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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANIMAL LEGAL DEFENSE FUND, *et al.*,

Plaintiffs,

v.

VICKI CHRISTIANSEN, *et al.*,

Defendants.

Case No. 3:18-cv-06410-JD

Notice of Hearing: January 31, 2019 at 10:00am

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In their preliminary injunction motion and supporting memorandum, Plaintiffs explained that an injunction is warranted to maintain the status quo and prevent the slaughter of federally protected wild horses until the Court can resolve the merits of this case. *See* ECF No. 21 at 15-25.[1] In response, rather than actually address Plaintiffs' arguments concerning the Forest Service's obvious change in position that was both never explained to the public in the manner required by the Administrative Procedure Act ("APA") nor subjected to legally required scrutiny under the National Environmental Policy Act ("NEPA") or the National Forest Management Act ("NFMA"), the government instead insists that it has not yet made the determination to allow the sale of any of the wild horses at issue "without limitation," and relies primarily on public policy rationales in favor of any such future decision.

However, as demonstrated below, the Forest Service has clearly made the decision to allow the sale of some of these horses "without limitation"—i.e., this is the very reason it cites for having constructed its own holding facility for these horses, because, as the government explains, if it had continued to use the facility operated by the Bureau of Land Management ("BLM") it would be *prohibited by Congress* from allowing the sale of any wild horses "without limitation." ECF No. 33 at 17-18. As also explained below, the government's public policy defenses as to *why* it has chosen to change course and now allow the sale of wild horses without limitation have nothing to do with the issues before the Court.

Rather, this case—as with *any* case challenging an agency's change in practice—asks the Court to determine whether the Forest Service's new approach to disposition of wild horses removed from the Modoc National Forest, under which this Forest will for the *first time ever* allow horses to be sold without limitation and thus *slaughtered for human consumption*, met the basic procedural safeguards of the APA (as well as NEPA and NFMA) that apply to such significant changes in agency practice. Under Supreme Court and Ninth Circuit case law, the

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[1] For the Court's convenience, Plaintiffs refer to documents herein by their ECF number filed in this case stamped on the top of every page of each relevant document (rather than citing to the name of the document itself). The one exception is the opposition filed by the proposed intervenors—cited herein as "Intervenors' Opp."—since it was only filed in the related case.

Forest Service's failure to examine this issue at all cannot be sustained. Accordingly, a preliminary injunction is appropriate to avoid the irreversible death of these horses and irreparable harm to Plaintiffs until the Court can address the merits of this case.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because they amply satisfy each of the factors applied by the Ninth Circuit to obtain such relief. *See, e.g.*, *All. for the Wild Rockies v Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

I. PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS AND HAVE CERTAINLY RAISED SERIOUS QUESTIONS AS TO THE MERITS.

As Plaintiffs previously explained, they have demonstrated that they are likely to succeed on the merits, or, at bare minimum, have raised "serious questions" about the Forest Service's decision to sell horses without limitation. *See* ECF No. 21 at 15-20. The government's responses—many of which fail to address Plaintiffs' arguments—are without merit.

A. THE FOREST SERVICE ACTED ARBITRARILY AND CAPRICIOUSLY AND ABUSED ITS DISCRETION BY REVERSING LONGSTANDING PRACTICE AND POLICY WITH NO RATIONAL EXPLANATION.

In their opening brief**,** citing Supreme Court case law setting forth the requirements that apply to shifts in agency practice, Plaintiffs explained that the Forest Service's failure to provide *any* explanation—let alone a reasoned one—in a formal decision authorizing the Modoc National Forest to sell any of the horses at issue without limitation renders the agency's change in position concerning the disposition of federally protected wild horses arbitrary and capricious under the APA. *See* ECF No. 21 at 16-17. Defendants' responses do not rebut Plaintiffs' contention.

1. The Forest Service's New Decision to Sell Wild Horses for Slaughter Is a Final Agency Action for Purposes of the APA

Remarkably, the government argues that the Forest Service's decision to begin selling federally protected wild horses without limitation is not a final agency action subject to judicial review. *See* ECF No. 33 at 19-20. This defense is unavailing.

At the outset, the government is disingenuous in asserting that its decision to sell horses without limitation is not final. Elsewhere in its opposition brief, the Forest Service makes clear

that it views its decision as *final* because it sees no other viable options. *See* ECF No. 33 at 2 ("The Modoc Forest's implementation measure is the *proper course of action and should be allowed to proceed*." (emphases added)); *id.* at 13 (the agency decided that "*all* management tools provided by the Wild Horse Act *must be available*"); *id.* at 21 (explaining that "due to the Devil's Garden overpopulation crisis the Modoc *is left with no choice* but to put its longstanding policy of following the mandates of the Wild Horse Act into practice" (emphasis added)). Most important, Forest Supervisor McAdams has attested in a declaration that "*[t]he determination* that selling horses without limitation may be needed to place horses *was made at the Forest-level* and briefed to Regional and Washington Offices." ECF No. 33-1 ¶ 13 (emphasis added).

In fact, the Forest Service goes to great pains in its brief to explain that the very reason it constructed its own holding facility was so that it would no longer have to use BLM's facility because BLM is strictly prohibited by Congress from allowing the sale of wild horses without limitation. *See* ECF No. 33 at 17-18 (explaining that "while the majority of those horses would be sent to BLM's short-term holding facility and subject to Congress's 'sale without limitations' restriction, some of the horses would be sent to the Modoc's [] Double Devil facility and potentially subject to sale without limitations"). Indeed, the agency's assertion that its decision lacks finality is completely at odds with its own equities argument that Plaintiffs delayed bringing this action by waiting until long *after* the agency made its final decision to sell horses without limitation, to the great detriment of the agency which "in planning the gather, analyzed its finances and made a gather decision based, in part, on its ability to stay within the budget with its ability to dispose of excess horses through sale without limitation, if needed." *Id.* at 29 (emphasis added). However, the government cannot have it both ways—it cannot both argue that it is harmed by Plaintiffs' delay in bringing this action because of all the time and resources it has expended preparing to allow the sale of horses without limitation, yet also insist to the Court that it has not yet made any such decision. In short, the record and Defendants' own statements make clear that the decision to sell horses without limitation is final and judicially reviewable.[2]

[2] Although the Forest Service has plainly made its final decision sell Devil's Garden horses without limitation here and in the future, Plaintiffs are amenable to the Court deferring ruling on

Nor is there any merit to the government's argument that its decision to sell Devil's Garden horses without limitation is not reviewable because it merely involves "day-to-day activities" and "implementation measures to comply with the 2013 Territory Management Plan" and the 1991 Forest Plan. ECF No. 33 at 19-20. The cases cited by Defendants involved situations in which an agency *had* previously analyzed and made a final decision in a planning document to proceed with a particular action, and thus plaintiffs' challenge to the subsequent *implementation* of that action—rather than challenging the original decision to proceed with that action—failed. *See, e.g., Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146, 1150 (9th Cir. 2003) (rejecting challenge to "the maintenance of trails designated by those plans" because earlier "forest and travel management plans [marked] the consummation of the decision making process with regard to trails allowing off-road vehicle access"). Here, in sharp contrast, the Forest Service *never* analyzed, let alone decided, whether to sell Devil's Garden horses without limitation in the Forest Plan or the Territory Management Plan—a point which the agency does not refute. Thus, in the absence of any prior decision by the agency to abandon its longstanding practice and to substitute sales without limitation in its place, the Forest Service's new decision cannot be fairly characterized as merely an "implementation measure" because there is *no* measure concerning this practice in the relevant Forest Plan or elsewhere to implement.

Further, there can be no legitimate dispute that the agency's new decision to sell Devil's Garden horses without limitation is an "action" as that term is defined by the APA. Notably, the Supreme Court has held that "action" is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Even if "the agency has not dressed its decision with the conventional procedural accoutrements of finality," a court may find that the agency's "own behavior . . . belies the claim that its interpretation is not final." *Id.* Applying these principles, courts have found actions to be final agency actions—rather than "day-to-day activities" or "implementation measures"—in situations analogous to the Forest Service's decision to fundamentally alter the disposition

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this motion until February 18, 2019 when the agency has stated "it will consider whether to implement the option of sale without limitation," ECF No. 33 at 14, so long as the Forest Service commits to selling no horses without limitation pending issuance of the Court's injunction order.

regime for federally protected wild horses. *See Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) (rejecting argument that an action is not final agency action because it "merely implements other decisions that the Forest Service has already made" where the challenged action is the decision in which "the Forest Service arrived at a definitive position to allow grazing in the Malheur National Forest and put that decision into effect"); *Or. Nat. Res. Council Fund v. Forsgren*, 252 F. Supp. 2d 1088, 1097-1101 (D. Or. 2003) (finding final agency action rather than mere "day-to-day management responsibilities" where new agency guidance constituted "forest-wide policies that add lynx guidelines to the Forest Plan where none originally existed" without satisfying the legally required process for amending the Forest Plan).[3]

Accordingly, the Forest Service's new Forest-wide decision to sell Devil's Garden horses without limitation for the first time in the history of the Modoc National Forest both constitutes "the consummation of the agency's decisionmaking process," and is the decision "from which legal consequences will flow" because wild horses that otherwise would have been maintained alive in government holding facilities will now be shipped abroad to suffer the horrific fate of slaughter. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

2. The Significant Complexities Faced by The Forest Service Do Not Allow the Agency to Ignore Basic APA Safeguards

The government's primary defense in response to Plaintiffs' argument that the Forest Service acted arbitrarily and capriciously by failing to examine its new practice of wild horse disposition, and to supply a reasoned explanation for it in the manner required by the APA, is to assert that the agency faces "substantial challenges," "practical realities," and "substantial administrative obstacles imposed by Congress" that lead to a "no-win situation." ECF No. 33 at

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[3] *See also Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241 (D. Mont. 2005) (relying on "a series of agency pronouncements rather than a single edict" to find that there was final agency action—even though there was no single "decision document" mandating the use of fire retardant—and further rejecting agency's argument that the court was inserting itself in the daily management of firefighting because "Plaintiff is not asking th[e] [c]ourt to oversee how the USFS fights fires," but rather is only asking the court "to decide a legal question, whether or not the USFS is required to consult NEPA before taking a major federal action which undoubtedly has a significant effect on the environment"); *Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1114 (D. Ariz. 2009) (noting that where the challenged decision represents a "critical instrument" by which an agency regulates the resources under its jurisdiction, the document represents the culmination of the agency's decisionmaking process and "cannot be relegated to the insignificant role of day to day operational guidance").

15-17. Even if true—and Plaintiffs believe there are myriad alternative ways to deal with these asserted problems that have not been addressed by the agency—these assertions do not remotely overcome the arbitrary and capricious nature of the agency's new, unexplained practice that will result in slaughtered horses for the first time in the history of the Modoc National Forest.

To begin with, because the Forest Service failed to formally analyze whether to sell these horses without limitation—rather than continuing its longstanding practice of maintaining such horses in BLM or Forest Service holding facilities until they can be adopted or sold with limitations—all of the government's purported concerns about the challenges the agency faces are nothing more than post hoc rationalizations of government counsel, to which this Court may not defer in assessing the merits of this case. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that courts "may not supply a reasoned basis for the agency's action that the agency itself has not given" in the decision under review); *id.* at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Indeed, the government's brief does not cite to the preliminary Administrative Record ("AR") compiled by the Forest Service to support counsel's assertions of complexities facing the agency, relying instead on declarations supplied by agency staff during litigation—which do not warrant deference in an APA challenge. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (rejecting "[d]eference to what appears to be nothing more than an agency's convenient litigating position"). Hence, in the absence of any reasoned explanation for the Forest Service's major change in position *in the decisionmaking record* before the Court, there is simply nothing to which the Court may defer. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (holding that an "unexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary and capricious change from agency practice" (internal citation and quotation marks omitted)).

Moreover, despite the government's asserted public policy rationales in favor of sales without limitation—which, again, the agency never subjected to formal APA procedures—the Forest Service's real issue appears to be with Congress. *See* ECF No. 33 at 15 (asserting that the agency's efforts "are hindered by substantial administrative obstacles imposed by Congress"); *id.*

("Congress has not appropriated any funds for . . . sale *without* limitations."). But the way to resolve such concerns is not to make off-the-cuff decisions to fundamentally alter the Forest Service's longstanding disposition practice with respect to wild horses without any decisionmaking process or public comment, but rather to take these concerns to Congress to adopt a more effective statutory scheme. *See Friends of the Earth v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006) (stating that if an agency believes that a law leads to "undesirable consequences," "then it must . . . take its concerns to Congress").[4]

In any event, the government's diversionary focus on "practical realities" cannot distract from the indisputable fact that the Forest Service has never issued a formal decision pursuant to the APA authorizing sales without limitation and supplying a reasoned basis for that decision. Accordingly, the agency acted arbitrarily and capriciously in adopting its new approach to wild horse disposition. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125-26; *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966-70 (9th Cir. 2015) (en banc); *Am. Wild Horse Pres. Campaign v. Perdue* ("*AWHC*"), 873 F.3d 914, 918-20 (D.C. Cir. 2017).

3. Defendants Are Wrong that Plaintiffs Cannot Bring a Stand-Alone APA Challenge to an Agency's Shift in Practice

The government wrongly asserts that "Plaintiff[s] cannot plead a stand-alone APA claim," ECF No. 33 at 18—i.e., the Court cannot review an APA claim that is not tethered to a violation of some other statute. The Court can dispense with this argument for three reasons.

First, in contrast to other APA cases in which the question is whether an agency acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), in cases such as this one the Court is called upon to determine whether the agency, in

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[4] In an argument not joined by the government, the proposed intervenors assert that the Forest Service has a mandatory duty under the Wild Horse Act to sell *all* horses without limitations if they cannot be adopted or sold with limitations. *See* Intervenors' Opp. at 3-5. Not only is this argument inconsistent with Congress' treatment of this provision through repeated appropriations bills, but the Forest Service has not adopted this statutory interpretation in any formal decision document, and the Court may not accept this explanation for the new practice that the Forest Service itself has not supplied. *See State Farm*, 463 U.S. at 43 (explaining that courts "may not supply a reasoned basis for the agency's action that the agency itself has not given"); *id.* at 50 ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

adopting a new policy or practice *within its lawful discretion*, has acted in a manner that is "arbitrary, capricious, an abuse of discretion" or "without observance of procedure required by law" by failing to supply a reasoned explanation for the change. *Id.* § 706(2)(A), (D). Thus, by definition, change in practice challenges need not involve any other statutory violation; the agency's *process* of adopting its new approach can be arbitrary and capricious even if the outcome sought does not exceed the agency's statutory authority. Indeed, courts routinely review otherwise lawful agency changes in policy and practice, and often find such actions arbitrary and capricious. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125-26; *State Farm*, 463 U.S. at 46-51; *Organized Vill. of Kake*, 795 F.3d at 966-70; *AWHC*, 873 F.3d at 918-20.[5]

Second, even in APA contexts other than cases challenging agency changes in practice as arbitrary and capricious, the Supreme Court recently reaffirmed that courts have "long applied a strong presumption favoring judicial review of administrative action," and that "[t]he presumption may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or if the action is 'committed to agency discretion by law,' § 701(a)(2)." *Weyerhaeuser v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Moreover, the Court underscored that these exceptions are to be read "quite narrowly" in order "[t]o give effect to § 706(2)(A) and to honor the presumption of review." *Id.* In turn, the Court explained that where a plaintiff's "claim is the familiar one in administrative law that the agency did not appropriately consider all of the relevant factors [that should] guide the agency in the exercise of its discretion," *"[t]his is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under § 706(2)(A)*." *Id.* at 371 (emphasis added). Therefore, the Supreme Court rejected the contention that an agency action was unreviewable as committed to agency discretion where the statute stated that the agency "may" take a certain action, *id.* at 369-72—precisely the situation presented here. *See also Ark Initiative v. Tidwell*, 64 F. Supp. 3d

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[5] For the same reason, Federal Defendants' separate argument that Congress "envisioned the possibility of horses being slaughtered for commercial purposes" by authorizing "sale without limitations," 16 U.S.C. § 1333(e)(2), has no bearing on Plaintiffs' challenge. *See* ECF No. 33 at 23. In other words, although the Wild Horse Act allows the Forest Service to sell horses without limitation, before doing so the agency must at least examine its drastic change in approach and supply a reasoned explanation as to why it is abandoning its longstanding practice.

81, 100-02 (D.D.C. 2014) (rejecting "stand-alone" APA argument as "a loser" because "countless courts have issued opinions analyzing whether challenged agency actions are 'arbitrary and capricious in violation of the [APA]' without relying on anything other than the APA, the administrative record, and the relevant caselaw").

Third, although not mandated by the APA, Plaintiffs *have* alleged in their Complaint that the Forest Service's adoption of its new approach to wild horse disposition violates other statutes, including important procedural and substantive safeguards Congress required for agency actions of this kind in NFMA and NEPA. *See* ECF No. 1 ¶¶ 70-80. For all of these reasons, Defendants' stand-alone APA argument must fail.

4. A Court May Find a Shift in Longstanding Agency Practice—Despite Isolated Past Instances to the Contrary—Arbitrary and Capricious.

The government next asserts that the challenged practice is not new (and thus not arbitrary) because a different national forest purportedly sold a few horses without limitations in the past. *See* ECF No. 33 at 21-23. This argument does not even leave starting gate.

Simply put, there is no legal support for the government's defense that its obvious shift in practice regarding disposition of *the Devil's Garden wild horses* is not arbitrary due to a different Forest's one-time past use of sales without limitation. Even if the government could provide evidence that the Carson National Forest has "sold approximately 170 horses *without* limitations," ECF No. 33-1 ¶ 17—an assertion that is not contained in the AR and has only been supplied through a post hoc declaration lacking any evidentiary support—the fact that another Forest purportedly sold some horses in the past does not change the crucial fact that the Forest Service generally, and the Modoc National Forest specifically, has adhered to a consistent practice of *not* selling wild horses (and certainly not Devil's Garden horses) without limitation. *See* ECF No. 33 at 9 (explaining that "the Forest Service is dependent on BLM in the implementation of the Forest Service [Wild Horse] Program" which means "*the Forest Service is subject to all of the Congressional limitations and prohibitions placed on BLM—e.g., the prohibition on . . . sale without limitations*" (emphasis added)).

In any event, the inquiry before the Court is not whether the agency has *ever* deviated from its longstanding practice, but whether the Forest Service satisfied its APA obligations by providing a reasoned explanation when it decided to abandon its longstanding approach to wild horse disposition in lieu of its new—and heinous—practice of sales without limitation. *See, e.g.*, *Ramos v. Nielson*, 336 F. Supp. 3d 1075, 1097 (N.D. Cal. 2018) (Chen, J.) (finding likelihood of success on the merits in case challenging change in agency practice where the agency's ability to point to a single outlying instance in which it applied a different standard "did not disavow the general approach"); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 840 (E.D. Cal. 2008) (holding that although agency had previously contemplated barring a certain practice, the agency had "supported [the practice] in more recent history, [so] whatever the agency's previous position," the agency was obligated to explain its departure from this more recent practice when it shifted away from this approach). Simply put, the Forest Service has changed its general approach to disposing of Devil's Garden wild horses—and did so without analyzing this consequential action and supplying coherent rationales for it—and nothing proffered by Defendants changes this highly dispositive fact.

5. The Forest Service's Unexplained Decision to Sell Horses without Limitation Is Textbook Arbitrary and Capricious Decisionmaking

Having run out of arrows in its quiver to avert the Court's eyes from the patently arbitrary and totally unexplained new decision to sell Devil's Garden horses without limitation—which means these horses will inevitably be sold for slaughter and human consumption—the government cursorily asserts that the Forest Service *did* adequately explain its decision. *See* ECF No. 33 at 22. Conspicuously, however, the *only* decisions the government invokes in contending that the Forest Service engaged in reasoned decisionmaking concerning its new disposition approach are the 2013 Territory Management Plan and the 2018 decision to build its own holding facility. *Id.* But neither of those decisions even *mentions* sales without limitation, let alone analyzes this approach, supplies an explanation for it, or ultimately authorizes this radical shift in practice with huge public policy implications. As a result, Plaintiffs are very likely to succeed on the merits of their claim that the agency failed to provide a reasoned explanation for

its change in practice, or have at least raised serious questions on that issue. *See Ramos*, 336 F. Supp. 3d at 1097-98 (granting "a preliminary injunction based on [plaintiffs'] showing on the merits of the APA claim" where there "was a substantial and consequential change in [agency] practice" and "[t]he government has offered no explanation or justification for this change").

B. THE FOREST SERVICE VIOLATED NFMA.

In their opening brief, Plaintiffs explained that the Forest Service's new decision to sell horses without limitation—in direct contravention of the agency's longstanding approach to *never* allow Devil's Garden wild horses removed from public lands to be killed for slaughter—is a *de facto* revision and/or amendment to the 1991 Forest Plan (as well as the 2013 Territory Management Plan), which never discussed, and certainly never authorized, this action, and that, accordingly, the agency issued this decision without complying with the procedures required by NFMA. *See* ECF No. 21 at 17-18. The government's responses do not pass muster.

First, the government asserts once again that the challenged action is merely the "day-to-day management" of wild horses and thus it need not "be spelled out in the overarching plan documents." ECF No. 33 at 22. However, as dispelled above, there is nothing routine or mundane about the agency's decision to now sell Devil's Garden horses for slaughter for the first time in agency history. As a result, this decision constitutes a significant amendment to the 1991 Forest Plan and 2013 Territory Management Plan, and therefore cannot be characterized as a modest run-of-the-mill implementation measure.[6]

Second, Federal Defendants contend that the new decision is "consistent with both plans" without explaining how the Court could arrive at that unsupported conclusion. ECF No. 33 at 22. Not only can the government not point the Court to *any* place in the 1991 Forest Plan or the 2013 Territory Management Plan where the agency authorized any sales without

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[6] Belying the government's assertion that the disposition of wild horses need not be addressed in planning documents is the fact that the Forest Service regularly includes extensive discussion about wild horse disposition in such plans. *See, e.g.*, Murderer's Creek Territory Management Plan at 25-29, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_033478.pdf. In addition, the working group *commissioned by the Modoc National Forest*—whose members are extremely familiar with the agency's wild horse management in Devil's Garden—*twice* concluded that sales without limitation would *not* be consistent with either plan, thereby requiring further analysis under NFMA. *See* ECF No. 21-6 at 9-10; ECF No. 21-7 at 22.

limitation or explained its reasons for doing so, but Federal Defendants characterize those plans as "allow[ing] the wild horse gathers." ECF No. 33 at 22. However, Plaintiffs have *not challenged* the agency's authority to *remove horses* from Devil's Garden (an action that is addressed in both the 1991 Forest Plan and the 2013 Territory Management Plan), but rather the Forest Service's ability to revise those plans by adopting a drastic new approach to wild horse *disposition* that was never contemplated or addressed by either plan, and which the agency has accomplished without satisfying NFMA's procedural obligations for such revisions. *See, e.g.*, *Forsgren*, 252 F. Supp. 2d at 1097-1101 (finding action an arbitrary *de facto* amendment to forest plan rather than mere "day-to-day management responsibilities" where it constituted "forest-wide policies that add [] guidelines to the Forest Plan where none originally existed").

Hence, the Forest Service's decision that lacked formal revision and/or amendment to the Forest Plan and any opportunity for public comment violates NFMA and its regulations.

C. THE FOREST SERVICE VIOLATED NEPA.

For many of the same reasons, Plaintiffs previously explained that the Forest Service's unexamined action also violated NEPA and its regulations. *See* ECF No. 21 at 18-20. Defendants' responses to this argument also lack merit.

The government's primary defense—i.e., that "there has not been a change in policy" because sales without limitation are merely an implementation measure, ECF No. 33 at 23-24—must be rejected for the reasons explained *supra*, at 4-5. The government's secondary defense—i.e., that this action will not "have any immediate significant effect on the environment" because "the conditions under which those horses are sold will not further impact the environment," *id.* at 24-25—makes no sense. It is indisputable that Congress designated wild horses as *federally protected wildlife resources*, and that selling them for slaughter will result in their destruction, while also setting a disastrous and highly controversial precedent for the disposition of other federally protected wild horses. Therefore, it is clear that environmental impacts flow from the Forest Service's decision to allow the sale of wild horses without limitation.

Moreover, the agency's position that there will be no impacts on the environment is completely belied by its statement that it is undertaking this new approach to wild horse

disposition to deal with "what is universally recognized as a natural catastrophe." ECF No. 33 at 34. In other words, even under the government's *own* characterization, this action will have *a significant* impact on the environment, which not only requires NEPA review, but normally mandates the preparation of a full-blown Environmental Impact Statement ("EIS"). *See* 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").[7]

Therefore, the Forest Service's failure to subject to NEPA review its decision to adopt a new and environmentally consequential disposition approach—especially where the 1991 and 2013 plans did not analyze this issue and the agency's duly-commissioned working group found that "[a]dditional NEPA" is "required," ECF No. 21-7 at 22—cannot withstand scrutiny.

II. THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING AN INJUNCTION.

A. Plaintiffs Will Suffer Irreparable Harm without an Injunction.

Plaintiffs previously supplied detailed declarations and controlling authority in establishing that they will be irreparably harmed in the absence of an injunction. *See* ECF No. 21 at 20-23. Defendants' arguments to the contrary are misplaced.

The government first argues that Plaintiffs' delay in bringing suit undermines their irreparable harm. *See* ECF No. 33 at 29-30. This argument is frivolous. It was not until September 25, 2018 that the Forest Service, in a Devil's Garden wild horse placement meeting, informed the public that it would likely permit sales without limitation, *see* ECF No. 21-8. Even then, Regional Forester Randy Moore did not publicly affirm until October 10, 2018 that the agency had reached a *final decision* to sell horses without limitation, *see* ECF No. 21-15. As soon as he made this statement, Plaintiffs filed suit one week later and then immediately engaged with the government concerning a schedule for preliminary injunction briefing, *see* ECF No. 1. In any event, had Plaintiffs brought suit prior to October 2018, the government most certainly would have argued that there was not yet final agency action (as it argues now) or that

[7] Conspicuously, the government says *nothing* in response to Plaintiffs' arguments concerning the numerous NEPA "significance" factors implicated here to trigger an EIS, including the likely violation of California state law. *See* ECF No. 21 at 4-5, 19 (citing 40 C.F.R. 1508.27(b)).

the matter was unripe for review. Thus, it is disingenuous in the extreme to assert that Plaintiffs somehow could have brought suit any sooner.

The government next contends that "[e]stablishing an injury to show standing is not sufficient to demonstrate an immediate threatened injury." ECF No. 33 at 30. But it is the same cognizable Article III injuries recognized in the cases cited by Plaintiffs—coupled with the irreversible nature of those harms in *this* case—that support a finding of irreparable harm here. Thus, Plaintiffs are irreparably harmed because their overall mission—*to protect these wild horses from slaughter*—will be greatly impaired if the Forest Service is allowed to proceed with its disposition plan, and thus, Plaintiffs have had to, and will continue to have to, expend resources on this issue that could be spent on other wild horse advocacy issues. *See, e.g.*, ECF No. 21 at 20 (citing case law sustaining such injuries as cognizable); ECF No. 21-17 ¶¶ 15-22 (explaining the irreparable harms to Plaintiffs' cognizable interests); ECF No. 21-18 ¶¶ 10-15.

Defendants also assert that "Plaintiffs have not shown that their actions would actually change" if the Forest Service sells these horses for slaughter as part of a new practice. ECF No. 33 at 30. But this ignores Plaintiffs' declarations, which explicitly identify myriad ways in which the organizational Plaintiffs *will* indisputably be affected and their missions impaired by this decision. *See, e.g.*, ECF No. 21-17 ¶¶ 12, 16, 19, 20 (explaining how AWHC's extensive and highly successful efforts to advocate for more expansive PZP use by the Forest Service in lieu of wild horse removals will be irreversibly frustrated by the agency's new practice, thereby "undermining, impeding, and harming AWHC's extensive [PZP] efforts" going forward).

Finally, the government makes the peculiar argument that although there is "no bringing the horses back to life," "[t]his assertion assumes that the horses will be slaughtered, which is only speculative." ECF No. 33 at 31. But even the government's own statements confirm the Forest Service's understanding that any horses sold without limitation *will in fact be slaughtered*. *See, e.g., id.* at 34 ("While slaughtering wild horses does not present a pleasant picture, . . . [t]he Forest Service is taking a step to reduce what is universally recognized as a natural catastrophe"); *id.* at 16 (acknowledging that destroying or slaughtering horses "is not a popular, palatable, or desired solution . . . . but . . . it may be the only way the statutory scheme,

as written, can actually work"). In any event, lest there be any question, the Forest Service's own working group left no doubt that "*100% of the animals sold would likely end up slaughtered*" if sales without limitation occur. ECF No. 21-6 at 9.

In sum, Defendants have not remotely rebutted Plaintiffs' extensive demonstration of irreparable harm that will result absent an injunction.

B. Both the Balance of Equities and the Public Interest Tip Sharply in Favor of an Injunction Until the Court Resolves the Merits of this Case.

Plaintiffs previously explained that in contrast to the irreversible harms Plaintiffs would suffer absent an injunction, the government would suffer little if any harm between now and resolution of the merits if sales without limitation are temporarily enjoined, and Plaintiffs also established that the public interest favors the requested injunction. *See* ECF No. 21 at 23-25. The government's responses severely miss the mark.

First, Defendants assert that the equities are in their favor because "[t]he Devil's Garden Territory now faces an overpopulation crisis and cannot support these horses," ECF No. 33 at 31, and because "[r]ecent vegetation surveys confirm that wild horses are causing degradation of the range." *Id.* at 33; *see also* Intervenors' Opp. at 9-13 (alleging similar harm to range resources from overpopulation). However, this purported harm from overpopulation—which does not even directly injure the government but instead range resources managed by the Forest Service—has absolutely *nothing* to do with this case. Again, Plaintiffs have *not* challenged the Forest Service's 2018 *removal* of wild horses, nor have Plaintiffs sought any remedy to return horses to the range. *See* ECF No. 1, Prayer for Relief. Thus, because the horses at the core of this dispute *have already been removed from the range* and are currently in government holding facilities, any purported harm to the Forest Service due to overpopulation has *already* been addressed by the agency's recent roundup, and therefore an injunction temporarily enjoining the sale of these already-removed horses that are in holding will not affect range resources at all between now and resolution of the merits later this year. Indeed, the Forest Service's declarants certainly do not indicate that the agency would be forced to return to the range any horses currently in holding *before resolution of the merits in the event that the Court issues a*

preliminary injunction—a highly unlikely scenario given that the agency currently has the horses in holding and can keep them there until this Court rules on the merits (as it has done for many horses in the past). Likewise, although the Forest Service states in its brief that "[w]ith current range conditions, the horses are starving," ECF No. 33 at 31, not only is this hyperbolic statement devoid of any evidentiary proof, but, again, it has nothing to do with whether the horses *that have already been removed from the range* should remain alive and well in the Forest Service's holding facility until this Court can reach the merits of Plaintiffs' claims.[8]

Second, Defendants assert that the Forest Service will be harmed by incurring "substantial costs of maintaining the gathered horses throughout the course of this litigation." ECF No. 33 at 33-34. Importantly, however, in asserting that whether there will be any sales without limitation is purely speculative the government elsewhere explains that by the time the Court issues a preliminary injunction ruling, there may be very few horses remaining in the Forest Service's holding facility. *See id.* at 14 ("On February 18, 2019, *if there are any remaining horses left at Double Devil*, the Forest Service will consider whether to implement the option of sale without limitation" (emphasis added)). Hence, even if a few horses remain at that time, the overall costs to the Forest Service—which amounts to a mere "five dollars a day per horse," *id.* at 33—will be relatively insignificant between the preliminary injunction ruling and the Court's resolution of the merits later this year, which Plaintiffs are amenable to briefing on an expedited schedule should the Court so require.

Accordingly, this case cries out for maintaining the status quo, where, on the one hand, absent the issuance of a preliminary injunction federally protected wildlife will be slaughtered—thereby irreversibly impairing Plaintiffs' cognizable interests in these horses—and on the other hand the government will, at most, incur some limited financial burden for the short duration of time that the injunction is in place before resolution of the merits. *See Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) ("Although the record

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[8] The only citations included for this statement are WH000825 and the declaration of Thomas Frolli (ECF No. 33-2) ¶ 27. However, the first says *nothing* about starvation specifically or horse health generally; the second states only, without evidentiary support, that some horses "are showing signs of malnutrition." Nothing supports counsel's assertion that horses are starving.

indicates that a preliminary injunction could present a financial hardship to the Forest Service . . . this possible financial hardship is outweighed by" the permanent environmental harm at issue); *Kathrens v. Zinke*, 323 F. Supp. 3d 1142, 1155 (D. Mont. 2018) (granting temporary injunction in wild horse context where "the public's interest and the balance of equities tips sharply toward the Plaintiffs because the harms Plaintiffs face are permanent, while [the government] faces [only] temporary delay").[9]

C. The Court Should Not Require a Bond In this Case.

The government urges the Court to order a bond in the event it issues an injunction. *See* ECF No. 33 at 34-35. However, as explained above, any costs incurred should be relatively circumscribed during the limited time period in which the Court considers the merits of the case, and, in any event, continuing to maintain these horses in holding is the normal, routine way the agency has long dealt with horses removed from the range until its recent change in practice. Moreover, courts routinely require no bond in environmental cases of this kind. *See Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1191 (N.D. Cal. 2009); *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, No. 05-cv-2227, 2005 WL 1514071, at *7 (N.D. Cal. June 27, 2005); *League of Wilderness Defs. v. Zielinski*, 187 F. Supp. 2d 1263, 1272 (D. Or. 2002). Thus, Plaintiffs respectfully request that the Court not require a bond.

CONCLUSION

For these reasons and those set forth in Plaintiffs' opening memorandum, Plaintiffs respectfully request that the Court issue a preliminary injunction to maintain the status quo until the Court has an opportunity to resolve Plaintiffs' claims on the merits.

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[9] The proposed intervenors cite a case denying a preliminary injunction that involved a wild horse *removal*. *See* Intervenors' Opp. at 9. However, the irreparable harm inquiry in this case is factually distinct because the issue at stake is the *disposition of already-removed* horses (and whether they will die before this case is resolved) instead of a garden-variety removal action where the removed horses will not be killed before merits stage. Moreover, contrary to the arguments made by the proposed intervenors, there is no support for the proposition that wildlife advocates such as Plaintiffs lack standing or irreparable harm merely because *some* horses remain on the range and thus will survive the horrific fate of slaughter *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (holding that wildlife enthusiasts "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ William S. Eubanks II
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