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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CITIZENS AGAINST EQUINE SLAUGHTER, and PROTECT MUSTANGS, Plaintiffs, vs. The UNITED STATES FOREST SERVICE, a department of the United States Department of Agriculture; JEFF ULRICH, Santa Rosa District Ranger; the UNITED STATES BUREAU OF LAND MANAGEMENT, a department of the United States Department of Interior, Defendants.	No: 3:13-cv-00442-RCJ-(WGC)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT

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Pursuant to Fed. R. Civ. P. 65, Plaintiffs, Citizens Against Equine Slaughter ("CAES") and Protect Mustangs, file this Motion for Preliminary Injunction and Memorandum in Support. Plaintiffs respectfully request this Court to stay all ground operations and enjoin ongoing and continuous roundups authorized under the Fort McDermitt Horse Gather 2013 Agreement ("Gather Plan"), as well as action authorized under the United States Forest Service ("USFS") Notice of Intent ("Notice") to impound unauthorized livestock pending review of this case on the merits. Plaintiffs have provided a copy of the Complaint and this Motion to the U.S. Attorney's Office in Reno.

INTRODUCTION

The USFS recently issued the Notice to impound unauthorized livestock on June 14, 2013, approving the Fort McDermitt Horse Gather, (Exhibit 1), resulting in the roundup and impoundment of unbranded and unclaimed wild horses. The USFS has not prepared an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS"), and has not issued a Record of Decision for this project. The Notice authorizes the Fort McDermitt Paiute Tribal Council to roundup and remove from public, private, and tribal lands up to 700 unbranded and branded horses based on the Gather Plan (Exhibit 5). The Gather Plan includes provisions that unlawfully transfer ownership and federal responsibility concerning federally protected unbranded, wild and free-roaming horses: "Unbranded horses will be the possession of the Fort McDermitt Tribe or ownership of any unbranded horses will be determined by the Tribe." *See* Exhibit 5 (Operating Plan) at 14. The USFS has not detailed procedures for distinguishing between 1) unbranded, wild and free-roaming horses, 2) estray horses or livestock, and 3) unbranded tribal horses in the Gather Plan; the agency has simply enacted a rule that unbranded horses become property of the Fort McDermitt Tribe.

Furthermore, the USFS Gather Plan does not detail any sort of procedure for USFS retaining control of unbranded, wild horses, and does not contemplate that there are wild horses on the Humbolt-Toiyabe National Forest (HTNF). *See* Exhibit 5[1] ("Retain control of identified non-tribal horses for owner redemption or Forest Service disposition in accordance with Nevada statute NRS 565.125(1)."

The provisions of the Gather Plan remain in effect until it expires on May 31, 2013, providing for up to two years of roundups of unbranded, wild, free-roaming horses. During this period, the USFS and the Bureau of Land Management ("BLM") will transfer ownership of said unbranded horses to the Fort McDermitt Tribe in accordance with the Gather Plan. The USFS and the BLM have failed to fully evaluate and protect public land resources, including the wild, free-roaming horses that inhabit the Owyhee Complex Herd Management Areas ("HMA" or "HMAs") and roam throughout the Humbolt-Toiyabe National Forest (HTNF). These horses will be removed forever from the HMAs, from public and private lands throughout the HTNF, and will be auctioned off and potentially used for commercial purposes or slaughtered in violation of the Wild and Free-Roaming Horses and Burros Act ("WFRHBA"). To date, a gather based on the Notice has occurred, where hundreds of branded, unbranded, tribal, and wild horses were rounded up and delivered to Fallon Livestock Exchange.

In authorizing the Gather Plan, the USFS engaged in rulemaking that unbranded, wild horses become the property of the Fort McDermitt Tribe. *See* Exhibit 5. Such a rule unlawfully transfers federal conservation and management duties reserved for the USFS and the BLM to the Fort McDermitt Tribe. The Gather Plan, as well as the Notice, violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500-1508, the Wild and Free Roaming Horses and Burros Act ("WFRHBA") §§

[1] NRS § 565.125(1) addresses private ownership and excludes wild horses and burros at section (2)(c).

1331 *et seq.*, and its implementing regulations, 36 C.F.R. §§ 222.20 - 222.36, as well as Administrative Procedure Act ("APA") rulemaking procedures, 5 U.S.C. §§ 551-553.

Injury to Plaintiffs' interests will be immediate and irreparable. The balance of hardships tips in favor of the Plaintiffs. Issuance of an injunction will not materially harm the interests of the USFS or the BLM. Although there may be a short-term economic implication to Fallon Livestock Exchange, such injury is not irreparable. Additionally, Fallon Livestock is not authorized to sell and dispose of wild and free-roaming horses and burros under the WFRHBA, and any and disposal of unbranded horses at Fallon Livestock Exchange is solely due to illegal agency actions taken by the USFS and the BLM. Lastly, the public interest favors a stay of the Gather Plan while this court reviews the case on the merits.

STANDARDS FOR PRELIMINARY RELIEF

In order to obtain preliminary relief, a plaintiff "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." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 374 (2008). Assuming that irreparable harm is sufficiently likely and the public interest favors a stay, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (dealing with irreparable harm from logging on public lands used for recreation). "Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff

might offset a lesser showing of likelihood of success on the merits." *Id*. at 1131. Under this test, "serious questions going to the merits" is defined as:

> Serious questions are "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a "fair chance of success on the merits."

Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (citations omitted). As shown below, Plaintiffs satisfy the four parts of this test, and therefore this Court should issue the preliminary injunction.

ARGUMENT

I. The Fort McDermitt Gather Plan will Result in Immediate and Irreparable Harm

The USFS approval of the Gather Plan, Notice, and subsequent Fort McDermitt Horse Gather ("Gather") thus far has authorized the round up of over 400 unbranded and branded horses, including wild horses, and for those horses to be held at Fallon Livestock Exchange and be sold for any purpose. This roundup was completed, and wild, unbranded horses were held at auction yards due to actions taken by the USFS and the BLM. The Gather Plan authorizes roundups of an undisclosed and unquantified number of horses in this manner until May 31, 2015. (Exhibit 5). The Supreme Court has stated that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987). The Gather and future roundups authorized by the Gather Plan has caused certain irreparable harm to Plaintiffs; once the roundup takes place these unbranded, federally protected wild horses will be impounded, auctioned, sold, potentially slaughtered, and can never be returned to the range.

Irreparable environmental injury follows from a NEPA violation. *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) ("likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high"). Here, the USFS did not conduct *any* NEPA review as to the impacts that result from the agency authorization of an unquantified and undisclosed number of roundups and horses over the next two years.

The Gather Plan, the Notice, the Gather, and subsequent roundups authorized by the USFS and the BLM will irreparably harm Plaintiffs and their members. Craig Downer discusses how unbranded, wild and free-roaming horses that have been and will be rounded up, impounded, and potentially slaughtered are relied upon and used for recreational, cultural, spiritual, and aesthetic enjoyment by members of CAES and Protect Mustangs. Declaration of Craig C. Downer (Exhibit 3). These unbranded, free-roaming horses that are important to Mr. Downer would be eliminated by the Gather Plan and gathers, directly harming him. *See id.* Mr. Downer details the certain and irreparable harm to himself, and such harm is indicative of the direct harm that will be caused by the Gather Plan and Gather on members of Plaintiffs' organizations. *Id.*

Michael Blake discusses the importance of wildlife, including wild horses in Nevada, as a source of inspiration throughout his personal and professional life. Declaration of Michael L. Blake (Exhibit 4) ("Wild horses and their connection with the land in the American West inspire me to write."). Mr. Blake's Declaration details the certain and irreparable harm to himself resulting from removing unbranded, wild horses from public lands and the range they inhabit and roam upon. This harm is indicative of the direct harm that will be caused by the Gather Plan and roundups conducted under the Gather Plan on members of Plaintiffs' organizations.

II. The Balance of Hardships and the Public Interest are in Favor of the Plaintiffs

The public interest is in favor of preserving the current status quo[2] and preventing irreparable environmental harm until this Court has fully reviewed the case on the merits. The Defendants have not conducted NEPA regarding the Gather Plan authorizing an unspecified number of roundups on HTNF lands, or for the roundup of 700 horses authorized by the Notice. The USFS and the BLM are punting on their duties to preserve wild horses on public lands—duties which are exclusive to the agencies under the WFRHBA—and the agencies failed to conduct NEPA to analyze the impacts of such an action.

The Ninth Circuit has stated that the "public interest strongly favors preventing environmental harm," *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006), as well as "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *South Fork Band Council*, 588 F.3d at 728. It thereby follows that "[s]uspending a project until that consideration has occurred thus comports with the public interest." *Id.* *Alliance for the Wild Rockies* discusses this issue extensively, recognizing "the well-established 'public interest in preserving nature and avoiding irreparable environmental injury.'" Furthermore, that court relied on precedent that "suspending such projects until that consideration occurs 'comports with the public interest.'" *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quoting *S. Fork Band Council*, 588 F.3d at 728).

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[2] The status quo for USFS and BLM action with respect to wild and free-roaming horses is for the federal agencies to conduct roundups *only* after preparing an Environmental Assessment. *See* BLM Owyhee ROD (Exhibit 2). Plaintiffs are arguing for this status quo, that the agencies complete NEPA prior to rounding up an undisclosed number of horses over the next two years, and seek this remedy as outlined in their Complaint and this Motion for Preliminary Injunction.

The USFS and the BLM 1) failed to conduct NEPA in accordance with the status quo, 2) failed to conduct a careful consideration of environmental impacts, and 3) failed to put the rule established by the Gather Plan through public notice and comment, resulting in a decision that is certain to cause environmental harm. The Gather Plan should be suspended until the USFS and BLM have demonstrated that it comports to the public interest. Additionally, as Plaintiffs seek to enforce NEPA and the WFRHBA, two federal laws designed to protect the environment and resources, and due to the fact that the injunction would preserve the status quo of preparing NEPA prior to federally authorized wild horse round ups, Plaintiffs' requested injunction against the USFS and the BLM would certainly serve the interests of the public.

The USFS and the BLM's interests are not sufficient to stand against the interests of Plaintiffs and the public in preventing irreparable harm. The BLM and USFS do not stand to suffer monetary injury as the agencies have given up their duties to analyze environmental impacts under NEPA and to protect, manage, and conserve wild and free-roaming horses. Fallon Livestock Exchange's potential economic harm would solely be due to the illegal actions taken by the federal agencies, and the livestock yard could easily re-coup any losses by auctioning off horses that are *not wild and free roaming horses*. Regardless, the "loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment" *National Parks & Conservation Assoc v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001)

III. Plaintiffs Are Likely to Succeed on the Merits

By approving the Gather Plan, Notice, Gather, and authorizing future roundups, the USFS, as well as the BLM, violated the procedural requirements of NEPA, the substantive requirements of the WFRHBA, and the notice and comment procedures required by the APA.

The USFS and the BLM failed to conduct NEPA when there may be significant impacts resulting from the Tribe destroying federally protected wild horses under the jurisdiction of the BLM and USFS. Finally, the USFS created a legislative-type rule undermining and contradicting the text of the WFRHBA in violation of APA notice and comment procedures. The USFS and BLM authorization of these proceedings is unlawful under NEPA, the WFRHBA, and the APA.

Pursuant to the APA, a federal court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] … (D) without observance of procedures required by law." 5 U.S.C. § 706(2). *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). "Although the court must defer to an agency conclusion that is 'fully informed and well- considered,' it need not 'rubber stamp a clear error of judgment.'" *Western Land Exchange Project v. BLM*, 315 F.Supp.2d 1068, 1086 (D. Nev. 2004). "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary to the evidence, … or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2)." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

E. The USFS and the BLM failed to conduct NEPA for the Fort McDermitt Gather Plan

1. The USFS Gather Plan Requires an EA.

NEPA compliance requires federal agencies including the USFS and the BLM to assess the environmental impact and any potential alternatives to the proposed action. 42 U.S.C. § 4332(2)(C), (E). NEPA regulations require environmental information to be made "available to public officials and citizens *before* decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Under NEPA, agencies shall to the fullest extent possible

"[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d). Pursuant to 40 C.F.R. § 1508.18, NEPA applies to actions which constitute "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17)." 40 C.F.R. § 1508.18. This regulation provides that a major Federal action subject to NEPA includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.

The BLM routinely prepares NEPA documents for the public to comment on when planning wild horse and burro gathers; the agency then contracts out or hires companies or individuals to carry out the roundups on the ground via helicopter or by bait trapping. (Exhibit 2). The roundups via contractors routinely occur on public lands and HMAs, but also cross over into private land and ownership that is outside the HMA area when horses freely roam, stray, or are chased.[3] The agency often involves the public in the NEPA process in accordance with NEPA regulation 40 C.F.R. § 1500.1(b) by soliciting comments, responding to comments, and allowing the public a certain level of viewing opportunity for wild horse gathers.

In the present case, the roundups authorized by the Gather Plan are *nearly identical* to the BLM or USFS deciding to remove horses from the range over a period of years to reach the desired Appropriate Management Level ("AML"), and authorizing a contractor to roundup horses via helicopter after preparation of an EA. The USFS, with BLM personnel involved,

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[3] *See generally* Owyhee Complex Final EA ("Wild horses have moved outside of the HMAs in search of forage, water, and space.") available at: https://www.blm.gov/epl-front-office/projects/nepa/33902/40771/42881/DOI-BLM-NV-W010-2012-0055-EA_FINAL.pdf

authorized roundups as per the Gather Plan until May 31, 2015. This is not a single roundup; the actions authorized by the USFS may be repeated under the supervision of the BLM and USFS over the next two years within the meaning of "new and continuing activities" under 40 C.F.R. § 1508.18.

The USFS did not conduct *any* NEPA review as to the impacts that result from the agency authorization of an unquantified and undisclosed number of roundups and horses over the next two years. The agency has failed to look at impacts to 1) the range where these unbranded, wild horses roam, 2) impacts to AML and 3) impacts to the preservation of a thriving natural ecological balance (or TNEB) as required by the WFRHBA. NEPA stresses that environmental information is made available to the public *before* the action is taken to ensure the federal agency is making an informed decision. 40 C.F.R. § 1500.1(b). NEPA analysis certainly would have benefited the BLM and USFS, as the USFS does not understand that *wild horses are unbranded*. The following statement by HTNF personnel clearly shows this fact:

> I have been documenting and inspecting horses within and adjacent to the Santa Rosa Ranger District since 2008. I have only seen one horse that had the BLM freezer brand tattoo on its neck, and it was branded with a personnel brand. Each year I typically spend from October to February of each year documenting horses that have been grazing on Forest Service and adjacent lands. I have spent countless hours recording brands and identifying who these horses belong to. I also have reviewed our case history of horses here in the district office, and I have never seen any documentation of "Wild Horses" viewed within the Santa Rosa Ranger District.
>
> Also speaking with the local rancher who operate [sic] in the area (Charlie Amos, Nevada First Corp. Ranch manager) has never seen any "Wild Horses" on Forest Service lands.

Exhibit 6. The USFS authorization of the Gather Plan while operating under the assumption that wild horses must have a freeze brand is exactly why NEPA needs to be conducted before the agency action occurs—the USFS is conducting operations without an understanding of what

constitutes a wild, free-roaming horse within the meaning of 16 U.S.C. § 1332(b). BLM NEPA documents clearly show that freeze brands are applied 1) when a horse is removed from the range and put up for adoption, and 2) when mares are administered Porcine Zona Pellucida (PZP) for population control.[4] Contrary to the assumptions of the USFS, a wild horse is determined by 16 U.S.C. § 1332(b), and only looking for BLM freeze brands or individual brands fails to account for the vast majority of wild horse populations.

2. The USFS and the BLM have exercised Federal Control Under 40 C.F.R. § 1508.18.

Pursuant to 40 C.F.R. § 1508.18, the federal agencies have exercised substantial control over the Gather Plan and roundup operations. NEPA applies to effects that may be major and which are potentially subject to Federal control and responsibility. 40 C.F.R. § 1508.18. The USFS and the BLM authorized personnel to participate in Fort McDermitt gathers, issued a Notice of intent to round up 700 horses, controlled and established parameters for how the roundup would be conducted, expended funds and tallied costs, and even went so far as to declare that "unbranded horses gathered by the tribe would become property of the tribe. Exhibit 5 (Operating Plan). Indeed, the Gather Plan dictates the exact extent of federal control over continuous roundup operations. *See e.g.* Exhibit 5 (USFS is to: "Retain control over all impounded animals gathered off of NFS lands until delivered to the designated tribal holding facility as described in Operating Plan, Exhibit B."). The USFS and/or BLM are required to conduct NEPA review in the instant case as the agencies have exercised federal control within

[4] Owyhee Complex Final EA at 85, 89, available at: https://www.blm.gov/epl-front-office/projects/nepa/33902/40771/42881/DOI-BLM-NV-W010-2012-0055-EA_FINAL.pdf

the meaning of NEPA and an EA or EIS is required. 40 C.F.R. § 1508.18. 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1501.4(a)(1). The USFS and the BLM's attempt to conduct two years of unbranded horse gathers and wild horse disposal under the public's eye cannot escape judicial review.

F. The Gather Plan is Illegal Under the Wild and Free-Roaming Horses and Burros Act of 1971

The BLM and the USFS have exclusive authority under the WFHBA to conserve and protect wild horses and burros on the public lands administered by those agencies. 16 U.S.C. § 1332(a), (e). Wild free-roaming horses and burros are defined as "all unbranded and unclaimed horses and burros on public lands of the United States" *Id.* § 1332(b), 43 C.F.R. § 4700.0-5(l). The range of wild horses is defined as:

> [T]he amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands.

16 U.S.C. § 1332(c). Congress intended that all wild horses found on *any public lands* should be protected from being used for commercial purposes or slaughter. Regarding H.R. 9890, which formed the basis for the WFRHBA, Mr. Baring stated: "As far as the protection of wild horses & burros is concerned, it is my opinion that they would be protected from indiscriminate slaughter, harm or conversion into commercial products when found on game ranges or refuges as they would be on other public or private lands." CONG. REC. 34774 (daily ed. Oct. 4, 1971) (statement of Mr. Baring) (Exhibit 7). The intent of the WFRHBA is to "prevent indiscriminate slaughter of wild horses and burros and assure them of equal consideration on the public land along with other wildlife and domestic livestock." *Id.* "Wild horses and burros alone should not be singled

out for slaughter or reduction if and when reduction is required by adverse range conditions. All too often this has been the practice in the past and this is what we want to avoid by this legislation." *Id.* at 34775.

1. The Gather Plan is Illegal Under 36 C.F.R. § 222.25.

The Gather Plan gives complete authority to the Tribe to claim ownership of unbranded wild horses on HTNF lands: "Unbranded horses will be the possession of the Fort McDermitt Tribe or ownership of any unbranded horses will be determined by the Tribe." (Exhibit 5) This provision flies in the face of federal regulations, which contemplate and recognize wild free-roaming horse movement across territories: "Individual animals and herds of wild free-roaming horses and burros will be under the protection of the Chief, Forest Service, even though they may thereafter move to lands of other ownership or jurisdiction as a part of their annual territorial habitat pattern or for other reasons." Protection of Wild Free-Roaming Horses and Burros when they are upon other than the National Forest System or Public Lands, 36 C.F.R. § 222.25.

Provisions of the Gather Plan identify the same unbranded horses as the WFRHBA, and the Gather Plan illegally assigns ownership of any unbranded, wild free-roaming horses that are rounded up by the Fort McDermitt Tribe. Mr. Downer discusses in his Declaration that horses routinely travel across HMAs and onto adjacent public lands, private lands, and tribal lands, hence the "wild and free-roaming" portion of the name. Exhibit 3. The BLM's documents support this wild free-roaming movement, identifying that wild horses frequently

leave the Owyhee Complex HMAs and venture to outside lands.[5] ("Wild horses have moved outside of the HMAs in search of forage, water, and space.").

The BLM and USFS have no procedure to make a distinction or determination between what is an unauthorized, unbranded livestock and what is an unbranded wild, free-roaming horse. Plaintiffs therefore requested the agencies determine by DNA testing what unbranded horses are wild, free-roaming horses; yet even this single request is ultimately frustrated by the Gather Plan ownership transfer provision: "Unbranded horses will be the possession of the Fort McDermitt Tribe or ownership of any unbranded horses will be determined by the Tribe." Exhibit 5.

The USFS is prohibited by law from 1) authorizing the Gather Plan and 2) allowing the tribe to claim any and all unbranded wild horses on HTNF lands or Fort McDermitt tribal lands. *See* 36 C.F.R. § 222.25. The Gather Plan is illegal under the WFRHBA, and the USFS decision to authorize and implement the Gather Plan is arbitrary and capricious and not in accordance with law under the APA. 5 U.S.C. § 706(2).

2. *The USFS and the BLM Failed to Follow the WFRHBA Priority Order for Removal and Make an Excess Determination in the Gather Plan.*

The BLM and USFS are required to follow the procedures at 16 U.S.C. § 1333(b)(2) when the agency removes any excess wild horses to reach designated AML. The agency needs to determine the wild horses are in excess, and only then is removal of wild horses authorized. 16 U.S.C. § 1333(b)(2). ("Such action shall be taken, in the following order and priority, until all

[5] Owyhee Complex Final EA, available at: https://www.blm.gov/epl-front-office/projects/nepa/33902/40771/42881/DOI-BLM-NV-W010-2012-0055-EA_FINAL.pdf

excess animals have been removed . . ."). The agency first shall order old, sick, or lame horses to be destroyed humanely, followed by humane capture and removal for adoption, and finally if the previous steps are insufficient and no adoption demand exists, additional excess wild horses may be destroyed humanely. *Id.* § 1333(b)(2)(A)-(B). Excess animals shall be sold if the animal is over ten years old or has been unsuccessfully offered for adoption at least three times. *Id.* § 1333(e)(1)(A)-(C).

The USFS and the BLM did not follow any of the WFRHBA priority order steps above for wild horses, instead the agencies opted to simply remove all horses, branded or unbranded, via the Gather Plan. Under the Gather Plan, the USFS is to provide a contractor to gather and remove horses from the Santa Rosa Ranger District and adjoining tribal lands, retaining "control over all impounded animals gathered off of NFS lands until delivered to the designated tribal holding facility as described in Operating Plan." Exhibit 5. The USFS is to "[r]elinquish control of all identified tribal member horses to the McDermitt Tribal Council for tribal member owner redemption or Tribal Council disposition." *Id.* When a tribal member horse is identified, the USFS gives up control, but for non-tribal horses, the USFS is to "[r]etain control of identified non-tribal horses for owner redemption or Forest Service disposition in accordance with Nevada statute NRS 565.125(1)," which specifically excludes wild free-roaming horses. *Id.*

The USFS provisions utterly fail to account for roaming unbranded wild horses, and the agencies fail to even specify a procedure whereby federally protected wild free-roaming horses will be distinguished from tribal unbranded horses. Without a procedure in place to return wild horses back to their HMAs or public lands, the USFS and the BLM are violating the WFRHBA in authorizing the Fort McDermitt Tribe, in contravention of the WFRHBA, to

sell or destroy federally protected wild horses. 16 U.S.C. § 1334 ("If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by the agents of the Secretary.").

The Gather Plan transfers ownership of wild free-roaming horses to the Tribe for disposal. The WFRHBA requires an excess determination to be made by the agency, and the steps for removal are to be followed thereafter. The Gather Plan includes no such excess determination, no provisions regarding old or sick unbranded wild horses, and no provisions for adopting out unbranded wild horses that are captured in violation of 16 U.S.C. § 1333(b)(2). The USFS Gather Plan is in violation of the WFRHBA, and it follows that the final agency action taken by the USFS is arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

3. The USFS Failed to Consult with Relevant Agencies on the Gather Plan.

16. U.S.C § 1340 provides:

> The Secretary of the Interior and the Secretary of Agriculture shall consult with respect to the implementation and enforcement of this Act and to the maximum feasible extent coordinate the activities of their respective departments and in the implementation and enforcement of this Act. The Secretaries are authorized and directed to undertake those studies of the habits of wild free-roaming horses and burros that they may deem necessary in order to carry out the provisions of this Act.

The USFS reliance upon information such as: "I have only seen one horse that had the BLM freezer brand tattoo on its neck, and it was branded with a personnel brand," (Exhibit 7), to determine unbranded wild horses do not inhabit the public lands in the HTNF is clearly erroneous, and many problems inherent to the Gather Plan should have been remedied by

consulting with the BLM to determine a procedure for the return of wild free-roaming horses to public land or the Owyhee HMAs. The BLM has discussed in NEPA documents how wild horses move freely outside the HMAs and on public and private lands.[6] Fort McDermitt tribal lands are only 20 miles west of the BLM-managed Owyhee HMAs. Because the USFS relied on seeing BLM freeze brands (which USFS were unlikely to see, as they account for a fraction of wild horse populations) as proof of the existence of wild horses, the USFS expectedly did not document any such wild horses when they were present on public lands. This is exactly why the WFRHBA requires the agencies to consult ("shall consult") regarding the implementation of the WFRHBA and to coordinate activities dealing with wild horses. 16. U.S.C § 1340.

A Gather Plan is such an activity, and the USFS failed to consult with the BLM and other relevant agencies when issuing the Gather Plan and Notice in violation of 16 U.S.C §§ 1333, 1340; the USFS's actions violating the WFRHBA are arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

G. The USFS and the BLM Violated the APA Notice and Comment Procedures

The APA requires that agencies provide notice and an opportunity to comment prior to issuing a "rule." 5 U.S.C. § 553. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." *Id.* § 551 (4). However, the APA expressly exempts from the notice and

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[6] Owyhee Complex Final EA, available at: https://www.blm.gov/epl-front-office/projects/nepa/33902/40771/42881/DOI-BLM-NV-W010-2012-0055-EA_FINAL.pdf

comment requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(A). To determine the type of rule requiring notice and comment, the Supreme Court has held that only "substantive" or "legislative-type rules" have the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979). Interpretive rules generally explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress. *Id.*

In *Hemp Industries Association v. DEA*, the Ninth Circuit adopted the D.C. Circuit's three part test for determining a legislative rule: "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." 333 F.3d 1082, 1087 (9th Cir. 2003) (quoting *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)). The D.C. Circuit held the ultimate inquiry as to what constitutes a legislative-type rule rests on "whether the agency action binds private parties or the agency itself with the "force of law." *General Electric Co. v. EPA*, 290 F.3d 377, 382, 385 (D.C. Cir. 2002) ("binding obligations upon applicants" that appeared on the face of the agency documents were sufficient to render them a legislative rule requiring notice and comment). Binding obligations have been determined via the use of commanding verbs: the "agency action *will* provide," and "[a]ll . . . acres of suitable habitat . . . *will* be used," as well as the agency document "*will* identify." *Swanson Group Mfg. LLC v. Salazar*, 2013 U.S. Dist. LEXIS 89603, *19 (D.D.C. June 26, 2013) (citing *McLouth*

Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988) ("The use of the word 'will' suggests the rigor of a rule, not the pliancy of a policy")); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (language that "commands . . . requires . . . orders . . . dictates" is indicative of an intent to bind);

Turning to the Gather Plan, USFS obligations are expressed clearly in section IV, where: "The U.S. Forest Service *[s]hall* . . . provide a contractor to gather and move horses off the Santa Rosa Ranger District," *id.* (Exhibit 5) (emphasis added); the USFS *shall* "[r]etain control over all impounded animals gathered off of NFS lands" and "[r]etain control of identified non-tribal horses," *id.*; "[a]ny horses removed . . . *will be* documented," *id.* (emphasis added); "[t]he contractor *will transport* all gathered horses," *id.* (emphasis added); and on ground operations, "[b]randed horses *will be* identified by legal Tribal Brands or Brands . . . .Unbranded horses *will be* the possession of the Fort McDermitt Tribe or ownership of any unbranded horses *will be* determined by the Tribe." *Id.* at Exhibit B (emphasis added).

Because the USFS, BLM, and the WFRHBA define wild, free-roaming horses as unbranded and unclaimed, the Gather Plan authorizing the Fort McDermitt Tribal Council to round up and sell at auction any unbranded and unclaimed horses that may travel between the Owyhee HMAs, the HTNF, and Fort McDermitt tribal lands effectively amends the USFS and BLM obligations under the WFRHBA. See *Hemp Industries Association v. DEA*, 333 F.3d at 1087. The Gather Plan is a rule; it is a binding statement of agency obligations and private party obligations describing obligations of the USFS, the BLM, and the Fort McDermitt Tribe with respect to any roundup of unbranded tribal horses, as well as roundup of unbranded wild, free-roaming horses that occur and travel in the vicinity of the HTNF, the Owyhee HMAs, and Fort

McDermitt tribal lands. The Gather Plan changes the duties and obligations of the USFS and BLM with regard to wild horse management under the WFRHBA, including but not limited to authorizing another party to sell wild and free-roaming horses and burros for commercial profit at auction. The USFS created a legislative-type rule within the meaning of 5 U.S.C. § 551(4) in violation of APA notice and comment procedures when the agency authorized the Gather Plan between the USFS and the Fort McDermitt Tribal Council. *See* 5 U.S.C. § 553.

IV. A Waiver of the Bond Is Appropriate in this Case

Under Rule 65(c) of the Federal Rules of Civil Procedure, in order to obtain a preliminary injunction, a plaintiff must generally post a bond "in such sum as the court deems proper." However, the "court has discretion to dispense with the security requirement, or to request a mere nominal security, where requiring security would effectively deny access to judicial review." *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). In cases in which the plaintiffs are public interest organizations or entities seeking a preliminary injunction to protect the environment, courts routinely waive the bond requirement or impose a nominal bond. *Id.* at 1325-26. Here, Plaintiffs are small nonprofit organizations with very little financial resources. A requirement of a more than nominal bond would prevent Plaintiffs from vindicating their rights and frustrate legitimate judicial review.

CONCLUSION

Plaintiffs respectfully request this Court to issue a Preliminary Injunction prohibiting all ground operations on public and tribal lands and enjoin the Gather Plan pending a review of this case on the merits.

Respectfully submitted August 23, 2013.

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Pursuant to local rules regarding multiple signatures, I attest to the consent of the other parties signing this document.

Respectfully submitted this August 23, 2013.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRCP 7.1, Plaintiffs state that they have not issued shares to the public and have no affiliates, parent companies, or subsidiaries issuing shares to the public.

Respectfully submitted August 23, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record. I mailed copies of Plaintiffs' Complaint as well as this Motion and Memorandum in Support to the U.S. Attorney's Office in Reno at 100 West Liberty Suite 600 Reno, NV 89501.

Respectfully submitted this August 23, 2013.

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