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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

THE CLOUD FOUNDATION, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 09-cv-01651
	)	
KEN SALAZAR, in his official capacity as Secretary Department of the Interior, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

The Defendants, Ken Salazar, Secretary of the Department of the Interior; Robert Abbey, Director, U.S. Bureau of Land Management ("BLM"); Jim Sparks, Field Manager, BLM; and Jared Bybee, Wild Horse and Burro Specialist, BLM Billings Field Office (collectively, "Defendants"), hereby file their Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for a Temporary Restraining Order.

INTRODUCTION

The Wild Free-Roaming Horses and Burros Act confers on the BLM the authority and discretion to manage wild horses for their protection but also to remove horses where necessary to address overpopulation and overuse of rangeland. In this case, BLM documented in a well articulated environmental assessment its determination that an overpopulation of wild horses exists under the Wild Free-Roaming Horses and Burros Act ("Act" or "Wild Horses and Burros Act") on the Pryor Mountain Wild Horse Range ("PMWHR" or "Range"). BLM concluded that this surfeit is causing significant habitat destruction to the Range, and that the gather and removal not only would improve conditions for flora and fauna on the Range, but that it also was required under the Wild Horses and Burros Act. Accordingly, the agency determined that slowing and reducing herd growth is appropriate to meet the statutory obligation to maintain a thriving natural ecological balance. This determination was made after taking a hard look at the environmental effects and finding that there would be no significant impact on the environment. This decision is entitled to deference. The Court should accordingly deny Plaintiffs' motion for a temporary restraining order ("TRO").

STANDARD OF REVIEW

The Supreme Court just last year reiterated that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. NRDC, 129 S. Ct. 365, 376 (2008) Notably, as here, Winter involved claims under the National Environmental Policy Act ("NEPA"), and the Court made clear that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 374 (emphasis added); see also National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 613 (D.C. Cir. 1980); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The Supreme Court recently repudiated the "serious questions" approach to preliminary injunctions by requiring a likelihood of success showing in all cases, regardless of whether the balance of equities weighs in favor of the injunction. See Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008).

Plaintiffs in the instant case are not entitled to a TRO because they cannot show that they have a likelihood of success on the merits, that they will be irreparably injured if an injunction is not granted, that the balance of hardships weighs in their favor, or that the public interest would be served by granting the TRO.

LEGAL FRAMEWORK

A. WILD FREE-ROAMING HORSES AND BURROS ACT

BLM "manages the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). Since 1971, this responsibility has included oversight and management of wild horses and burros on public lands. See generally Wild Horses and Burros Act, 16 U.S.C. § 1331 et seq. When it enacted the Wild Horses and Burros Act, Congress was concerned that

wild horses were vanishing from the West. Congress wished to preserve the horses as "living symbols of the historic and pioneer spirit of the West," and directed the Secretary to provide for their protection and management. See 16 U.S.C. §§ 1331. The Wild Horses and Burros Act grants the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros on federal lands and directs the Secretary to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. §1333(a); see also Fund for Animals, Inc. v. BLM, 460 F.3d 13, 15 (D.C. Cir. 2006). "The Bureau (as the Secretary's delegate) carries out this function in 'localized herd management areas'" ("HMAs"), id.; see also 16 U.S.C. § 1332(c); 43 C.F.R. § 4710.3-1, established in accordance with broader land use plans. Fund for Animals, 460 F.3d at 15; see also 43 C.F.R. § 4710.1. "Responsibility for a particular herd management area rests with the [BLM's] local field and state offices." Fund for Animals, 460 F.3d at 15. The BLM is prohibited from allowing a deterioration of the range associated with an overpopulation. See 16 U.S.C. 1333(2) (iv).

In each herd management area, BLM officials at the field and state office levels are afforded significant discretion to determine their own methods for computing "appropriate management levels" ("AML") for the wild horse and burro populations they manage. Id.; see also 16 U.S.C. § 1333(b)(1). When wild horse populations exceed the carrying capacity of the range, or when they stray outside of a designated herd area, BLM is obliged under the Wild Horses and Burros Act to remove them. See 16 U.S.C. §§ 1331(f) (defining "excess animals" as " wild free-roaming horses or burros (1) which have been removed from an area by the Secretary pursuant to applicable law or, (2) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area"),

1333(b)(2); 43 C.F.R. §§ 4710.4 (management of wild horses "shall be undertaken with the objective of limiting the animals' distribution to herd areas"), 4700.0-5 (herd areas are the "geographic area identified as having been used by a herd as its habitat in 1971."). This assessment is known as an "Excess Determination."

The Wild Horses and Burros Act does not require that the maximum number of horses be retained on the range without regard to the impact identified or projected for the ecosystem as a whole. Instead the agency is given broad discretion to take action in a humane manner to remove horses to preserve and maintain the habitat for sustained use or to control population growth through the use of fertility contraception. American Horse Prot. Ass'n, Inc. v. Frizzell, 403 F. Supp. 1206, 1217 (D. Nev. 1975); 16 U.S.C. § 1333(b)(1).

The 1978 amendments to the Wild Horses and Burros Act discussed information that the agency is to review in making decisions regarding whether to remove horses:

> The most important 1978 amendment, for our purposes, is section 1333(b)(2). That section addresses in detail the information upon which BLM may rest its determination that a horse overpopulation exists in a particular area. The Agency is exhorted to consider (i) the inventory of federal public land, (ii) land use plans, (iii) information from environmental impact statements, (iv) the inventory of wild horses. But the Agency is explicitly authorized to proceed with the removal of horses "in the absence of the information contained in (i-iv)," Id. Clauses (i-iv) are therefore precatory; in the final analysis, the law directs that horses "shall" be removed "immediately" once the Secretary determines, *on the basis of whatever information he has at the time of his decision*, that an overpopulation exists. The statute thus clearly conveys Congress's view that BLM's findings of wild horse overpopulations should not be overturned quickly on the ground that they are predicated on insufficient information.

American Horse Prot. Ass'n, Inc. v. Watt, 694 F.2d 1310, 1318 (D.C. Cir. 1982) (emphasis in original); see also Blake v. Babbitt, 837 F. Supp. 458, 459 (D.D.C. 1993) (noting "the [a]mendments made clear the importance of management of the public range for multiple uses,

rather than emphasizing wild horse needs" and "adjustments can be made later, but the endangered and rapidly deteriorating range cannot wait").

B. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and insuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA does not mandate particular results or impose substantive environmental obligations upon federal agencies. See Id., 490 U.S. at 350-51; Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989). Rather, NEPA ensures "that [an] agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Id.*

To fulfill NEPA's dual purposes, an agency must prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Not every federal action or proposal requires preparation of an EIS. NEPA and its implementing regulations make clear that only major Federal actions "significantly" affecting the quality of the human environment require the preparation of an EIS. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. Thus, an EIS is not necessary if the agency issues a Finding of No Significant Impact ("FONSI") after its preparation of an environmental assessment ("EA"). 40 C.F.R. §§ 1501.4(c), (e), 1508.9; Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984).

In preparing an EA, the agency must take a "hard look" at environmental concerns, Town of Cave Creek, Arizona v. FAA, 325 F.3d 320, 328 (D.C. Cir. 2003), and must include "brief discussions of the need for a proposal, [and] of the environmental impacts of the proposed action

and alternatives." 40 C.F.R. § 1508.9(b). The agency is responsible for determining the range of alternatives to be considered, and its decision should be sustained if reasonable. Biodiversity Conservation Alliance v. U.S. Bureau of Land Mgmt., 404 F. Supp. 2d 212, 218 (D.D.C. 2005). For this reason, the Court reviews an EA's consideration of alternatives under a "rule of reason." Southern Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48, 51 (D.D.C. 2002).

In reviewing a FONSI, the court's role is "limited," designed primarily to ensure "no arguably significant consequences have been ignored." TOMAC, Taxpayers of Michigan Against Casinos v. Norton, 433 F.3d 852, 860 (D.C. Cir. 2006), quoting Public Citizen v. National Highway Traffic Safety Admin., 848 F.2d 256, 267 (D.C. Cir. 1988). In its review of a FONSI, the court must determine whether,

> [f]irst, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a 'hard look' at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.

Town of Cave Creek, Arizona, 325 F.3d at 328, citing Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120, 125 (D.C. Cir. 1985).

C. THE ADMINISTRATIVE PROCEDURE ACT

Because neither the Wild Horses and Burros Act nor NEPA contains an internal standard of judicial review, courts review agency compliance with these statutes under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). National Audubon Soc'y v. Hester, 801 F.2d 405 (D.C. Cir. 1986); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). The scope of review under the "arbitrary and capricious" standard is narrow. A court is not to substitute its judgment for that of the

agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983). The reviewing court should consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a "clear error in judgment." Motor Vehicle, supra, at 44. To prevail, an agency need only articulate a "rational connection between the facts found and the choice made." American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 233 (D.D.C. 2008). Moreover, where a "highly technical question" is involved, "courts necessarily must show considerable deference to an agency's expertise." Id.

FACTUAL BACKGROUND

The Pryor Mountain Wild Horse Range was created in 1968 by order of the Secretary of the Interior. BLM, Environmental Assessment at 3. The range, established to protect a population of wild horses, wildlife, and watershed, recreational, and scenic values, encompasses approximately 39,650 acres of BLM, National Park Service, United States Forest Service, and private land, located in Carbon County, Montana, and extending into Bighorn County, Wyoming. Id. The PMWHR is an extremely diverse and complex area topographically, geologically, and ecologically. Environment and elevation in the PMWHR vary from a cold shrub-dominated desert at 3,850 feet at the southern end of the range in Wyoming to subalpine habitat at 8,750 feet in Montana at the high point of the range. Id. Water is limited to five perennial water sources within the PMWHR. Id.

A. THE PROPOSED GATHER

After analysis of public comments, BLM announced on August 27, 2009, in its Decision Record ("DR") and Finding of No Significant Impact ("DR/FONSI") that it intended to gather nearly all wild horses present within the Range and adjacent lands to protect the horses and

preserve the natural landscape. Id. at 1. BLM proposes to remove up to 70 adults, treat up to 60 mares with fertility control pellets, and return and manage approximately 120 horses in the wild. Id. While currently there are approximately 190 horses within the Range and adjacent national forest lands, BLM's Excess Determination concluded that no more than 120 wild horses can be present while retaining a thriving natural ecological balance. Id. at 10, 29. For the animals identified for release, the sex ratio would be balanced at or near 50% males and 50% females. Id. at 11. The gather would begin on or around September 3, 2009, and continue until management objectives are met. Id. at 10. Excess wild horses removed would be prepared for adoption or sale at the Britton Springs Facility. Id. The method of capture would be helicopter drive-trapping using temporary traps of portable panels as well as trapping directly at Britton Springs Corrals.[1] Id. After completing the gather, BLM will continue collecting information on herd characteristics, including genetic samples, and determining the status of herd health through direct examinations. Id.

B. BLM'S JUSTIFICATION FOR THE PROPOSED GATHER

BLM took this decision after review of wild horse census, distribution and condition data, forage utilization, ecological conditions, and trend and precipitation information after determining that an excess population of wild horses existed within the Range. Id. at 2. BLM also observed that individual wild horses are spilling out of the Range into adjacent Forest Service lands. Id. at 16. This gather is therefore needed to: (a) restore wild horse herd numbers to levels more consistent with a thriving natural ecological balance; (b) remove or relocate wild horses from areas outside the PMWHR; and (c) improve herd health and eliminate conflict with

[1] A gather operation was suspended in 2008 due to personnel availability and legal action challenging the propriety of the gather. Excess wild horses were last gathered from the PMWHR in 2006 utilizing a bait trapping method. Previous to that, helicopter drive-trapping was used in 1997, 2001, and 2003.

other multiple uses. Id. at 2. Cumulative impacts, including weather, drought, and grazing, have resulted in the deterioration of the Range. Id. Data from the Natural Resource Conservation Service's ("NRCS") *Pryor Mountain Wild Horse Range Survey and Assessment* (2004) and the *Interagency Pryor Mountain Wild Horse Range Evaluation* (February 2008) (the "2008 Evaluation") shows that the PMWHR does not have the capacity to sustain the current wild horse population over the long term in a way that is conducive to healthy rangelands or ecological conditions. Id. at 5. While wild horses were not identified as the only cause of damage, they were found to be a significant contributing factor. Id. at 32. Because BLM's mandate is to manage for healthy, self-sustaining herds on healthy rangelands, and the habitat objectives in the current HMAP are to manage for a slight upward trend in range health, BLM determined that this gather is necessary and required by the Wild Horses and Burros Act. Id. at 2.

C. CONSIDERATION OF GENETIC DIVERSITY

BLM considered genetic diversity of the Pryor herd in taking this decision. BLM noted that since the inception of the PMWHR in 1968, twenty-four gathers have been completed, and approximately 600 wild horses removed. Id. at 29. Wild horse populations on PMWHR have not been negatively impacted by these gathers. Id. BLM also determined baseline genetic diversity by the analysis of blood samples collected during gathers in 1991, 1994, 1997 and 2001. Id. at 9. According to these studies, current levels of genetic diversity within the Pryor herd are relatively high for a wild horse population, are well above the mean for domestic breeds, and have been steady during the period of the studies. Id. There is also no current sign of inbreeding. Modeling also indicates that the population after the gather would not put the population at as high of a risk of catastrophic loss or "crash." Id. at 17.

To guard against a future loss of genetic diversity, during gather activities, BLM personnel or BLM volunteers would record data for the captured horses including sex, age and color, and assess herd health and sort horses by age and sex. Id. at 11. Selected animals would be removed or returned to the range based on the 2009 HMAP. Id. Under these and other removal considerations, 47 wild horses less than 5 years old would be removed, 6 wild horses between 5 and 10 years old would be removed, and 17 wild horses over the age of 10 years old would be removed. Id. Removal would include mares with foals or pairs; it is anticipated four pairs would be removed but more could be removed if new foals are born before the gather begins. Id. This removal would ensure the core of the herd's breeding population is intact while preserving the characteristics and health of the herd. Id. By following the removal considerations from the 2009 HMAP allowing more competition between stallions and more frequent interchange of mares, the action may result in a higher level of exchange of genetic material. Id. at 17.

Additionally, under BLM's proposal, the agency would continue to monitor genetic diversity of the Pryor herd over time. Any effects from the proposed gather on genetic diversity would be over the long term. Importantly it takes approximately 200 years before a population is at risk due to a loss of genetic variation. Id. at 9. Rate of loss is usually slower than the time frame in which management actions can occur. Id. Any significant loss of diversity over time will be detected by evaluating an inbreeding coefficient, which measures observed diversity. Id. BLM does not intend the establishment of an AML as a one-time determination, but rather an adaptive process in which adjustments can be made as warranted. Id. at 8.

As part of its analyses, BLM also considered the effects that would flow from taking no action. First, taking no action would lead to a steady increase in wild horse numbers, and

carrying capacity of the range would continue to be exceeded. Id. at 18. This is because wild horses are a long-lived species with high survival rates, and predation and disease do not substantially regulate the wild horse population levels. Id. Increased risk to rangeland and horse herd health would result, and individual horses would be at risk of death by starvation and lack of water, affecting mares and foals most severely. Id. Fighting among stud horses would increase as they protect their position at water sources. Id. Social stress would increase. Id. The areas closest to the water would experience severe utilization and degradation. Id. Over time, the animals would deteriorate in body condition as a result of declining forage availability and the increasing distance needed to travel to forage. Id. Many horses, especially foals and mares, could die after a period of time when the resource is exhausted. Id.

Another concern is that more horses would leave the Pryor Mountain Range and lose the protection afforded by the Wild Horses and Burros Act. BLM has no authority to permit such horses to remain in the wild. If the current wild horse population continues to grow, within ten years the median population size would be 314 wild horses. Id. As the population increases beyond the capacity of the habitat, more bands of horses would leave the boundaries of the PMWHR seeking forage and water. Id. This could put them at risk in new and unfamiliar country and in conflict with authorized users. Id. In sum, the health of the wild horse herd population would be reduced, the condition of the range would deteriorate, and other range users would be impacted. Id.

ARGUMENT

A. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

1. Plaintiffs are Not Likely to Succeed on their Wild Horses and Burros Act Claim.

None of Plaintiffs' allegations concerning violations of the Wild Horses and Burros Act are borne out by the record before the Court. Congress expressly mandated that BLM must remove excess horses, and that to do so furthers the objective of promoting a thriving natural ecological balance. The Wild Horse and Burros Act focuses on the maintenance of a healthy population and makes clear that removal of individuals may be required to achieve that goal in consideration of ecological limitations. That is exactly what BLM did here. In August 2009 BLM's Excess Determination satisfied the statutory definition of "excess animals" for animals in the Range, and additionally identified horses that had left the Range, traversing into and damaging the Custer National Forest. EA at 29. BLM's determination here is therefore entirely in accord with the recent decision of the Court from Judge Rosemary M. Collyer, Colorado Wild Horse and Burro Coalition, Inc. v. Salazar, No. 06-1609-RMC (D.D.C. August 5, 2009). While there, BLM was attempting to remove horses without having previously made an excess determination, here BLM has made a well-grounded Excess Determination. See Colorado Wild Horse and Burro Coalition, Inc. at *6.

(a) Range Conditions

Plaintiffs first claim that "BLM has failed to demonstrate that an overpopulation of wild horses exists in the PMWHR." TRO Motion at 23. To the contrary, BLM's thorough environmental assessment, which relied upon a 2004 study by the Natural Resource

Conservation Service,[2] clearly demonstrates that (a) the PMWHR is overpopulated, (b) significant resource damage has occurred as a result of drought and overgrazing by horses, among other factors; and (c) significant benefits would accrue from the proposed gather and removal of 70 horses. The EA noted that, while wild horses were not identified as the only cause of damage, they were found to be a significant contributing factor. Id. at 32; Sparks Decl. ¶¶ 25-29. These effects are substantial and clearly attributable to wild horses, not precipitation alone. Id. ¶ 25; see also American Horse Prot. Ass'n, Inc. v. Frizzell, 403 F. Supp. 1206, 1209 (D. Nev. 1975) (noting that range is and has been deteriorating because of wild horse overgrazing for many years). The NRCS made adjustments to allow for the fact that 2002 and 2003 were especially dry years. Sparks Decl. ¶ 25 ("Annual forage production levels were determined and then "normalized" for average annual precipitation levels.").

A further study of the PMWHR was conducted in February 2008 to evaluate management practices from 1995–2007 and determine if BLM is meeting its objectives for the Range. BLM planning documents identify a 45% forage utilization level as the objective for the Range. This means that 45% of the available forage is grazed, leaving 55% for wildlife habitat and to protect soils and promote rangeland health. Any forage utilization level over 45% is non-attainment of this objective and the limiting factor in meeting this objective. The Evaluation determined that the same geographic areas of the PMWHR have been experiencing severe to heavy forage utilization on an annual basis (i.e., in excess of 45%). Id. Most if not all of this utilization is

[2] The NRCS, part of the U.S. Department of Agriculture (formerly known as the Soil Conservation Service), is the agency acknowledged as the technical experts in rangeland health analyses. NRCS provides technical assistance via assessments regarding, *inter alia*, soil science through soil surveys, and animal husbandry. See www.nrcs.usda.gov (last visited Sept. 1, 2009).

attributable to wild horses, as no domestic livestock are authorized to graze in this area and wildlife populations have been determined not to be contributing to this overutilization of forage.

The Evaluation also measured the trend of rangeland conditions. Studies showed a downward trend in rangeland condition for the low-elevation areas of the range caused by heavy use by wild horses. EA at 6 (photo showing severe utilization at Turkey Flat in 2008). The Evaluation also determined that there was an upward trend in rangeland conditions for the mid-elevation areas of the wild horse range which received little wild horse grazing use. Sparks Decl. ¶ 26. The upper elevation area had insufficient data to determine an actual trend. However, in every year from 1995 through 2006, forage utilization values exceeded the 45% objective required to promote healthy rangelands and address wildlife needs. Id. ¶¶ 26-28. More recent precipitation trends from the last several years do not mitigate these conditions, as Plaintiffs allege. TRO Motion at 23. Monitoring data and forage utilization data do not show that a change in plant species composition has occurred from the slightly higher precipitation levels in 2007, 2008, and 2009. Sparks Decl. ¶ 28; EA at 6.

For these reasons, the Court should uphold BLM's Excess Determination. Blake v. Babbitt, 837 F. Supp. 458, 459 (D.D.C. 1993) (noting "the amendments made clear the importance of management of the public range for multiple uses, rather than emphasizing wild horse needs" and "adjustments can be made later, but the endangered and rapidly deteriorating range cannot wait"); see also American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 233 (D.D.C. 2008) (where a "highly technical question" is involved, "courts necessarily must show considerable deference to an agency's expertise."). The BLM examined the relevant factors and, contrary to Plaintiffs' assertions, made its Excess Determination in consideration of current

ecological conditions. That Plaintiffs disagree with this determination is not grounds for emergency relief.

(b) Effects on the Burnt Timber Canyon Wilderness Study Area

Plaintiffs likewise question BLM's conclusion that maintenance of the Pryor herd in its current state is incompatible with maintaining the wilderness character of the Burnt Timber Canyon wilderness study area ("WSA"). TRO Motion at 24, citing EA at 24. Plaintiffs, however, misinterpret the part of the EA discussing the WSA. BLM did not suggest that management of the herd at numbers above 120 would impact the Burnt Timber Canyon WSA. Rather, the WSA was discussed as part of the natural environment affected by the gather. EA at 26 (noting that temporary impacts to opportunities for solitude within WSA could occur during gather operations due to possible noise of increased vehicle traffic and activity around WSA or recommended wilderness). Plaintiffs' WSA argument is groundless.

(c) Creation of water catchment areas for wild horses.

Plaintiffs next note that BLM aspires to develop additional water catchment areas for horses, for a total of 5. Plaintiffs attempt to convert the discretionary creation of such water sources, however, into a requirement. TRO Motion at 26. To the contrary, nothing in the Act requires BLM to create water sources for the Pryor herd or for any other herd. Instead, the Horses and Burros Act clearly directs that horses "shall" be removed "immediately" once the Secretary determines that an overpopulation exists. American Horse Prot. Ass'n Inc. v. Watt, 694 F.2d 1310, 1318 (D.C. Cir. 1982); see also Blake, 837 F. Supp. at 459 ("[a]djustments can be made later, but the endangered and rapidly deteriorating range cannot wait"). Moreover, the development of water sources is not an alternative to the gathering. BLM has stated in its planning documents that nine additional water developments would be needed to provide

sufficient water for 120 horses. Therefore, even if BLM were to have constructed 3 new water catchment areas, this still would not be enough to support 195 horses. In any event, there was no requirement for BLM to construct any particular number of water catchment areas, and Plaintiffs objections to the gather on this basis are unsupported by the law.

(d) Benefits to wild horses from the gather

Finally, Plaintiffs contend that BLM did not adequately explain how the gather and removal of Pryor herd wild horses, including older animals and causing disruption of family bands, driving of young foals by helicopter, and the holding of animals for adoption or sale, would fulfill the purposes of the Wild Horses and Burros Act. This claim does not withstand scrutiny. The gather and removal project will clearly benefit horses left on the range. Currently, as forage quantity and quality decreases, less is available for horses to eat with serious impacts to wild horse health. Native perennial grasses are limited in lower elevations and throughout winter habitat. Riparian areas are receiving heavy utilization, and few watering sites are available. The gather and removal will ameliorate these feed and watering conditions. Sparks Decl. ¶¶ 13-14; 16. BLM's action will therefore clearly benefit those wild horses left on the range.

Moreover, BLM proposes to proceed humanely with the horses selected for removal as is expressly required by the Wild Horses and Burros Act. Excess wild horses would be prepared for adoption or sale. Sparks Decl. ¶ 9. Adopters are required to provide humane care for the animals for one-year before receiving title, or ownership of the animal. Id. Any animals that cannot be adopted, and are eventually sold under the authority of the Wild Horses and Burros Act would be sold with limitations. Id. Buyers must attest that they will not sell the animals for slaughter or for any commercial products. Id. Moreover, adoption rates for the PMWHR have

traditionally been very high. Id. Finally, any animals that are not adopted or sold to private individuals willing to provide humane, long-term care would be cared for by the BLM in large pastures in the Midwest. Id.

Finally, on two separate occasions the same Plaintiffs have brought similar claims in the District Court for the District of Montana. In each case, the court has denied the Plaintiffs the relief they seek here. The Cloud Found'n, Inc. v. Kempthorne, No. 06-109-M-DWM (D. Mont. Aug. 6, 2006) (attached); see also The Cloud Found'n, Inc. v. Kempthorne , No. CV-06-111-BLG-RFC, 2008 WL 2794741 (D. Mont. July 16, 2008) (attached). For example, just last year, Magistrate Judge Ostby, affirmed by District Judge Cebull, denied plaintiffs' motion for summary judgment where BLM proposed to reduce the Pryor herd by 22 horses, reducing the total from 160 to 138. The Cloud Foundation, Inc. v. Kempthorne , No. CV-06-111-BLG-RFC, 2008 WL 2794741, *4 (D. Mont. July 16, 2008). Notably, the court found the Wild Horses and Burros Act "gives . . . BLM . . . a high degree of discretionary authority in managing wild horses on public lands." Id. at *11. The court accepted BLM's assessment of harm to the ecosystem based on the same 2004 NRCS study cited here. Id. The court concluded that "horse numbers on the [Range] exceed management plan limits, and are causing range deterioration," and upheld BLM's Excess Determination. Id. at *4, 12.

For these reasons, the Court should uphold BLM's decision. Frizzell, 403 F. Supp. at 1217 (denying motion for a preliminary injunction, permitting round up of 400 wild horses to go forward, and noting BLM is given a "high degree of discretionary authority for the purposes of protection, management, and control of wild free-roaming horses and burros on the public lands"); American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 233-34 (D.D.C. 2008)

(where a "highly technical question" is involved, "courts necessarily must show considerable deference to an agency's expertise.").[3]

For these reasons, Plaintiffs have not demonstrated a likelihood of success on their Wild Horses and Burros Act claim.

2. Plaintiffs are Not Likely to Succeed on their NEPA Claims.

The Complaint in this case contends that BLM's approval of the September 3 gather violates NEPA because the agency should have prepared an EIS. In addition, it alleges the EA failed to provide sufficient information to decision makers and the public, failed to take the required "hard look" at environmental consequences, did not properly analyze project alternatives, and failed to adequately disclose and consider contrary scientific opinion. Complaint at 22. In the memorandum supporting their TRO motion, Plaintiffs' NEPA arguments are limited to just two of these contentions. First, they argue that an EIS is required because BLM's Finding of No Significant Impact is allegedly contradicted by certain record evidence, and because there is a "substantial dispute" about the consequences of the proposed action. TRO Motion at 28. Second, Plaintiffs advance – without argument or other support – the

[3] This case is distinguishable from that presented in Judge Rosemary M. Collyer's recent decision, The Colorado Wild Horse and Burro Coalition, Inc. v. Salazar, __ F. Supp. 2d __, No. 06-1609, 2009 WL 2386140 (D.D.C. Aug. 5, 2009). See TRO Motion at 12, 18, 25 (citing Judge Collyer's decision). Plaintiffs contend the case demonstrates that BLM's action is incompatible with the Wild Horses and Burros Act's mandate to manage "at the minimal feasible level . . . in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species." In Colorado Wild Horse and Burro Coalition, Inc., Judge Collyer dealt with BLM's planned removal of wild horses in the West Douglas Herd Area in Colorado. Id. at *1. There BLM had not made an excess determination due to an overpopulation of horses. Rather, BLM argued that it had the implicit authority to remove wild horses pursuant to its generic authority to "manage" them. Id. at *6, citing 16 U.S.C. § 1333(A). The Court declined to afford BLM's interpretation of the Wild Horses and Burros Act deference. Id. Here, in contrast, BLM has made the very excess determination that Judge Collyer found lacking. Id. at *6 (BLM's removal authority is limited to those wild free-roaming horses and burros that it determines to be 'excess animals' within the meaning of the Wild Horse Act."). Colorado Wild Horse and Burro Coalition, Inc. does not serve as the basis for granting emergency relief.

conclusory assertion that, because the WFHBA directs BLM to manage wild horses at the "minimal feasible level," id. at 25, therefore the EA's alternatives analysis violates NEPA.

As explained below, these arguments lack merit and Plaintiffs are thus unlikely to succeed on the merits. The EA, DR and FONSI demonstrate that the agency fully complied with NEPA, satisfying its dual goals of ensuring that decision makers are properly informed, and that the public is afforded a meaningful opportunity to participate in the process. Importantly, BLM's decision was rendered in an area of agency expertise and is therefore entitled to substantial deference. Plaintiffs' motion for TRO should be denied.

(a) BLM took the required hard look at the project consequences.

A court reviewing an agency's NEPA analysis must ensure the agency has taken a "hard look" at the environmental consequences of a proposed action, and has considered the relevant factors. Coalition on Sensible Transportation v. Dole, 826 F.2d 60, 66-67 (D.C. Cir. 1987). In this case, BLM took the required hard look and Plaintiffs identify no relevant factors that were not considered by the agency. They disagree with the agency's expert opinions in regard to genetic diversity and rangeland condition, but this does not mean NEPA's hard look requirement was not satisfied, and does not justify invalidation of agency action.

Even though an EA is defined by CEQ regulations as a "*concise* public document . . . that serves to . . . *[b]riefly* provide sufficient evidence and analysis for determining whether to prepare an [EIS]," 40 C.F.R. § 1508.9 (emphasis added), BLM has nonetheless taken an exhaustive look at the impacts of the planned gather. The agency prepared a thorough 42-page EA, with 14 additional pages of appendices, that took into account the conclusions and "removal considerations" established in the 2009 Pryor Mountain Wild Horse Range Herd Management

Area Plan (HMAP), completed by the agency in May, 2009, and also subjected to independent NEPA analysis.

To ensure the public a meaningful opportunity to participate in the decision making process, the BLM mailed out copies of the draft EA on July 17, 2009 to over 200 interested parties, including all three of the Plaintiffs, and announced a 30-day public comment period, a procedure not mandated by NEPA in the case of EAs. In response, BLM received and considered 54 letters and two detailed recommendations for population management. As a result of the comments, "new information was incorporated into the analysis," EA at 31, and the proposed action was refined. Id. In the final EA, BLM also published a seven-page summary of public comments received, and the agency's responses to the public.

In addition to providing a meaningful opportunity for the public to participate in the NEPA process, the final EA also served to ensure that the agency's decision making was well informed. The EA examined impacts of the proposed action and of a "no action" alternative on a complete array of existing resources, including impacts on the herd itself, EA at 16-18; and impacts on rangeland health; on vegetation, including noxious and invasive plant species; and on soils. Id at 18-21. It examined impacts on water resources, including wetlands, riparian areas, and surface water, such as Crooked Creek and Cottonwood Spring. Id at 21-22. The EA also considered impacts on wildlife other than horses, including mountain lions, migratory birds, game birds, and big game species, such as mule deer, bighorn sheep, elk, and black bear. Id at 18-21. It considered impacts on special status plant and animal species, although we note there are no known threatened or endangered species or habitat in the Pryor Mountains. Id at 23-24. The EA also examined impacts on recreation in the Pryor Mountains, and on wilderness resources, cultural resources, and paleontological resources. Id at 24-27. Throughout the impacts

analysis, BLM noted beneficial impacts, and dutifully disclosed adverse impacts. EA at 14-31. Plaintiffs' claim that BLM failed to take the required hard look is simply not borne out by an examination of the agency's comprehensive environmental assessment.

(b) BLM's Finding of No Significant Impact Satisfies NEPA's Requirements.

Plaintiffs contend that BLM's Finding of No Significant Impact violates NEPA because it is "contradicted" by BLM's statement acknowledging that, after removal, recreational visitors would have diminished opportunity to "view and photograph large groups of wild horses." TRO Motion at 27 (quoting EA at 27). Plaintiffs contend these diminished opportunities significantly impact the human environment, thus requiring an EIS, yet they cite no case or other authority supporting such a view. They simply argue that viewing wild horses is the leading recreational activity in the area, and they point to a recent increase in "recreation-related visitation." Id. Defendants do not dispute these facts; however, acknowledgment of a minor impact does not render a FONSI arbitrary.

NEPA's implementing regulations, 40 C.F.R. Parts 1500 to 1508, state that the term "significantly" as used in NEPA includes consideration of both the context and intensity of the impacts. 40 C.F.R. § 1508.27. In assessing project intensity, which refers to the severity of an impact, the regulations identify ten factors that agency officials should consider. 40 C.F.R. § 1508.27(b). Not one of the factors is even remotely implicated by the concerns Plaintiffs raise about this recreational activity. Moreover, Plaintiffs make no attempt to explain how the regulatory definition of significance encompasses this particular impact. Plaintiffs' conclusion that "any action" which "reduces opportunities for the primary recreational activity" requires an EIS is unfounded and should be rejected.

Plaintiffs also claim that a substantial dispute exists as to whether the herd "would be able to survive genetically" following the removal, TRO Motion at 27-28, and they argue on the basis of this purported controversy that an EIS is required. However, the NEPA "intensity factors" for assessing significance. 40 C.F.R. § 1508.27(b)(4), contemplate effects that are "highly controversial," and the evidence here refutes the existence of such a controversy.

As noted, BLM determined baseline genetic diversity by the analysis of blood samples collected during gathers in 1991, 1994, 1997 and 2001. EA at 9. Current levels of genetic diversity within the herd are relatively high for a wild horse population; they are well above the mean for domestic breeds; and they have held steady during the period of available studies. Id. Moreover, the herd exhibits no signs of inbreeding. Id. Wild horse populations on PMWHR have not been negatively impacted by the 23 gathers conducted since the range was established in 1968, during which more than 600 wild horses were removed. Id. at 29. Despite these actions, the herd has flourished.

Importantly, the mere existence of disagreement between experts does not render agency decision making arbitrary. A federal agency is entitled to rely on the reasonable opinions of its own qualified experts and other government agencies, "even if, as an original matter, a court might find contrary views more persuasive," Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). And as this Court explained in Fund for Animals v. Williams, 246 F. Supp.2d 27 (D.D.C., 2003), disagreement between the Service's experts and outside experts does not "create a NEPA controversy, for '[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.'" Id. at 46 (quoting Sierra Club v. Watkins, 808 F.Supp. 852, 862 (D.D.C.,1991). See also Fund for

Animals v. Babbitt, 903 F. Supp. 96, 115 (D.D.C.1995) (noting that "disagreement [among experts] does not render the agency's action arbitrary and capricious").

In sum, the court's role in reviewing a FONSI is a "limited" one, designed primarily to ensure that "no arguably significant consequences have been ignored." TOMAC, 433 F.3d at 861. Plaintiffs' motion fails to identify any significant consequence of the proposed action that was not considered. For this reason, Plaintiffs are unlikely to succeed on the merits of this claim.

(c) BLM examined an adequate range of alternatives.

NEPA requires agencies to examine the impacts of alternatives. 42 U.S.C. §4332(2)(C)(iii). NEPA regulations direct agencies preparing EAs to include "brief discussions . . . of the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). The agency is responsible for determining the range of alternatives to be considered, and its decision should be sustained if reasonable. Biodiversity Conservation Alliance v. U.S. Bureau of Land Mgmt., 404 F. Supp. 2d 212, 218 (D.D.C. 2005). For this reason, the Court reviews an EA's consideration of alternatives under a "rule of reason." Southern Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48, 52 (D.D.C. 2002).

Here, BLM initially considered eight alternatives, including the proposed action and a "no action" alternative. EA at 10-13. Six of these eight, including Plaintiff Cloud Foundation's suggestion that the agency consider purely "natural management" of the herd, AR 13, were then eliminated from detailed analysis because they did not meet project objectives. See 40 C.F.R. § 1502.14(a) ("for alternatives which were eliminated from detailed study, [the EIS shall] briefly discuss the reasons for their having been eliminated"). The EA described each of the alternatives that were eliminated and, as required by regulation, explained why they were not examined in detail. EA at 12-13.

Nonetheless, Plaintiffs assert for the first time in litigation that because the WFHBA directs BLM to manage wild horses at the "minimal feasible level," Mem. at 25, therefore the EA's alternatives analysis violates NEPA. However, they do not explain how this constitutes a NEPA violation. In particular, Plaintiffs contend BLM "failed to *ignore* other alternatives than removal . . . ." EA at 25 (emphasis added). Defendants presume Plaintiffs intended to state that BLM failed to *consider*, rather than ignore, alternatives to removal. However, in considering the "no action" alternative, BLM in fact did consider an alternative to removal, and it explained that maintaining the status quo would result in continued growth in herd size, an increase in areas of "excessive forage utilization," and a failure to achieve the required "thriving natural ecological balance" and to make "progress toward meeting rangeland health standards." EA at 12. In addition, more wild horses would reside outside the range, id., where they would lose the protections afforded by the Wild Horses and Burros Act.

Moreover, even if BLM had not considered alternatives to removal, the fact is Plaintiffs' suggestion of this alternative is untimely. The Supreme Court has explained that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952). The Supreme Court more recently affirmed this principle in Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004), also involving a challenge to an agency's alternatives analysis, explaining that "[p]ersons challenging an agency's compliance with NEPA must structure their participation so that it . . . alerts the agency to the [parties'] position and contentions." Id. at 764 (quoting Vermont Yankee Nuclear Power Plant v. NRDC, 435 U.S. 519, 553 (1978)). Absent exceptional circumstances, belatedly raised issues may not form the basis for reversal of the agency's decision.

Finally, we note that courts have found that consideration of a more limited range of alternatives is proper under NEPA where, as here, environmental impacts are not significant. See Central S.D. Co-op. Grazing Dist. v. U.S. Dep't. of Agric., 266 F.3d 889, 897 (8th Cir. 2001) (when proposed project "will have a minimal environmental effect, the range of alternatives it must consider. . . is diminished"); North Carolina v. FAA, 957 F.2d 1125, 1130 (an EA may consider fewer alternatives). Under the rule of reason, Plaintiffs' contention that the agency failed to adequately consider alternatives should be rejected. The agency's analysis fully comports with NEPA's requirements.

For these reasons, the Court should find that the Plaintiffs have failed to meet their burden of showing a likelihood of success on the merits.

B. PLAINTIFFS WILL NOT SUFFER IMMEDIATE, IRREPARABLE INJURY IF INJUNCTIVE RELIEF IS NOT GRANTED.

Plaintiffs' also will not suffer any immediate, irreparable injury if the Court declines to issue a TRO. Plaintiffs make two assertions regarding harm. First, Plaintiffs claim that the removal will "threaten the continued existence of the herd" and the "horses themselves are threatened with grave danger on an individual and herd basis." Presumably, Plaintiffs are referring to their contention that removing the 70 horses – 40 of which are presently outside of the Range and not protected by the Wild Horses and Burros Act – will somehow jeopardize the genetic integrity of the herd. TRO Motion at 2, 9-12, 28. The gravamen of Plaintiffs' claim is that the gather will not leave a population in place that is sufficient to ensure the herd's overall genetic diversity, and that this will have deleterious effects on the herd.

Plaintiffs' contention, however, is not supported by the record. Genetic diversity is not a specific statutory or regulatory factor for management of wild horse herds. Even if it were, the Pryor herd has been subject to extensive testing and will continue to be subject to that testing.

Baseline genetic diversity has been determined by the analysis of blood samples collected during Pryor herd gathers in 1991, 1994, 1997 and 2001. BLM's EA clearly found that (a) current levels of genetic diversity within the Pryor herd are relatively high for a wild horse population, are well above the mean for domestic breeds, and have been steady during the period of available studies; and (b) the Pryor herd exhibits no signs of inbreeding. EA at 9; Sparks Decl. ¶ 30 (noting Dr. Ernest ("Gus") G. Cothran, Jr., a clinical professor at Texas A&M University[4], and one of the individuals cited by the Plaintiffs, stated that "the level of variation in the PMWH herd is still among the highest observed in feral horse populations.").

Furthermore, the EA demonstrated that genetic diversity is not by nature an immediate concern. Any significant diversity loss over time can be detected through ongoing evaluation. Id. While the Pryor herd is hardly in danger of a collapse, id. at 17, should the need arise, ample time will remain to make adjustments. Blake v. Babbitt, 837 F. Supp. 458, 459 (D.D.C. 1993) (noting "adjustments can be made later, but the endangered and rapidly deteriorating range cannot wait"). Moreover, as the Sparks Declaration shows, the PMWHR is healthy. Sparks Decl. ¶ 18. The population trajectory since 1973 demonstrates that an AML of 120 horses is sufficient to sustain the Pryor herd. As the chart at ¶ 18 of the Sparks Declaration demonstrates, the Pryor herd has continuously expanded despite repeated interventions by BLM. Over 600 horses have been removed. These removals have not stopped the herd from increasing its numbers. Moreover, in 5 of the years since 1973, the herd has been at or below 120. Sparks Decl. ¶ 18. Each time, the Pryor herd rebounded, creating a need to implement additional gatherings. Id. In 1978, for instance, the herd had approximately 87 individuals. By 1979 there were 105, and by 1980 there were 127 horses. In 1981 there were 155 horses, a 78% increase

[4]See http://www.cvm.tamu.edu/vibs/FacultyDetail.aspx?ID=GCothran (last visited Sept. 1, 2009).

over a 3 year period. Indeed, at no time did the herd exhibit a decrease in numbers due to natural factors. In short, Plaintiff's claim that a maximum AML of 120 is not sufficient to sustain the Pryor herd is not supported by observed data.

As they have in previous lawsuits concerning the Pryor herd, Plaintiffs assert that a BLM field manager, Sandra Brooks, has in the past opined that the Pryor herd had been managed at minimum levels, and an increase in AML may need to be considered. TRO Motion at 11. However, this statement was made in 1999, before the drought years had commenced, and the range suffered further significant deterioration. Also, the statement is made prior to the individual-based genetic studies conducted by Cothran, 2002 and Cothran and Singer, 2000, referenced in the EA, that found that current levels of genetic diversity within the Pryor herd are relatively high for a wild horse population, and well above the mean for domestic breeds, and have been sustained over the time period when blood samples have been taken. The Court should therefore disregard Plaintiffs' referral to the Brooks statement, which is inconsistent with recent information.

In making their allegations concerning the appropriate AML, Plaintiffs place unjustified emphasis on a 2009 letter sent to BLM by Dr. Gus Cothran. Plaintiffs also take this letter out of context. Plaintiffs suggest that Dr. Cothran believes a census population of 150 to 200 is required to achieve a minimum effective population size for the Pryor herd. Compl. ¶ 34. However, mention that Dr. Cothran wrote the letter under the assumption that BLM planned to reduce the census population to 95 individuals. Moreover, in 1992, when BLM adopted a previous plan establishing an AML of approximately 95 individual horses, Dr. Cothran opined that he had no "overall objections." Later, in 2005, Dr. Cothran provided comments to the BLM on a plan to reduce the herd to 100 total horses for a period of five years to improve range

conditions. At the time, Dr. Cothran noted that, as long as the reproductive core of the Pryor herd is maintained, most of its genetic variation would be maintained. Sparks Decl. ¶ 34. Dr. Cothran stressed at the time that, barring the unexpected, "the plan to keep the herd at 100 for five years should have minimal impact." Id. BLM has considered Dr. Cothran's views and weighed them in its decision. BLM, the expert agency, has determined that at this time the gather is necessary. Even if Dr. Cothran's views opposed that, the Court should defer to the expert agency's judgment. American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 233-34 (D.D.C. 2008) (where a "highly technical question" is involved, "courts necessarily must show considerable deference to an agency's expertise.").

It is also notable that the U.S. District Court for the District of Montana has used Dr. Cothran's statements to address and reject the same arguments Plaintiffs make here. In its August 6, 2006, order denying The Cloud Foundation's motion for a preliminary injunction, U.S. District Judge Donald W. Molloy found that the Pryor herd would not suffer irreparable injury if excess horses were removed. The Cloud Foundation, et al. v. Kempthorne, et al., CV 06-111-BLG (D. Mont. Aug. 6, 2006), Order at 6. The Court's findings were based on Dr. Cothran's conclusion that a reduction to 100 horses – not 120 – could be achieved without impacting its long-term genetic viability. Id. In the same July 2009 letter that Plaintiffs cite, moreover, Dr. Cothran also confirmed that the genetic diversity of the herd is relatively high.

Second, Plaintiffs assert that their members will be harmed because they will "lose the ability to see the horses in the wild." TRO Motion at 29-30. Such expressions of concern do not satisfy Plaintiffs' burden. In previous litigation based on the same allegations, the court noted that while Plaintiffs appeared "devoted to the wild horses and well versed in [the horses'] behavior, the Court is concerned with preventing irreparable harm to the wild horses in the Pryor

Mountains - not individual normative reactions to the BLM's adherence to legal mandates." The Cloud Foundation, Inc. v. Kempthorne, No. 06-109-M-DWM, *7 (D. Mont. Aug. 6, 2006). The Court should similarly reject Plaintiffs' claim of harm to their individual members based on their reactions to BLM's wild horse gather.

For these reasons, the Court should find that the Plaintiffs have failed to meet their burden of showing that they would be immediately, irreparably harmed by the propose gather. Winter v. NRDC, 129 S. Ct. 365, 376 (2008).

C. THE BALANCE OF THE HARDSHIPS WEIGHS IN FAVOR OF BLM, NOT THE PLAINTIFFS.

While the Plaintiffs have not demonstrated any hardship, should the Court issue a TRO, BLM would suffer significant hardship. Specifically, the agency would bear over $91,000 in fixed costs. Sparks Decl. ¶ 12. First, BLM would have to pay its contractor $8,000.00 per day of delay, for a total of $72,000.00. Id. These amounts began accruing on August 31, 2009 and would foreseeably last through September 8, 2009. Id. Second, BLM would have to pay $2,900.00 for hay that would have been given to the gathered horses. Id. Third, BLM would have to pay $2,500.00 for vaccine services that would not be used. Id. Fourth, BLM would have to pay $20,000 for additional labor costs for services related to preparation for adoption for the horses, travel of personnel, and staff costs. Id. Finally, additional law enforcement requested but not used would cost $10,000.00. Id.

Moreover, allowing overpopulation to continue will only increase BLM's cost of restoring these lands in the future. Id. at ¶ 20. The range will suffer more over-utilization resulting in more unhealthy range conditions. These conditions will take more time to recover. Id. For these reasons, the balance of the hardships favors BLM, not the Plaintiffs.

D. THE PUBLIC INTEREST WOULD NOT BE SERVED BY GRANTING A TRO.

Nor would the public interest be served by the granting of a TRO. If the gather does not go forward by September 15, 2009, weather and snow conditions in the higher elevations of the PMWHR may make the operation of helicopters, and operation of the trucks and trailers necessary to move collected horses, infeasible and unsafe. Sparks Decl. ¶ 10. If gather operations cannot be accomplished this year, any gather would have to be delayed until after the majority of the foals are born next year, but before the weather deteriorates. This window of opportunity would not open again until the late summer 2010. Id.

Blocking the proposed gather would also interfere with BLM's mandate to manage for multiple uses of the PMWHR. The gather is scheduled to minimize interference with Montana and Wyoming hunting seasons, including once-in-lifetime opportunities for a number of hunters to harvest a bighorn sheep. Id. ¶ 11. In addition, the Montana archery season begins in the area the first weekend of September. Id. The gather was scheduled to minimize interference with this authorized activity. If the gather is delayed, moreover, it may necessitate a revision of the EA to address the additional impacts to the hunting season and other recreation issues. Id. Under this scenario, the gather could not take place until December. However, the operation is unfeasible at that time, and would be cancelled due to contractor unavailability, weather, and snow conditions in the higher elevations of the PMWHR. Id. ¶ 11. Additionally, the gather must take place in the scheduled timeframe if the horses are to be ready for adoption on National Wild Horse Adoption Day on September 26, 2009. Id. at ¶ 12. All of these activities would be negatively impacted by a TRO.

Moreover, if a gather of excess wild horses is not completed this year, management objectives for the PMWHR will not be met. By next year, the population will have increased to

approximately 215 adult horses and 30 foals, almost double the range's carrying capacity. Id. ¶ 10. A gather is necessary to achieve TNEB and protect the range from deterioration associated with overpopulation. Impacts to the horses themselves would result, too. Excess wild horses need to be removed from the area to preserve wild horse health. When rangelands are overpopulated, rangeland health and forage production is greatly impacted. As forage quantity and quality decreases, less is available for horses to eat. Id. ¶ 13. Rangeland vegetation is limited throughout the lower elevations of the PMWHR due to past drought, current range conditions, and limited water. If the current population of wild horses is confined to the boundaries of the PMWHR, their health is at risk under the current situation due to limited forage and water availability. Unless the population of wild horses within Range is reduced through the proposed removals or horses continue to leave the designated range on their own, wild horse body condition will decline through the winter. Accordingly, a TRO would make it difficult if not impossible for BLM to meet its obligation to manage wild horses "in a manner that is designed to achieve and maintain a [TNEB] on the public lands." 16 U.S.C. § 1332(c).

Finally, a TRO would impact the government's ability to deal with the nearly 40 animals that are permanently residing on Forest Service lands outside of the Range. The Wild Horses and Burros Act limits BLM's ability to protect once they leave the areas where they were found when the law was enacted, in 1971. Because of the current overpopulation, animals are expanding to areas outside of the Range. There is no statutory authority for the Forest Service or BLM to maintain these animals outside of the Range. Thus far, the Forest Service has had to suspend domestic livestock permits in this area because there is not adequate forage for both the cattle grazing on these lands and wild horses. Id. ¶ 15. In sum, a TRO would block BLM from

carrying out its obligation to remove these horses, achieve TNEB, and protect the Pryor Mountain Range ecosystem.

For these reasons, the Court should find that a TRO would not serve the public interest.

CONCLUSION

Because Plaintiffs have failed to show a likelihood of success on the merits, that they will be irreparably injured if an injunction is not granted, that the balance of hardships weighs in their favor, or that the public interest would be served by granting the TRO.

Respectfully submitted this 1st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, and by the methods of service noted below, a true and correct copy of the foregoing document was served on the following at their last known addresses:

Served Electronically through CM/ECF:

Valerie Stanley: valeriejstanley@yahoo.com

DATED: September 1, 2009

/s/ J. Brett Grosko

J. Brett Grosko