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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

International Society for the Protection of Mustangs and Burros, Plaintiff, vs. United States Department of Agriculture, et al., Defendants.	No. CV-22-08114-PHX-SPL **ORDER**

Before the Court is Plaintiff International Society for the Protection of Mustangs and Burros' ("Plaintiff" or "ISPMB") Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction (Doc. 13). On July 12, 2022, the Court granted the Motion's request for a TRO, set a briefing schedule for the parties, and set a Preliminary Injunction Hearing before this Court. (Doc. 15). The Motion is fully briefed (Docs. 13, 31, 33) and the Hearing was held on July 22, 2022 (Doc. 35). The Court has also received an amicus brief (Doc. 28-1) filed by the Center for Biological Diversity and the Maricopa Audubon Society. Having carefully considered all briefing and arguments submitted to the Court, the Court now issues this Order denying Plaintiff's Motion.

I. BACKGROUND

Plaintiff ISPMB is a non-profit organization formed for the purpose of furthering the protection and preservation of wild horses and burros. (Doc. 11 at 2). On June 11, 2021, former United States Forest Service ("Forest Service") Forest Supervisor Anthony Madrid

issued a determination letter to the Regional Forester concluding that certain unclaimed horses living on the Sprucedale-Reno and West Fork allotments in the Apache National Forest ("ANF") are "unauthorized livestock" as that term is defined in Forest Service regulations. (Doc. 11-3 at 2). On December 15, 2021, current Forest Supervisor Judith Palmer—a Defendant in this action—issued a memo authorizing the removal of the horses. (Doc. 11-5 at 2). On March 21, 2022, the Forest Service issued a notice indicating their intent to capture and remove the horses from the ANF. (Doc. 11-1 at 2). The notice stated that the horses "cause substantial problems not only for native plants and animals, which are being outcompeted for resources, but they also destroy watersheds[,] . . . negatively impact ecosystems, [and] pose an imminent threat to several federally listed and threatened species." (*Id.*). The notice called the decision a "necessary step to ensure that the [ANF] is healthy and sustainable for years to come." (*Id.*).

On June 28, 2022, Plaintiff filed a Complaint (Doc. 1) against the Forest Service, Ms. Palmer, the United States Department of Agriculture, and acting United States Secretary of Agriculture Tom Vilsack (collectively, "Defendants"). Plaintiff's Complaint asserts violations of the National Environmental Policy Act ("NEPA"), the Wild Free-Roaming Horses and Burros Act of 1971 ("WHA"), and the Administrative Procedures Act ("APA"), and seeks a declaration that the horses at issue are wild, free-roaming horses entitled to federal protection. (Doc. 11 at 7–16). On July 8, 2022, the Forest Service gave notice of the impending July 14, 20, and 21, 2022 public sale of "livestock impounded from National Forest System land." (*Id.* at 4). The notice indicated to Plaintiff that the Forest Service had captured the horses from the ANF, prompting Plaintiff to file an Amended Complaint (Doc. 11) and the present Motion (Doc. 13). On July 12, 2022, the Court granted Plaintiff's Motion to the extent it sought a TRO and prohibited Defendants from selling any of the captured horses. (Doc. 15). The parties briefed the issues, and a hearing was held before this Court (Doc. 35).

Plaintiff asserts that Defendants have "improperly, without adequate investigation, and in violation of several federal laws, determined the captured horses to be 'unauthorized

livestock' as opposed to federally protected wild free-roaming horses." (Doc. 13 at 2). Plaintiff seeks to enjoin Defendants from selling the already-captured horses and from capturing and selling or otherwise removing any other horses currently living on the ANF until Defendants comply with the requirements of the relevant federal statutes. ("Proposed Preliminary Injunction," Doc. 27-1 at 1–5).

II. LEGAL STANDARD

A party seeking injunctive relief under Rule 65 of the Federal Rules of Civil Procedure must show that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.[1] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014). "The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and internal quotations omitted). Where the movant seeks a mandatory injunction, rather than prohibitory, injunctive relief is "subject to a heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).[2]

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[1] The Ninth Circuit observes a "sliding scale" approach, in that these elements "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, by example, an injunction can issue where there are "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135.

[2] "A mandatory injunction orders a responsible party to take action," while "a prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Marlyn Nutraceuticals, Inc. v. Mucos*

III. DISCUSSION

To determine whether a preliminary injunction is appropriate, the Court must consider whether Plaintiff has made sufficient showings on each of the four *Winter* factors. As an initial matter, however, the Court will address Defendants' argument that Plaintiff lacks standing to bring this case in the first place.

A. Standing

To demonstrate standing, a plaintiff must show (1) that he or she suffered an injury in fact, (2) that the injury is traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). With respect to the injury requirement, an organizational plaintiff—such as ISPMB in this case—may demonstrate that the organization *itself* was injured in fact. In the Ninth Circuit, this requires the organization to demonstrate (1) frustration of its organizational mission and (2) diversion of its resources in response to that frustration of purpose. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). As to the diversion of resources, the Ninth Circuit has held that organizations "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. . . . It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). In other words, diverting resources to support litigation alone does not suffice to confer organizational standing under Ninth Circuit law.

Here, Plaintiff asserts that its organizational mission—to protect and preserve wild horses and burros—has been frustrated by Defendants' actions because the allegedly wild horses at issue here have been removed from the forest. (Doc. 33 at 2–3). According to the

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Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009). "The 'status quo' refers to the legally relevant relationship between the parties before the controversy arose." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060–61 (9th Cir. 2014).

Declaration of ISPMB President Karen Sussman, the organization "pursues its mission in many ways including efforts at education, the study of wild horse herds, and the pursuit of legislation that advances the interests of the horses to name a few." (Doc. 33-1 at 3). The Court finds that such organizational missions are frustrated by the removal of the horses from the ANF, particularly if Plaintiff can prove that the horses are indeed wild, free-roaming horses that should remain protected in the national forest. If the horses are permanently removed, Plaintiff is unable to conduct its studies on them in their natural habitat or otherwise protect and preserve them. As to the diversion of resources, Plaintiff asserts that it has had to divert time, manpower, and money to address Defendants' actions. Specifically, Plaintiff has been forced to spend time searching for the horses—both those removed by Defendants and those remaining in the ANF. Plaintiff has also had to devote time and money to investigating the issue and searching for ways to demonstrate that the horses are in fact wild, protected animals. The Court is satisfied that Plaintiff has had to divert resources such as time, money, and manpower—resources that otherwise could have gone toward the study of the horses in the ANF—to address Defendants' removal of the horses from the forest.

Having sufficiently alleged injury in fact, Plaintiff must also show causation and redressability—the other two standing requirements—to establish standing. However, when a plaintiff seeks to enforce a *procedural* requirement—such as, in this case, Defendants' compliance with NEPA—the causation and redressability requirements are relaxed. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003). Under the relaxed causation requirement, a plaintiff need not establish the immediacy of the injury—the possibility of future injury may be sufficient. *Id.* at 1087. As to redressability, a plaintiff need not show that further analysis by the government would actually result in a different conclusion. *Id.* Instead, a plaintiff "need only show that the decision could be influenced by the environmental considerations that NEPA requires an agency to study." *Id.* Here, the Court is satisfied that Plaintiff has established the relaxed causation and redressability requirements. Defendants' removal of the horses from the forest is the cause of Plaintiff's

frustrated organizational purpose, a purpose that stands to be further injured in the future if additional horses are removed. Plaintiff has also shown that Defendants' decision to remove the horses "could be influenced by the environmental considerations that NEPA requires an agency to study," because NEPA requires agencies to consider what effect their actions have on the environment. Here, Plaintiff alleges that the removal of these horses would influence the environment in ways that Defendants failed to consider. All told, the Court finds that Plaintiff has sufficiently established standing.

B. Preliminary Injunction Analysis

The first *Winter* factor requires a plaintiff to establish a substantial likelihood of success on the merits. Under the Ninth Circuit's sliding scale approach, an injunction may issue even where a plaintiff makes a somewhat *weaker* showing on the "likelihood of success" factor, so long as the plaintiff (i) establishes that there are at least "serious questions" going to the merits of the claim and (ii) makes a particularly strong showing on one of the other factors, such as irreparable harm or the balance of hardships. *See All. for the Wild Rockies*, 632 F.3d at 1131 (recognizing injunction could issue where serious questions exist and balance of hardships tips sharply in plaintiff's favor); *Shebanow v. First Magnus Fin. Corp.*, No. 3:10-cv-00765-RCJ-RAM, 2010 WL 5390132, at *3 (D. Nev. Dec. 22, 2010) (recognizing injunction could issue where serious questions exist and amount of harm prevented is "very great"). "To prevail on the motion, plaintiffs need only show a likelihood of success on the merits/serious questions as to *one* of their claims for relief." *De Anda Enters., Inc. v. JL Deanda Enters. LLC*, No. SA CV 16-2049-DOC (JCGx), 2017 WL 2960796, at *2 (C.D. Cal. Apr. 11, 2017) (emphasis in original) (citation and internal quotations omitted).

Here, Plaintiff asserts four claims for relief, including violations of NEPA and the WHA. However, neither NEPA nor the WHA allow for a private right of action. *In Def. of Animals v. U.S. Dep't of Interior*, 909 F. Supp. 2d 1178, 1187 (E.D. Cal. 2012). Thus, "a party can obtain judicial review of alleged violations [of NEPA or WHBA] only under the waiver of sovereign immunity contained within the [APA]." *Id.* In other words, this Court

must analyze Plaintiff's likelihood of success on its NEPA and WHA claims using the standard provided by the APA as it relates to judicial review of an agency action. The APA specifies that an agency action "may only be overturned when it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (citing 5 U.S.C. § 706(2)(a)).

i. WHA Claim

In 1971, Congress enacted the WHA to protect wild, free-roaming horses and burros "from capture, branding, harassment, or death." 16 U.S.C. § 1331. In passing the WHA, Congress found and declared that wild horses "are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene." *Id.* The WHA provides that wild horses "are to be considered in the area where presently found, as an integral part of the natural system of the public lands." *Id.* Under the WHA, the Bureau of Land Management and the U.S. Forest Service are charged with managing and protecting wild horses on federal lands that they control "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* § 1333.

The WHA defines "wild free-roaming horses and burros" as "all unbranded and unclaimed horses and burros on public lands of the United States." *Id.* § 1332(b). The Forest Service's regulations elaborate that the definition includes only those unbranded and unclaimed horses—and their progeny—"that have used lands of the National Forest System on or after December 15, 1971 . . . *but does not include* any horse . . . introduced . . . on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership." 36 C.F.R. § 222.60(b)(13) (emphasis added); *see also id.* § 222.60(b)(15) (defining "wild horse and burro territory" as National Forest System lands "which are identified by the Chief, Forest Service, as lands which were territorial habitat of wild free-roaming horses and/or burros *at the time of the passage of the Act*"). Horses that did not exist on National Forest System land on December 15, 1971—and that are not otherwise

authorized by permit—are considered "unauthorized livestock." *Id.* § 261.2. The Forest Service has authority to impound and dispose of unauthorized livestock on Forest Service land, and the regulations set forth certain procedural steps that must be taken for such removal to occur. *Id.* § 262.10.

Here, the parties primarily dispute whether Defendants correctly designated the horses living on the Sprucedale-Reno and West Fork allotments of the ANF as "unauthorized livestock" rather than WHA-protected, wild, free-roaming horses. As explained above, the dispute boils down to whether the horses were present on or near those allotments at the time of the WHA's passage on December 15, 1971. Defendants assert that the Forest Service made a "reasonable, well-supported, public determination" that horses were *not* present in 1971, and that they are therefore not "wild" horses for purposes of the WHA. (Doc. 31 at 16). Plaintiff takes issue with Defendants' conclusion, arguing that it is inadequately supported, unreliable, and that there is controverting evidence that horses *did* in fact exist on the land at the time of the WHA's passage. (Doc. 33 at 3–6).

Plaintiff argues that, for decades, Defendants failed to meet their WHA duties to inventory and to manage the unclaimed, unbranded horses living on the ANF. (Doc. 13 at 6, 8). As a result, Plaintiff asserts that the Forest Service "has no meaningful idea as to whether or in what numbers Wild Free-Roaming horses exist on the [ANF] because they have never looked, recorded, analyzed, or inventoried the horses." (Doc. 33 at 5). In other words, Plaintiff argues that Defendants violated the WHA not necessarily because they designated the horses at issue as unauthorized livestock, but rather because they failed to carry out their duty to "maintain a current inventory." Under this argument, Defendants' "unauthorized livestock" determination becomes less of a standalone WHA violation, and more of an *effect* of Defendants' original WHA violation—its failure to inventory and to manage the horses at issue. In the Response, Defendants characterize Plaintiff's argument as a misinterpretation of the law. (Doc. 31 at 18). Defendants argue that the WHA only requires the Forest Service to maintain current inventory and to manage only "those horses designated as 'wild' in 1971 and the resulting herd management areas." (*Id.*). According

to Defendants, the Forest Service "does *not* have a legal obligation to continuously survey all of the Forest for wild free-roaming horses because no wild horse territory is designated there, and a stray horse cannot become 'wild' under the [WHA] by coming onto the forest." (*Id.* at 18–19 (emphasis in original)).

The Court agrees with Defendants and finds that the WHA's "current inventory" requirement does not impose a duty on the Forest Service to continuously survey the entire ANF in search of wild free-roaming horses. The current inventory requirement can be found in § 1333(b) of the WHA, which provides that:

> The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands. The purpose of such inventory shall be to: make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).

16 U.S.C. § 1333(b)(1). This provision plainly requires the Forest Service to "maintain a current inventory . . . *on given areas of* the public lands"; it does not require the Forest Service to maintain a current inventory on the public lands *in general*. The Court finds that Congress' inclusion of "given areas" narrows the Forest Service's duty by requiring inventory to be maintained only on certain portions of the public lands—namely, on those portions of public lands that have been designated as "wild horse and burro territory." Moreover, the provision does not require Defendants to maintain a current inventory of "*all* horses and burros" on public lands, but rather an inventory of "*wild free-roaming* horses and burros." As noted above, the Forest Service's regulations explicitly define "wild free-roaming horses and burros" as meaning "all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971 . . . *but does not include* any horse or burro introduced . . . on or after December 15, 1971 by accident, negligence, or willful disregard of private ownership."

36 C.F.R. § 222.60(b)(13) (emphasis added). Thus, if this definition is substituted into § 1333(b)(1), the current inventory requirement would provide:

> The Secretary shall maintain a current inventory of *all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971 . . . [but not including] any horse or burro introduced . . . on or after December 15, 1971 by accident, negligence, or willful disregard of private ownership* on given areas of the public lands.

Read in this way, it becomes readily clear that the Forest Service is not required to maintain a current inventory all horses found anywhere on the ANF, regardless of their status under the WHA. Rather, the duty to inventory only applies to those horses that have been designated as being protected under the WHA. This interpretation of the statute also comports with the purpose of the current inventory requirement. The purpose of maintaining inventory is *not* to survey the entire forest in search of horses that may or may not be protected. Instead, the statute explicitly states that the purpose of maintaining inventory is to assist the Forest Service in making decisions related to overpopulation, the removal of excess animals, and determining and maintaining appropriate management levels of wild free-roaming horses and burros. 16 U.S.C. § 1331(b)(1). Unauthorized horses are exactly what their name implies—unauthorized. They are subject to impoundment and disposal at any time, without any consideration of overpopulation or management levels. 36 C.F.R. § 262.10. In sum, this Court finds that the Forest Service in this case did not violate the WHA merely because they failed to discover these horses sooner, or because they failed to otherwise maintain a current inventory of their existence.

However, the question remains whether Plaintiff has demonstrated a likelihood of success in proving that the Forest Service incorrectly designated the horses at issue as unauthorized livestock and that its removal of the horses therefore violated the WHA. On June 11, 2021, former Forest Supervisor Anthony Madrid issued a determination letter concluding that the horses at issue were "unauthorized livestock":

> These horses are not wild horses nor the progeny of wild horses

> and have not intermingled with wild horses as defined by 36 CFR [§] 222.60(b)(13). These horses originated from unauthorized livestock associated with past grazing permits and other private owners including the neighboring Fort Apache Indian Reservation. There were no unclaimed horses present at the establishment of the [WHA in 1971]. These horses became established in about the mid-2000s. Heber Wild Horses did not migrate from the Heber Wild Horse Territory to the Apache National Forest.

(Doc. 11-3 at 2). The conclusion was primarily based on the findings of two reports that were commissioned by Mr. Madrid in 2020: the "Unauthorized Livestock History" report ("History report") and the "Assessment of Horses on the Apache National Forest" report ("2021 Assessment"). (*Id.*). The History report (Doc. 31-3 at 17–37)—prepared by Forest Service historians and published in June 2021—documents "the history of horse presence on the Sprucedale-Reno and West Fork Allotments" and "is based on a close examination of allotment records held by the Apache-Sitgreaves National Forests." (*Id.* at 19, 21). Under the "Methodology" section, the History report indicates the following:

> To develop this report, a historian from the USDA . . . used records provided by the Apache-Sitgreaves National Forests in addition to secondary literature. The historian reviewed rangeland and grazing history in the West, the Forest Service, the Southwest Region, and the Apache-Sitgreaves National Forests; conducted a review of other ongoing horse-related concerns in Arizona such as the Heber Wild Horse Territory and the Salt River Horses on the Tonto National Forest; and did a page-by-page survey of all the file materials provided by Apache-Sitgreaves personnel.

(*Id.* at 22). The History report further detailed what records and materials were provided by Apache-Sitgreaves National Forest personnel:

> On November 14, 2019, historian Leighton Quarles met an [Apache-Sitgreaves] employee in Payson, AZ, and took receipt of approximately two linear feet of documents for review. These documents consisted entirely of materials related to the West Fork and Sprucedale-Reno grazing allotments on the Apache National Forest. Nearly all were 2210/2230 files: grazing permits, annual operating instructions, and similar. A few published reports were mixed in. The aim was to uncover any history of unauthorized horses. Materials largely covered the period between 1960 and 2000. 1940 was the oldest date of any document and almost no documents predated 1958.

(*Id.*). The History report chronologizes all known instances in which horses were seen on the allotments in the decades leading up to and after 1971. None of those sightings, however, indicated the definitive presence of wild, free-roaming horses. Rather, each sighting was attributable to horses that had escaped from either the nearby Fort Apache Indian Reservation or from one of several family allotments in the area. One family in particular—the Wiltbank's—"endlessly struggled with reports of their stock . . . leaving the allotment and either trespassing on the West Fork Allotment or simply winding up in the road." (*Id.* at 27–28). In fact, the History report found that "between 1966 and 1991 the only records of unauthorized horses on the West Fork or Sprucedale/Reno Allotments attributed those horses' ownership to the Wiltbank family." (*Id.* at 30).

The History report notes that unauthorized horse sightings "took a marked upswing" in the 1990s. (*Id.* at 31–34). However, Forest Service documents from those years again attributed all such sightings to horses that had escaped from the reservation or from nearby family allotments such as the Wiltbank's. (*Id.*). By the mid-2000s, there was a "sustained presence" of horses on the allotments, and by 2018, there were an estimated 260 horses living in the area.[3] (*Id.* at 35). As it relates to the presence of horses in 1971, however, the History report concluded that, based on its review of the materials, "there were no free-roaming unauthorized horses consistently resident on either the Sprucedale-Reno or the West Fork Allotments between the 1940s and the mid-1990s." (*Id.* at 22–23).

The 2021 Assessment (Doc. 31-4 at 1–17)—prepared by Forest Range Program Manager Ralph Fink and published in June 2021—sought to "inform the Forest Supervisor in making a determination of the legal status [and origin] of the . . . horses found on the Alpine and Springerville Ranger Districts, Apache-Sitgreaves National Forests." (*Id.* at 2). The 2021 Assessment relies on the History report's conclusion that no wild, free-roaming

[3] The 2018 estimate of 260 horses is from a University of Arizona study titled "Examination of the Ecological Interactions of Free-Roaming Horses on Montane Riparian Systems on the Apache-Sitgreaves National Forest, Arizona, USA." (Doc. 31-2 at 2). The Forest Service estimates that the number of horses is closer to 400–500 (Doc. 31-1 at 2).

horses consistently resided on the Sprucedale-Reno and West Fork allotments at the time the WHA passed in 1971. (*Id.* at 6). Instead of further speculating as to the existence of horses on the land in 1971, the 2021 Assessment focuses primarily on the factors that contributed to the rise in the horse population in the 1990s and 2000s. (*Id.* at 10, 12). The 2021 Assessment provides that:

> In the 1990's, when unauthorized horses began to increase, many of these fences were 20–60 years old in varying levels of condition, maintenance and upkeep. During this same time, tribes lost funding to assist in maintenance and reconstruction of fences for shared boundaries. These factors, compounded with the removal of fences from permittee maintenance responsibility, increasing elk numbers, pressure from horses and other livestock, fire, high wind events and falling trees all contributed to the challenge of managing livestock movements with fences. While these challenges exist with most fences, the 1990's appear to be the inflection point in which fencing maintenance exceeded the Forest's capacity largely due to workforce and funding. This is an issue shared across the region and has progressively worsened.
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> Wildfire has also contributed to fencing problems across the region. The Wallow Fire occurred in 2011 and burned over 500,000 acres, largely on the Apache-Sitgreaves National Forests. Approximately 14 miles of boundary fence between the Forest and Fort Apache Indian Reservation was impacted by the Wallow Fire.

(*Id.* at 10). The 2021 Assessment also attributed the increased horse population to higher rates of horse abandonments since 2007 and to warmer temperatures and less snowfall that resulted in horses remaining year-round in the ANF's higher elevations. (*Id.* at 12).

As noted in the June 2021 determination letter, the two reports served as the primary bases for the Forest Service's conclusions that (i) no consistent population of wild, free-roaming horses existed on the Sprucedale-Reno and West Fork allotments of the ANF in 1971, and (ii) that the horses currently found on the land—*i.e.*, the horses at issue in this litigation—most likely originated from stray, escaped, or abandoned horses that began populating the area in the 1990s and 2000s. However, Defendants further support their conclusion by pointing to "communications with individuals within and outside the Forest Service." (Doc. 11-3 at 2; *see also* Doc. 31-1 at 4 (indicating that "unauthorized horses"

conclusion was based in part on "communications within USFS and with outside stakeholders"). In the Response, Defendants elaborate by explaining that the Forest Service "conducted and continues to conduct substantive outreach to wildlife advocates, Native American tribes, grazing permittees, county and local law enforcement, local stakeholders such as sportsmen associations, and elected officials." (Doc. 31 at 17, n.4). As one example, on December 6 and 7, 2021, the Forest Service held two meetings with known stakeholders "to discuss the [Forest Service] determination that the horses should be managed in accordance with [Forest Service] regulations governing unauthorized livestock." (Doc. 31-1 at 4). Those in attendance included representatives of the Arizona Department of Agriculture, a representative of over 30 sportsman organizations, and representatives from allotments nearby the area at issue. (Doc. 31-4 at 30–31). The notes from the meetings indicate that the stakeholders were supportive of the Forest Service's efforts and plan to remove the horses. (*Id.* at 21–26). Aside from the December 2021 meetings, Defendants provide an extensive list of all organizations and individuals contacted by the Forest Service in relation to the "unauthorized livestock" issue. (*Id.* at 27–31). Importantly, none of the interested parties who were contacted "voiced an objection to the determination that the horses on the Forest are unauthorized." (Doc. 31 at 17, n.4). Moreover, the Forest Service's communications with interested parties failed to turn up any historical data that contradicted the Forest Service's conclusion—that is, none of the interested parties pointed to any historical data indicating that the horses were anything other than unauthorized livestock. (*Id.*; *see also* (Doc. 31-4 at 27–31)).

As noted above, the APA governs this Court's review of an agency's actions, conclusions, and findings of fact. *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005). Under the APA's arbitrary and capricious standard, this Court "cannot substitute [its] own judgment" for that of the Forest Service. *Id.* Instead, the Court can only ask whether the Forest Service's conclusion "was based on a consideration of the relevant factors, . . . whether there has been a clear error of judgment, . . . [and] whether the [Forest Service] articulated a rational connection between the facts found and the choice

made." *Id.* at 859. "Agency action should be overturned only when the agency has 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001).

Here, this Court simply cannot find that Plaintiff has demonstrated a likelihood of success in proving that the Forest Service's conclusion designating the horses as unauthorized livestock was arbitrary and capricious. First, this Court finds that the Forest Service's reliance on the reports and on its communications with interested stakeholders constituted a consideration of the relevant factors. The reports considered a substantial amount of relevant historical evidence, and the interested stakeholders consisted of a diverse group of organizations and individuals with a clear interest in the issue. The evidence gathered by the Forest Service fully supports a finding that the horses at issue are not descendants of horses that were wild and free roaming on the ANF in 1971. The Court finds that the Forest Service has thus demonstrated a rational connection between the facts it found and the conclusion it made.

Second, Plaintiff has failed to provide sufficient evidence to indicate that the Forest Service's conclusion was incorrect or should otherwise be overturned. Although Plaintiff may believe that horses were present on the West Fork and Sprucedale-Reno allotments in 1971, Plaintiff has failed to provide the Court with any meaningful evidence to support that belief. The only affirmative evidence offered by Plaintiff indicating the presence of horses on the ANF prior to 1971 is a short excerpt from the July 5, 1918 edition of "The Morenci Leader." (Doc. 13-3 at 2). The excerpt states:

> Accompanied by his son, Mr. John Sidebotham arrived in Clifton last Monday from his home in California, making the trip in his Ford car. He came into Greenlee [County] via the Apache reservation from Springerville and Holbrook. . . .
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> "There were many things of interest to be seen along the way, and much to interest an observing person," he stated to the

> Copper Era man after his arrival Monday. . . .
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> "I found that work on the railroad through the Apache forest is progressing rapidly, and much big timber is being gotten out in that reservation. I was told that the government is having men catch the wild horses in Apache forest for which they are paying 5 1-2 cents per pound delivered at the railroad. It is stated that these animals are being used for canners, but was not told for whom the meat will be prepared. The best animals are turned back into the forest, especially the mares."

(*Id.*). A quick glance at a map reveals that one who travels from California to Clifton, Arizona would indeed pass through the ANF if he passed through Springerville and Holbrook along the way. That, however, is the extent of the reliability that can be attributed to the above recounting of Mr. Sidebotham's 1918 journey. The reasons to minimize the evidentiary weight of—or discount entirely—this newspaper excerpt are obvious. First, it is not clear who Mr. Sidebotham was or why this Court should meaningfully credit his story over a century later. Instead, his story constitutes only a single, anecdotal reference to horses being present in the Apache forest. Second, Mr. Sidebotham was not recounting his own first-hand sighting of wild horses in the ANF, but instead describing what he had been "told" by someone else. Moreover, it is not clear *where* in the "Apache forest" the wild horses were being caught, or even if the horses were in the ANF at all. Finally, Mr. Sidebotham's use of the word "wild" is itself unreliable. As Defendants point out, it is impossible to know if the article's description of the horses as "wild" is "equivalent to the legal definition created by Congress over 50 years later in the [WHA]." (Doc. 31 at 17). In sum, this Court cannot credit this newspaper article as anything close to evidence substantially indicating the presence of horses in the ANF prior to 1971.

Aside from the newspaper article, Plaintiff has provided nothing—in its briefing or at the hearing—in the way of *affirmative* evidence indicating that horses were present on the relevant allotments of the ANF in 1971.[4] Instead, the balance of Plaintiff's WHA claim

[4] Plaintiff argues that "[c]ontrary to Defendants' conclusions that there are no protected Wild Free-Roaming horses in the [ANF], is a March 13, 2018 report prepared by the University of Arizona . . . [that] identifies its purpose in studying these free-roaming horses, who happen to be located in the same area the U.S. Forest Service determined had

consists of arguments that Defendants' conclusion was insufficiently supported and that "a more fully developed record on this issue is warranted prior to [the] permanent removal and potential destruction of the horses." (Doc. 33 at 3–6). Plaintiff argues that the two reports relied on by Defendants "consider and evaluate extremely limited sources of information." (*Id.* at 4). Specifically, Plaintiff takes issue with the fact that the reports rely solely on grazing allotment records and are "devoid of any scientific or observational evidence or independent study that documents characteristics and behaviors of the horses, their travel pattern, herd behavior, or potential lineage." (*Id.*).

To some extent, Plaintiff may be correct in pointing out these shortcomings. The reports relied almost exclusively on grazing allotment records. It is reasonable to think that a more thorough report would have carefully analyzed the horses *presently on the ANF* to see whether their behaviors and characteristics provided any insight into their origin. Indeed, if Plaintiff had *itself* provided such scientific or observational evidence, this Court would have certainly been more inclined to hold in Plaintiff's favor. At the least, Plaintiff could have more extensively explained *the practicability* of obtaining such scientific and observational evidence, and *the value* such evidence offers in determining whether horses were present on the land at issue in 1971. Instead, Plaintiff asks the Court to take Plaintiff's word that Defendants could have obtained certain scientific and observational evidence and that such evidence would have made a difference. This Court is not an expert on these issues. Consequently, this Court cannot simply assume that observing the behaviors and characteristics of horses on the ANF *today* would provide meaningful evidence of where

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zero wild free-roaming horses and where they executed their removal of 'unauthorized livestock' at issue in this case." (Doc. 33 at 4–5).

To the extent Plaintiff relies on the University of Arizona study as evidence indicating the existence of wild, free-roaming horses on the land at issue in 1971, the Court is entirely unconvinced. The University of Arizona study estimated a population of about 260 horses in the measured area, (Doc. 31-2 at 12), but made *no effort* to determine whether those horses had been in the area since 1971. Although the report refers to the horses as "free-roaming horses," (*Id.* at 5), it states *nothing* that supports a finding that the horses existed on the land in 1971 such that they are protected under the WHA.

horses existed on the ANF over *five decades ago*. It can be difficult enough to determine where a single, unbranded horse came from when it is found wandering unclaimed in a national forest. It stands to reason that it is even *more* difficult—if not impossible—to determine where that horse's ancestors lived fifty-one years earlier. For all this Court knows, a collection of grazing allotment records may very well be the best available evidence in making such a difficult determination. Without more from Plaintiff, this Court must defer to the expertise of the Forest Service and assume that such is the case.

Plaintiff also takes issue with the fact that the reports only consider historic horse presence in the West Fork and Sprucedale-Reno allotments, which comprise a "mere fraction" of the 1,000,000 acres of land encompassed by the ANF. (Doc. 33 at 4). Suppose, however, that the Forest Service's reports *had* considered the entire ANF. Further suppose that a small group of horses was found in an area on the opposite side of the ANF, and that such horses were the progeny of wild, free-roaming horses that lived in the same area in 1971. Such horses would, of course, be protected under the WHA. However, it is *not* clear to the Court—and Plaintiff has failed to provide any law stating—that the discovery of such WHA-protected horses on one side of the park would grant the horses on the West Fork and Sprucedale-Reno allotments the same federal protection. In other words, this Court is unaware of—and Plaintiff itself has not shown—any statute, regulation, or caselaw indicating that the WHA requires the Forest Service to survey an *entire* national forest to determine whether a particular group of horses—confined to one small area of that forest—are protected under the WHA. Indeed, it seems unlikely that such a requirement exists. First, such a requirement would moot the entire question presently before this Court because there are already WHA-protected horses in the Apache-Sitgreaves National Forest, less than one hundred miles away in the Heber Wild Horse Territory. The horses in this case would be protected under the WHA simply by virtue of WHA-protected horses existing in the Heber Wild Horse Territory. Second, such a requirement would be unreasonable, considering the sheer size of many national forests. For example, the Tongass National Forest in Alaska is approximately 17 million acres. *See* Forest Service,

Tongass National Forest – Districts, https://www.fs.usda.gov/detail/tongass/about-forest/districts/ (last accessed July 27, 2022). The Court cannot imagine that, if horses were discovered in a single, 20,000-acre area of that forest, the Forest Service would have to survey the remaining 16.98 million acres before it could determine whether the discovered horses were "unauthorized livestock" or wild, free-roaming horses. The Court assumes that no such requirement exists, and that the Forest Service's reports are not insufficient merely because they failed to account for the historical existence of horses in the entire ANF.

All told, Plaintiff has failed to establish that Defendants more likely than not acted in an arbitrary or capricious manner, otherwise abused its discretion, or acted contrary to law when it determined that the horses at issue were "unauthorized livestock" that are not protected under the WHA. Accordingly, Plaintiff has failed to demonstrate a likelihood of success on the merits of its WHA claim.

ii. NEPA Claim

NEPA, 42 U.S.C. §§ 4321–4370, "requires certain procedural safeguards before an agency takes an action that may significantly affect the environment." *In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior*, 751 F.3d 1054, 1067 (9th Cir. 2014); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (citation omitted) ("NEPA is a procedural statute that does not 'mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.'"). To satisfy NEPA's procedural requirements, federal agencies are required to first prepare an Environmental Analysis ("EA") to determine whether the environmental impact of the proposed action is significant enough to warrant the preparation of an Environmental Impact Statement ("EIS"). *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 853 (9th Cir. 1999) (citing 42 U.S.C. § 4332(2)(C)). An EIS is a more detailed analysis of the proposed action's environmental impact and requires a consideration of any available alternatives.

However, the above procedural requirements are lightened if the proposed action falls under a "categorical exclusion." *Id.* Categorical exclusions ("CE") are categories of

actions, as identified by each agency, which "do not individually or cumulatively have a significant effect on the human environment." *Id.* at 857. If a proposed action falls within a CE, the agency need not prepare an EA or EIS *unless* there are "extraordinary circumstances" related to the proposed action. *Id.* at 858. Extraordinary circumstances are those circumstances "in which a normally excluded action may have significant environmental effect." 40 C.F.R. § 1508.4.

Here, Defendants did not prepare an EA or an EIS because they determined that the removal of the horses from the ANF fell within *two* categorical exclusions: (i) the CE covering "civil and criminal law enforcement and investigative activities" and (ii) the CE covering "prohibitions to provide short-term resource protection or to protect public health and safety." (Doc. 31-4 at 33–34). Plaintiff argues that Defendants should not be allowed to invoke either CE because Defendants' reliance on them is "misplaced and not within the spirit or letter of the law." (Doc. 33 at 6). Essentially, Plaintiff argues that the removal of the horses at issue is an action beyond the intended scope of the CEs. Alternatively, Plaintiff argues that—even if a CE applied—there are "extraordinary circumstances" present that require Defendants to prepare an EA or EIS. (*Id.* at 7–8). Plaintiff's arguments ask this Court to review the Forest Service's application of its own regulations which, as stated above, requires this Court to use the APA's arbitrary and capricious standard. *Alaska Ctr. for Env't*, 189 F.3d at 857. The Ninth Circuit has specifically held that "an agency's interpretation of the meaning of its own [CE] should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Id.* "An agency's decision to invoke a [CE] to avoid an EIS or EA is not arbitrary and capricious if 'the agency reasonably determined that a particular activity is encompassed within the scope of a [CE]." *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 680 (9th Cir. 2022) (citations omitted).

Here, the Court finds that the Forest Service reasonably determined that the removal of the horses at issue was an action encompassed within the scope of the law enforcement CE. *See* 7 C.F.R. § 1b.3(a)(5) (identifying "[c]ivil and criminal law enforcement and

investigative activities" as a category of activity determined not to have significant effect on human environment and therefore excluded from EA and EIS requirements). Plaintiff argues that the removal of horses from the ANF "constitutes far more than civil and criminal law enforcement and investigative activities." (Doc. 33 at 6). Plaintiff asserts that the law enforcement CE is intended to cover activities such as "development, planning, routine activities, funding, research and studies, [and other] investigations which don't permanently or directly impact an environment." (*Id.*). The permanent removal of horses which have lived on the ANF for "periods of time unknown to the [Forest Service]," Plaintiff argues, clearly impacts the environment and is not an action that reasonably falls within the law enforcement CE. (*Id.*).

The Court is unpersuaded. In this case, the Forest Service determined that the horses at issue are "unauthorized livestock" that are not protected under the WHA. As discussed above, this Court finds that such determination was reasonable, and that Plaintiff has failed to demonstrate that it was arbitrary, capricious, or that it should otherwise be overturned. Therefore, for purposes of analyzing Plaintiff's NEPA claim, it would be inconsistent for this Court to now treat the Forest Service's "unauthorized livestock" determination as anything less than a fully supported and final agency conclusion. That said, it is indisputable that the Forest Service is authorized to impound and dispose of unauthorized livestock found on national forest land at any time. 36 C.F.R. § 262.10. As the Forest Service explained in its Project Initiation Form (Doc. 31-5 at 2–16) and in the White Paper (Doc. 31-5 at 18–23), unauthorized livestock are considered a "prohibition" on national forest land. It follows that dealing with prohibited, unauthorized livestock on national forest land is, at its core, a law enforcement issue. Indeed, the Forest Service Law Enforcement Handbook specifically sets forth the process for removing unauthorized livestock in a manner that is consistent with the Forest Service's regulations. (Doc. 31-5 at 18–21). This Court cannot find that the Forest Service was unreasonable in its determination that removing the unauthorized horses from the ANF was a law-enforcement activity that was encompassed within the scope of the law enforcement CE.

The Court is similarly unpersuaded by Plaintiff's argument that "extraordinary circumstances" exist that preclude the invocation of a CE. As stated above, extraordinary circumstances are those circumstances "in which a normally excluded action may have significant environmental effect." 40 C.F.R. § 1508.4. Generally, the existence of extraordinary circumstances is revealed during the "scoping process," which is a process used to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *Id.* § 1501.7. "The Forest Service conducts scoping for 'all proposed actions, including those that would appear to be categorically excluded.'" *Alaska Ctr for Env't*, 189 F.3d at 858 (citing Forest Service Handbook, 1909.15, 30.2(3)). "If extraordinary circumstances having a significant effect on environment are revealed during scoping, then the Forest Service conducts an EA." *Id.* (citing Forest Service Handbook, 30.2(3)).

Forest Service regulations provide a list of "resource conditions" that "should be considered in determining whether extraordinary circumstances" exist. 36 C.F.R. § 220.6(b). In this case, the Forest Service considered all seven resource conditions during the scoping process and determined that none of the resource conditions were present. (*See* Doc. 31-5 at 8–15). The Forest Service's scoping process also included contacting interested organizations and individuals and holding two scoping meetings with relevant stakeholders. (Doc. 31-4 at 27–31). All told, the scoping process revealed that no "extraordinary circumstances" existed.

Plaintiff correctly notes that Defendants overlooked the presence of *one* resource condition—the existence of federally listed threatened or endangered species. (Doc. 33 at 7). As explained by Plaintiff and by the Center's amicus brief (Doc. 28-1), the New Mexico meadow jumping mouse is an endangered species that is present on the land at issue in this case, yet Defendants' scoping failed to identify this as a resource condition that existed. However, the Forest Service's regulations specifically provide that

> [t]he mere presence of one or more of these resource conditions *does not preclude* use of a [CE]. It is the existence of a cause-effect relationship between a proposed action and the potential

> effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

36 C.F.R. § 220.6(b)(2) (emphasis added). Here, the unauthorized horses have apparently "degraded the protected habitat" of the jumping mouse and "jeopardized their continued existence." (Doc. 28-1 at 3). In fact, part of the reason the horses are being removed in the first place—aside from them being unauthorized livestock—is that they "cause significant damage to the ecosystem by reducing forage available for wildlife . . . and damaging habitats of species" such as the jumping mouse. (Doc. 31 at 8). Thus, it is reasonable to presume that a cause-effect relationship exists between removing the horses and the effect that will have on the jumping mouse. However, the degree of that effect is unclear. If anything, however, the removal of the horses would prove beneficial to the jumping mouse. In any respect, Plaintiff makes no meaningful argument as to how the presence of this single resource condition constitutes the existence of an extraordinary circumstance sufficient to prevent Defendants from invoking the CE to remove the horses.

"An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." *Jones v. Gordon*, 792 F.2d 821, 827 (9th Cir. 1986). "The agency must supply a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985). "To determine whether agency action is arbitrary or capricious, a court must consider 'whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment.'" *Alaska Ctr for Env't*, 189 F.3d at 859 (citation omitted). "Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Id.* (citation omitted).

Here, this Court finds that the Forest Service's scoping process provided a reasoned decision that considered the proper factors and concluded that no extraordinary

circumstances were present that would warrant the preparation of an EA or EIS. "Employing the deferential standard of review, which we must when reviewing factual conclusions within the agency's expertise, we conclude that the Forest Service considered the relevant factors and determined that no extraordinary circumstances were present." *Alaska Ctr for Env't*, 189 F.3d at 859.

In sum, Plaintiff has failed to demonstrate a likelihood of success on the merits of its NEPA claim because the Forest Service reasonably interpreted its law enforcement CE to encompass the removal of unauthorized livestock from national forest land. Moreover, the Forest Service, through its scoping process, thoroughly considered the relevant factors in determining whether any extraordinary circumstances existed. Its conclusions with respect to NEPA compliance are entitled to deference under the APA, and this Court cannot substitute its own judgment absent clear error.

Having found that Plaintiff has failed to establish a likelihood of success on the merits, the Court need not address the remaining *Winter* factors.

IV. CONCLUSION

A preliminary injunction is an "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008), and one that should only be granted "upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Here, Plaintiff has failed to demonstrate a likelihood of success on—or even serious questions going to the merits of—its claims for relief. Thus, the Court cannot grant a preliminary injunction in Plaintiff's favor and must deny Plaintiff's Motion.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 13) is **denied** to the extent it seeks a preliminary injunction.

Dated this 28th day of July, 2022.

Honorable Steven P. Logan
United States District Judge