniques are to be completed, such as how the rubber bullets will be collected and accounted for after the gather, and who will be controlling the LRAD and ADS devices. Effects

of these weapons on vegetation, soils, and water bodies were completely ignored, such as any chemical leaching into the soils and water from uncollected rubber bullets. Only speculative conclusions may be reached as to the effects of the LRAD and ADS, in particular.

Second, the BLM made minimal reference to and no analysis of the potential impacts of the gather containment facilities, focusing instead on the potential effects of the site from where the horses are to be gathered. The facilities where these horses will be kept until genetic profiles are complete are a large component of this plan, and these facilities may have significant effects on the human environment.

ii. The BLM's decision to issue a FONSI was arbitrary and capricious because it gave explanations for its decision that were contrary to the purpose, policy, and evidence before the BLM.

It is the policy of the BLM to manage wild horse populations for horse protection, maintaining a thriving natural ecological balance (TNEB), and for multiple use purposes. (E.A. at 1.) Removal without contraception defeats the purpose of population management because it leads to numerous gather and removal plans in the future to control the horse population. These multiple gathers are unnecessarily costly to the environment and the budget, whereas horse populations controlled by contraceptives are more successful than control by removal alone. Gross, *supra*.

The BLM failed to acknowledge this combined adaptive management for the Gather Plan, and such a failure to consider well-established adaptive management strategy is arbitrary and capricious because it was contrary to the purpose, policy, and evidence before the BLM. *Motor Vehicle*, 463 U.S. 29. The alternative proposed by Rafiki Mountains Wild Mustang Center was rejected by the BLM with contradictory and insufficient rationale. The BLM stated that the alternative did "not meet the purpose and need" of the project because it would

"maintain a population beyond what would achieve a [TNEB]." (E.A. at 6.) However, this is contrary to the Gather Plan purpose because it rejected the alternative management goal of 100 horses on the grounds that it would maintain a population beyond what would achieve a TNEB, even though the BLM set the AML at 85 to 105 horses. The alternative in fact does not set a population beyond that established by the BLM. (E.A. at 1, 6.) An agency's contradiction of its policy is evidence that the agency's action was not reasonable, or arbitrary and capricious. *Portela*, 650 F.2d 210. Thus, the explanation for rejecting this alternative rests solely on the plan not meeting the purpose and need of the project, an insufficient analysis under NEPA. *Envt'l Prot. Info. Ctr.*, 234 F. App'x 440 (rejection of an alternative in an EA solely because it was not consistent with the purpose and need was insufficient without further explanation).

III. THE DISTRICT COURT ERRED WHEN HOLDING THE BALANCE OF HARDSHIPS DOES NOT FAVOR THE APPELLANTS.

The equitable balance of hardships tips sharply in favor of the Appellants because the BLM made a hasty decision that may have serious adverse effects on horses, wildlife, habitat, and people. Thus, the District Court erred when it ruled that the balance of hardships tipped in favor of the Defendants, and this Court should grant the injunction requested by Appellant-Plaintiff.

An injunction is an equitable remedy, which is granted based on whether the plaintiff has established that "[1] he is likely to succeed on the merits, [2] he is likely to suffer irreparable harm in the absence of preliminary relief, [3] the balance of equities tips in his favor, and [4] an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (U.S. 2008). The Court balances the "claims of injury" that would occur if the injunction were to be either granted or denied. *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531 (1987).

Irreparable damage is presumed if an agency fails to thoroughly evaluate the possible environmental impacts. *People of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. Alaska 1985). An injunctive relief is the remedy for a violation of environmental statutes, absent rare or unusual circumstances. *Id*. "Unusual circumstances" are those where an injunction would interfere with a long-term contractual relationship or would result in irreparable harm to the environment. *Forelaws on Bd. v. Johnson,* 743 F.2d 677 (9th Cir. 1984); *Am. Motorcyclist Ass'n v. Watt,* 714 F.2d 962 (9th Cir. 1983).

A. The BLM Gather Plan Will Cause Irreparable Harms to Wild Horses, People, and Environment.

The BLM minimally acknowledged harms to the habitat, watersheds, soils, wildlife, horses, and people. The use of LRAD, ADS, and rubber bullets for gathering the horses may be detrimental to horses by causing high levels of stress, pain, and unknown long-term effects likely to cause hearing loss and sterility. (R. at 10); American Technology Corp.- *Wildlife Preservation,* http://www.atcsd.com/site/content/view/268/110 (last visted Jan. 2, 2010). The BLM did not state who will be controlling these military-grade devices. An improperly trained individual may easily misuse the LRAD and/or ADS, causing severe damage.

The Gather Facility will deteriorate surrounding habitat, increase regional competition for natural resources, degrade water quality, and cause the horses undue stress and crowding. Although located in a previously disturbed region and not within a riparian zone, these facilities require water for horses to drink, and to clean the horses and facilities. Waste will be washed into the soils and drain into surrounding watersheds. Removal of an entire herd of horses is against the interest of society. The horses will be absent from the management area for an unknown amount of time that may negatively impact local residents and businesses who make a livelihood on the horses from ecotourism. The sudden removal and reintroduction of horses in a

given area changes habitat and resource competition for the horses and other wildlife, disturbing and displacing entire species populations within the ecosystem.

B. The BLM Has Minimal Hardship for Postponing the Gather Plan Until the Irreparable Harm Potential is Significantly Reduced and/or Mitigated.

The BLM rushed into the Gather Plan concerned about deteriorating lands and hungry horses due to a belief the herd's demands exceeded available food resources. However, the BLM did not show the horses were the cause of such deterioration in the management area. Instead, the drought damage was augmented by the herd and lack of proper herd management. (E.A. at 2.) Heavy rainfall since 2006 has rebounded the water table and vegetation. Also, because horses have a fairly long gestation period, the population size is not likely to significantly increase if the BLM postpones the Gather Plan until further data is collected. The horse population has increased an average of two horses per year, a small hardship compared those sustained by the herd, habitat, wildlife, watersheds, and people if the BLM acts hastily. Thus, the balance of hardships tips in the Appellants favor, and this Court should reverse the decision below.

Conclusion

For the reasons stated above, Appellants request this Court find in their favor and reverse the lower court's decisions regarding those issues, and grant the preliminary injunction.

Date : January 4, 2010

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Counsel for Appellants