UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-8063

AMERICAN WILD HORSE PRESERVATION CAMPAIGN, THE CLOUD FOUNDATION, RETURN TO FREEDOM, CAROL WALKER, GINGER KATHRENS, and KIMERLEE CURYL

Petitioners-Appellants

v.

SALLY JEWELL, Secretary U.S. Department of the Interior and NEIL KORNZE, Acting Director Bureau of Land Management

Respondents-Appellees

and

ROCK SPRINGS GRAZING ASSOCIATION

Respondent-Intervener-Appellees

and

STATE OF WYOMING

Respondent-Intervener-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

APPELLANTS' RULE 8(a) EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

**** RELIEF REQUESTED BY 11:59 PM SEPTEMBER 11, 2014 ****

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September 2, 2014

EXISTENCE AND NATURE OF EMERGENCY

On September 12, 2014, the Bureau of Land Management ("BLM") will commence with a roundup that will permanently remove *all* wild horses from the Wyoming Checkerboard within three wild horse herd management areas ("HMAs"). It is undisputed that this proposed roundup will remove hundreds of wild horses from public lands and that BLM has not even purported to comply with any of the statutory requirements set forth by Congress in Section 3 of the Wild Free-Roaming Horses and Burros Act ("WHA"), 16 U.S.C. § 1333, which are mandatory prerequisites before a single wild horse may be removed from public lands. This is the first time in its more than four decades of implementing the WHA that BLM has sought to remove wild horses from public land without first complying with the express statutory dictates of Section 3 and without conducting *any* environmental analysis whatsoever under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f.

Accordingly, the decision under review involves important legal questions of first impression, the resolution of which will have profound implications for BLM's future management of our nation's federally protected wild horses. BLM has not suggested that any emergency necessitates immediate execution of this roundup. Thus, there is absolutely no reason why the roundup cannot be delayed until such time that this Court can undertake a thorough review of its legal validity.

Appellants American Wild Horse Preservation Campaign, The Cloud Foundation, Return to Freedom, Carol Walker, Kimerlee Curyl, and Ginger Kathrens (herein collectively referred to as "AWHPC") sought a preliminary injunction from the U.S. District Court for the District of Wyoming in an attempt to delay the proposed roundup until the district court could reach the merits of the case. On August 28, 2014, the district court denied that request. *See* Order Denying Preliminary Injunction ("PI Order"), Docket Entry ("DE") 35, (Appeal Ex. 1). On the same day, the district court granted an administrative injunction delaying the roundup through September 12, 2014, to allow AWHPC a brief window of time to seek further relief from this Court. *See* Order, DE 41 (Aug. 28, 2014). On the next day, all of the Appellees moved to vacate that limited administrative injunction. *See* Requests to Vacate, DE 42, DE 45, and DE 46 (Aug. 29, 2014). Today, the district court dissolved that limited injunction from the bench during a hearing, on the grounds that BLM orally committed to voluntarily defer commencement of the proposed roundup until September 12, 2014 in order to allow this Court a short window of time to consider AWHPC's present motion for relief. [1]

[1] If BLM is willing to delay the challenged roundup for a longer period of time, AWHPC would be open to accommodating an expedited briefing schedule to facilitate this Court's merits review of the district court's denial of the preliminary injunction motion. However, at this juncture and in order to preserve the status quo pending resolution of the appeal, AWHPC must proceed with this preliminary motion pursuant to Rule 8 *before* filing an opening appellate brief on the merits pursuant to Rule 28. As such, AWHPC has not advanced the full slate of

As a result, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure and Rule 8 of the Tenth Circuit Local Rules, AWHPC hereby moves this Court for an emergency injunction to preserve the status quo, pending resolution of AWHPC's appeal of the district court's denial of their request for a preliminary injunction. Given the extremely expedited nature of this request – which is driven entirely by BLM's unexplained insistence that this roundup must commence no later than September 12 – AWHPC is compelled to move under Rule 8.2(B) for ex parte relief if opposing counsel are unable to file responsive briefs within a reasonable time frame preceding the requisite deadline for a ruling. Counsel for all Appellees have been duly notified of this motion and the relief requested and all Appellees oppose the motion. **Because the roundup will start on September 12, 2014, a decision on this motion is needed by no later than 11:59 pm on Thursday September 11, 2014**.

arguments concerning the denial of the preliminary injunction in this motion which is intended only for the limited purpose of Rule 8, but AWHPC will present all of its claims in an opening appellate brief at the appropriate juncture as determined by a briefing schedule ordered by the Court.

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JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case arises under the laws of the United States. This is an appeal of a decision by the U.S. District Court for the District of Wyoming denying a request for a preliminary injunction. *See* PI Order, (Appeal Ex. 1). As such, this court has jurisdiction to review this decision under 28 U.S.C. § 1292(a)(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants American Wild Horse Preservation Campaign, The Cloud Foundation, and Return To Freedom are non-governmental public interest organizations. None of them issues stock of any kind, nor has parent or subsidiary corporations. Pursuant to Fed. R. App. P. 25(a)(5) and Tenth Circuit Rule 25.5, the undersigned also certifies that all required privacy redactions have been made.

/s/

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INTRODUCTION

This appeal raises a straightforward – albeit legally significant – question of statutory construction. As with any issue of statutory construction, it is necessary to first frame the "precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The precise question at issue in this appeal is rather simple: Can BLM permanently remove wild horses from public lands without complying with Section 3 of the WHA, 16 U.S.C. § 1333? Congress "has directly spoken to th[is] precise question," *id*., and the unequivocal answer is "no." Section 3 of the WHA is the *only* mechanism in the entire statutory scheme that grants BLM the authority to remove federally protected wild horses from public land, and that authority is *only* triggered if certain mandatory determinations are first made by BLM. *See* 16 U.S.C. § 1333(b)(2). The application of Section 3 to public lands is absolute, as Congress did not adopt *any* exceptions to its requirements. Thus, because "the intent of Congress is clear, that is the end of the matter," and the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In sharp contrast, the ruling below willfully ignores the plain language of Section 3 of the WHA by offering a novel interpretation of a *different* provision of the WHA that, by its own language, only applies to wild horses located on *private* land. *See* PI Order at 14 (Appeal Ex. 1). Rather than seriously grapple with the

statutory obligations at issue, the district court summarily denied AWHPC's preliminary injunction request based on the court's pronouncement that *Section 4* of the Act requires permanent removal of *all* wild horses on public lands that *may*, at some undefined point in the future, stray onto private lands, *id.* at 15 – a sweeping proposition which cannot be found anywhere in the WHA itself. Because the ruling below cannot be squared with the plain language of the statute, it must be reversed and the roundup should be enjoined until this Court has an opportunity to fully review the legality of BLM's unprecedented management decision.

BACKGROUND

This case involves the management of wild horses on the Wyoming Checkerboard lands within the Adobe Town, Salt Wells Creek, and Great Divide Basin herd management areas ("HMAs"). The Wyoming Checkerboard is a unique pattern of land ownership that consists of one-mile-by-one-mile squares of federal land continuously alternating with one-mile-by-one-mile squares of private land, forming a checkerboard pattern. Consequently, over half of the Wyoming Checkerboard is public land, while the remainder is private land. *Rock Springs Grazing Ass'n v. Salazar*, 935 F. Supp. 2d 1179, 1182 (D. Wyo. 2013); *see also* Pet'rs' Motion for Preliminary Injunction ("PI Motion") at 10, DE 17-1 (Aug. 9, 2014) (Appeal Ex. 2) (additional background on the relevant Checkerboard lands).

Because of this public-private land pattern, BLM has two distinct legal obligations under the WHA when managing wild horses in the Checkerboard: one pertaining to the public lands (Section 3, 16 U.S.C. § 1333) and one pertaining to the private lands (Section 4, 16 U.S.C. § 1334). Section 3 grants BLM the limited authority to manage wild horse populations by permanently removing "excess" wild horses from *public* lands. BLM may only exercise this authority after the agency: (1) determines that "excess" wild horses exist in a given HMA, 16 U.S.C. § 1333(b)(2); (2) determines that the removal of those "excess" horses is necessary to achieve the appropriate management level ("AML") for that HMA, *id.*; and (3) complies with NEPA's requirements by preparing an Environmental Impact Statement ("EIS") or at least an Environmental Assessment ("EA"). *See* PI Motion at 2-5 (Appeal Ex. 2) (additional background). Section 4 of the WHA grants BLM the limited authority to remove horses from *private* land and to transfer those horses back onto the public lands from which they strayed. *See* 16 U.S.C. § 1334.

On July 18, 2014, BLM made the unprecedented decision pursuant to *only* Section 4 of the WHA, 16 U.S.C. § 1334, to authorize the permanent removal of an estimated 806 wild horses from the Wyoming Checkerboard lands within the Adobe Town, Salt Wells Creek, and Great Divide Basin HMAs. *See* Exhibit K to Pet'rs' Mtn. for Preliminary Injunction ("Decision Record"), DE 17-12 (Appeal Ex. 3); Exhibit E to Pet'rs' Mtn. for Preliminary Injunction ("Categorical

Exclusion"), DE 17-6 (Appeal Ex. 4). In the Decision Record, BLM admits that wild horses will be "removed [from] the public land portions of the checkerboard." *See* Decision Record at 3 (Appeal Ex. 3). The agency also concedes that Section 3 of the WHA was not followed. *Id*.; *see also* Pet'rs' Reply in Support of the Preliminary Injunction Motion ("PI Reply") at 10, DE 33 (Aug. 25, 2014) (Appeal Ex. 5). When deciding to proceed with this roundup, BLM determined that "due to the unique pattern of land ownership" in the Checkerboard, the *only practical* way for the agency to comply with Section 4 of the WHA was to completely disregard the congressional dictates of Section 3. *See* Decision Record at 3-4 (Appeal Ex. 3).

STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 8(a) and Rule 8 of the Tenth Circuit Local Rules, to obtain an injunction pending appeal a party must demonstrate: (1) a likelihood of success on the merits of the appeal; (2) irreparable harm to the applicant if an injunction pending appeal is denied; (3) an injunction will not harm the opposing parties; and (4) an injunction is in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Sec. Investor Prot. Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960, 968 (10th Cir. 1992). As set out below, Appellants easily satisfy each of these four requirements.

I. AWHPC HAS DEMONSTRATED A LIKELIHOOD OF SUCCCESS ON THE MERITS

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), the Court "shall . . . hold unlawful and set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." When determining whether an agency action is "in accordance with law," *id*., the Court applies the two-step analysis set forth in *Chevron*, 467 U.S. at 842. Under this analysis, the Court must first "determine 'whether Congress has directly spoken to the precise question at issue.'" *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Housing and Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009) (quoting *Chevron*, 467 U.S. at 842). "If Congress has spoken directly to the issue, that is the end of the matter; the court . . . must give effect to Congress's unambiguously expressed intent." *Id*.

Only if the statute is silent or ambiguous on the pertinent issue should the Court "proceed to step two and ask 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). However, the Court "must not impose [its] own construction of the statute" and "will not defer to an agency's construction" if it is "manifestly contrary" to the statutory scheme. *Id*. at 1240.

A. BLM is Admittedly Violating Section 3 of the WHA

It is unassailable that hundreds of wild horses will be permanently removed from *public land* during the roundup at issue in this appeal. *See* Decision Record at 3 (Appeal Ex. 3). It is also undisputed that BLM has not even attempted to comply with the statutory requirements set forth in Section 3 of the WHA, which is the *only* mechanism Congress created for the permanent removal of wild horses from public land. *Id.*; *see also* PI Reply at 10 (Appeal Ex. 5). Thus, because BLM is deliberately ignoring "the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, this should be the end of the matter.[2]

In all cases requiring statutory construction, the Court must "begin with the plain language" of the statute because the Court must "assume that Congress's intent is expressed correctly in the ordinary meaning of the words it employs . . . ." *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1281-82 (10th Cir. 2001) (internal citations omitted). As this Court has made clear, when "the statute's language is plain and plainly satisfied, 'the sole function of the courts' can only be 'to enforce it according to its terms." *United States v. Adame–Orozco*, 607 F.3d 647, 652 (10th Cir. 2010) (internal citations omitted); *BP Am., Inc. v. Okla. ex rel. Edmondson*, 613 F.3d 1029, 1033-34 (10th Cir. 2010).

[2] If the roundup proceeds as planned, BLM will remove approximately 250 wild horses from the range that the agency would not have the legal authority to remove if the threshold determinations in Section 3 were made because it would violate the agency's own governing AMLs. *See* PI Motion at 18-20 (Appeal Ex. 2).

The plain language of the WHA could not be any clearer: Section 3, 16 U.S.C. § 1333, governs BLM's actions on public lands, while Section 4, 16 U.S.C. § 1334, guides BLM's actions on private land. There is no dispute that the Checkerboard lands at issue in this appeal contain both public and private land. *See* Categorical Exclusion at 1 (Appeal Ex. 4). Thus, just as BLM is "statutorily mandated to manage wild horses on the Checkerboard consistent with Section 4," PI Order at 11 (Appeal Ex. 1), BLM is also statutorily mandated to manage wild horses on the Checkerboard consistent with Section 3.

The district court, however, sanctioned BLM's unprecedented refusal to comply with Section 3 by penciling into the WHA a major exception that Congress itself did not see fit to adopt. The district court held that BLM may completely disregard Section 3 when managing the Checkerboard because those duties are simply too difficult and time consuming. *See* PI Order at 11-14 (Appeal Ex. 1). However, by its unambiguous terms, Section 3 of the WHA applies to *all* public lands, not just "non-Checkerboard public lands." *See Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1313 (10th Cir. 2012) (district courts are "never permitted to disregard clear statutory directions"). The absence of any exception from the statute is especially significant given that it was *Congress* that established the Checkerboard in 1862, and thus, Congress was well aware of the complexities of that land pattern when it enacted the WHA in 1971. *See RSGA*,

935 F. Supp. 2d at 1182 (the checkerboard was created in 1862 by the Union Pacific Act); *see also Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (courts must "necessarily assume[] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject") (citation omitted). Neither BLM nor the district court may pick and choose which statutory mandates under the WHA to comply with based on what makes BLM's task easier. *See, e.g.*, *Ohio Valley Envtl. Coal. v. Horinko*, 279 F. Supp. 2d 732, 748 (S.D.W.V. 2003) (The district court cannot "evade the unambiguous directions of the law merely for *administrative convenience*.") (emphasis added) (citation omitted).

Furthermore, the district court's countertextual interpretation of Section 4 cannot excuse BLM's clear violation of Section 3 for several reasons. First and foremost, this groundless interpretation of Section 4 is contrary to the plain language of the statute. The ruling below held that Section 4 requires the permanent removal of any "free-roaming horses that stray," regardless of whether those horses are located on public or private land, based on the district court's unfounded conclusion that Section 4 imposes a "ministerial duty to remove the stray horses as soon as practicable" which somehow trumps all other provisions of the statute. PI Order at 13-14 (Appeal Ex. 1). But, Section 4 of the WHA states quite clearly that "[i]f wild free-roaming horses . . . *stray from public lands onto privately owned land*, the owners of such land may inform the nearest Federal

marshall . . . who shall arrange to have the animals removed." 16 U.S.C. § 1334 (emphasis added). The phrase "onto privately owned land" makes it abundantly clear that Section 4 refers to the location of wild horses at the time of removal, and not to some amorphous "stray" characteristic of the wild horses themselves. Even if there were any doubt regarding the meaning of Section 4, BLM's regulations make clear that Section 4 is for the "[r]emoval of strayed animals *from private lands.*" 43 C.F.R. § 4720.2-1 (emphasis added). Thus, Section 4 certainly does *not* suggest that wild horses can forever be removed from public land – much less impose a ministerial duty to do so – because of a vague concern that at some undefined future time they *might* stray onto private land. *See Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1261 (10th Cir. 2004) (The court "cannot torture the language" of the statute "to reach the result the agency wishes.") (citation omitted).

In fact, it is well settled that BLM does *not* have a legal duty under Section 4 of the WHA to *preemptively* prevent wild horses from straying onto private land. *See, e.g., Fallini v. Hodel*, 783 F.2d 1343, 1346 (9th Cir. 1986) ("We fail to find any suggestion by Congress or otherwise that the BLM ha[s] a duty, ministerial or prescribed, to prevent straying of wild horses onto private land."); *id.* ("Section 4 of the Act clearly contemplates the possibility that wild horses may stray onto private lands."); *Roaring Springs Assocs. v. Andrus*, 471 F. Supp. 522, 523 (D. Or. 1978) ("Even if geography and the habit of these wild free-roaming horses dictate

that the Secretary of the Interior *must go back again to retrieve the animals, that is nevertheless his duty prescribed by the statute*.") (emphasis added). That fact alone – which the ruling below ignored – is fatal to the district court's novel construction of the statute.

Second, the district court's overly expansive reading of Section 4 in favor of hasty, non-transparent permanent removals of wild horses from public lands renders Section 3 of the WHA "mere surplusage" and reads that provision entirely out of the statute. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1247 (10th Cir. 2008); *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002) ("[W]e cannot 'construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.'") (citations omitted). If BLM can now remove any wild horses from public land simply by self-servingly characterizing them as horses that *may* possibly "stray from public lands onto privately owned lands" at some hypothetical future juncture, PI Order at 14 (Appeal Ex. 1), then the agency *never* again has to comply with Section 3 in the Checkerboard. That outcome cannot be squared with Congress's clear intent in enacting the WHA.[3]

[3] Even assuming that Section 4 is ambiguous – which it plainly is not – the district court's interpretation would also fail under *Chevron* step two. To begin with, the agency, not the district court, is tasked with resolving ambiguities in the statute. *Dep't of the Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 933 (1990) (giving "reasonable content to the statute's textual ambiguities" is "not a task [the Court] ought to undertake on the agency's behalf . . . .") (citations omitted). More importantly, even if the interpretation offered by the district court

In sum, because the ruling below cannot be upheld on *Chevron* or any other grounds, AWHPC is likely to prevail in this appeal because BLM has jettisoned its unequivocal Section 3 duties in connection with permanently removing hundreds of wild horses from the *public* lands within the Checkerboard – duties to which BLM *must* adhere until and unless Congress excuses BLM from these obligations.

B. BLM Has Not Conducted Any NEPA Analysis, and Instead Relies on a Plainly Inapplicable Categorical Exclusion

NEPA requires all federal agencies to prepare an EIS for major federal actions that may significantly affect the environment, *see* 42 U.S.C § 4332(C); 40 C.F.R. § 1508.27, or, at minimum, prepare an EA to determine if the effects of its proposed action are "significant." 40 C.F.R. § 1501.4(b). With this requirement, NEPA places upon all federal agencies the obligation to "consider every significant aspect of the environmental impact of a proposed action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (citation omitted). Simply put, NEPA demands that the agency take a "hard look" at the environmental

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had been formally advanced by BLM, it would not be entitled to deference because it is "manifestly contrary" to the statutory scheme. *United Keetoowah Band*, 567 F.3d at 1240; *Chevron*, 467 U.S. at 844 (regulations are not given controlling weight if they are "manifestly contrary to the statute."). The district court's facially implausible interpretation of Section 4 is not only antagonistic to the statutory scheme and purpose, *see* 16 U.S.C. § 1331, but it conflicts with decades of past agency practice and BLM's own policy manuals and handbooks governing wild horse management. *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1267-68 (10th Cir. 1994) (no Chevron deference is due "where the agency's interpretation . . . is inconsistent with its prior administrative interpretations."); *see* PI Motion at 9-13 (Appeal Ex. 2); PI Reply at 8-10 (Appeal Ex. 5).

consequences *before* taking a major action, thus prohibiting "uninformed" agency action. *Custer Cnty. Action Ass'n v. Garvey,* 256 F.3d 1024, 1034 (10th Cir. 2001).

BLM's decision to authorize the permanent removal of *all* wild horses from the Checkerboard portion of three HMAs, and to categorically exclude that authorization from *any* environmental analysis whatsoever, is precisely the type of uninformed agency action prohibited by NEPA. BLM's own directives expressly recognize that the permanent removal of *any* wild horses from the range significantly affects the environment by explaining that "[a]n appropriate NEPA analysis and issuance of a decision is *required* prior to removing the animals." Exhibit B to Pet'rs' Mtn. for Preliminary Injunction ("BLM Manual") at 4720.2.21, DE 17-3 (Appeal Ex. 6) (emphasis added). Indeed, BLM invariably "prepares a detailed 'gather' plan, including an environmental assessment in compliance with [NEPA]" before permanently removing wild horses from the range. *Fund for Animals v. BLM*, 460 F.3d 13, 16 (D.C. Cir. 2006).

Yet, instead of taking a "hard look" at the environmental consequences of its decision to permanently remove nearly a thousand wild horses from the range as required by NEPA, BLM invoked a categorical exclusion for the "[r]emoval of wild horses . . . *from private lands* at the request of the landowner." Exhibit C to Pet'rs' Mtn. for Preliminary Injunction ("BLM 516 DM 11") at 11.9, D4, DE 17-4 (Appeal Ex. 7) (emphasis added). On its face, however, this categorical exclusion

plainly does *not* apply to the current situation because BLM is removing wild horses from *public* land. *See* Categorical Exclusion at 5 (Appeal Ex. 4) ("[W]ild horses will also be removed from the public lands portions of the checkerboard.").

At bare minimum, BLM was required to prepare an EA before authorizing the removal of hundreds of horses. The categorical exclusion invoked by BLM is patently inapplicable and cannot be used to evade the agency's NEPA obligations.

II. APPELLANTS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

An irreparable injury is one that "that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (citations omitted). The Supreme Court and this Court have both explained that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *accord Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996).

The *permanent* removal of *all* wild horses from certain portions of the Checkerboard will irreparably harm Appellants' aesthetic, recreational, professional, and economic interests in the wild horses currently roaming these areas. For example, Appellants Carol Walker, Kimerlee Curyl, and Ginger Kathrens all visit and plan to return to these specific HMAs to view, observe,

photograph, and research the wild horse herds that reside in these areas. *See* Exhibit M to Pet'rs' Mtn. for Preliminary Injunction ("Walker Decl.") ¶¶ 3-4, 9, DE 17-14 (Appeal Ex. 8); Exhibit N to Pet'rs' Mtn. for Preliminary Injunction ("Curyl Decl.") ¶¶ 1, 5, 7, 9, DE 17-15 (Appeal Ex. 9); Exhibit O to Pet'rs' Mtn. for Preliminary Injunction ("Kathrens Decl.") ¶¶ 1, 4, DE 17-16 (Appeal Ex. 10).

The core of Ms. Walker's and Ms. Curyl's interests in the wild horses affected by the proposed roundup is their intimate and longstanding connection to *the particular horses* and *the specific horse families* as they currently exist on the Checkerboard lands – something which can never be replicated after the proposed roundup occurs, no matter how much time passes. *See* Walker Decl. ¶3 (Appeal Ex. 8) ("I have come to know and recognize certain horses and horse bands . . . to which I feel an especially close connection and relationship on a personal and aesthetic level."); *id.* at ¶4 ("I look for [a particular horse] each time I return to Adobe Town, and it brings me great joy knowing that he is still on the range."); Curyl Decl. ¶5 (Appeal Ex. 9) ("Every time I return to the Salt Wells HMA, I look for this specific horse and his band because of the aesthetic enjoyment I feel knowing that he and his band continue to roam the range.").

Indeed, the proposed roundup threatens to "take a huge toll on [Appellants] from an emotional, recreational, and aesthetic standpoint." Walker Decl. ¶6 (Appeal Ex. 8). The "heart-rending experience" of "see[ing]the tight-knit wild

horse families [they have] grown to know, recognize, and love ripped apart . . . *forever*" and "[t]he thought of these stunning animals languishing in small enclosures rather than running free across the range with their family bands," *id.* at ¶ 5, constitutes "harm that cannot be compensated after the fact by monetary damages," *Flowers*, 321 F.3d at 1258, and will be "permanent . . . *i.e.* irreparable," *Amoco Prod. Co.*, 480 U.S. at 545.

Ms. Walker's and Ms. Curyl's allegations are the paradigmatic examples of irreparable harm. Courts routinely find a likelihood of irreparable injury where, as here, the challenged agency action threatens to either: (1) reduce the size of a wildlife population that the moving party has a demonstrated interest in observing, or (2) negatively affect particular animals that the moving party has "developed relationships with." *See, e.g.*, *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 221-22 (D.D.C. 2003) (finding irreparable harm on both grounds based on swan kills); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 9, 14 (D.D.C. 1998) (finding irreparable injury from "thinning" of bison herd); *Fund for Animals v. Espy*, 814 F. Supp.142, 151 (D.D.C. 1993) (finding irreparable harm based on removal of up to sixty bison because "even the contemplation [] of [harmful] treatment" of wildlife may "inflict aesthetic injury upon . . . individual[s]" that if "experienced and threatened would be irreparable"); *Red Wolf Coal. v. N.C. Wildlife Res. Comm'n*, No. 2:13–CV–60-BO, 2014 WL 1922234, at *9 (E.D.N.C. May 13, 2014) (finding

irreparable injury based on decline in red wolf population and because the "ability to enjoy red wolves in the wild and the forced contemplation of [injury to these animals] would cause . . . irreparable harm."); *Flowers*, 321 F.3d at 1256 n.6 & 1257 (holding that irreparable harm does not require the elimination of entire species); *cf. Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding irreparable harm when a small percentage of a wilderness area would be logged despite fact that non-logged areas would remain).

Accordingly, in line with decades of precedent concerning injunctive relief in the wildlife context, Appellants have more than adequately shown how *their specific interests* will be irreversibly harmed by the permanent removal over 800 wild horses from the public lands of the Checkerboard. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (explaining that the touchstone for injunctive relief is whether *the plaintiff* is likely to suffer irreparable harm).

III. DELAYING THE ROUNDUP IS IN THE PUBLIC INTEREST AND IS NOT OUTWEIGHED BY ALLEGED HARM TO APPELLEES

The purpose of an injunction pending appeal is to "preserve the status quo." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1267 (10th Cir. 2004) ("[T]he sole purpose of such a stay is to preserve the status quo pending appeal so that the appellant may reap the benefit of a potentially meritorious appeal."). That is all that AWHPC is asking for from this Court:

preserve the status quo by temporarily delaying a roundup that, as planned, raises serious legal questions of first impression about BLM's statutory obligations that apply to management of the *public lands* of the Wyoming Checkerboard. *See* PI Motion at 14-20 (Appeal Ex. 2); PI Reply at 2-7 (Appeal Ex. 5).

On the one hand, the public interest will unquestionably be served by an injunction, since the public has an interest in the meticulous compliance with federal law by public officials. *See e.g., Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("On balance, the public interest favors compliance with NEPA."). Additionally, Congress has made clear that the protection of both wild horses and public land is a matter of great national importance. In 1971, Congress declared in the WHA that free-roaming wild horses "contribute to the diversity of life forms within the Nation and enrich the lives of the American people," and as a result should "be protected from capture." 16 U.S.C. § 1331. Even BLM's Section 4 duty to remove wild horses from private land, 16 U.S.C. § 1334, "was imposed by Congress *to benefit the public by keeping the animals on public lands*." *Fallini*, 783 F.2d at 1346-47 (emphasis added).

Moreover, Congress has sought to protect the public lands that wild horses and other wildlife utilize. Congress passed the Unlawful Inclosures Act of 1885 ("UIA"), 43 U.S.C. §§ 1061-1065, in order to prevent private landowners from usurping public land for their own exclusive use. In the UIA, Congress prohibited

any "assertion of a right to the exclusive use and occupancy of any part of the public lands." 43 U.S.C. § 1061. As explained by the Supreme Court in *Camfield v. United States*, 167 U.S. 518, 524 (1897), the UIA was necessary to protect public lands in the Checkerboard because "it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize [the public lands] for private gain." This Court in *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1509 (10th Cir. 1988), further recognized that the UIA prohibited the denial of "access to public lands for 'lawful purposes'" and that "provid[ing] food and habitat for fish and wildlife" – which includes wild horses – was a lawful purpose of public land protected by the UIA. *See also* 16 U.S.C. § 1331 (wild horses must be considered "as an integral part of the natural system of the public lands"). Hence, protecting wild horses and those horses' lawful use of public lands is of great concern to Congress and, in turn, the public interest.

In contrast, BLM cannot demonstrate that it will suffer *any* harm should this particular roundup be temporarily delayed until this Court has an opportunity to resolve this appeal on the merits. BLM has not asserted that this roundup is being driven by any sort of emergency, such as drought or scarce vegetation. In fact, the agency has not provided *any* reason why the roundup must proceed immediately. BLM has conducted roundups in these same areas during later months in past years

and there is no reason why the agency cannot do so in this case. *See* PI Motion at 9-10 (Appeal Ex. 2) (detailing similar roundup that occurred in November 2013); PI Reply at 17 (Appeal Ex. 5) (listing roundups in this areas occurring as late as December). Nor can BLM legitimately argue that these wild horses need to be removed immediately in order to protect the range from deterioration because the agency has not conducted *any* environmental analysis under NEPA; thus, BLM does not even know if the wild horses slated for removal are impacting the range.

In addition, any argument that the Intervener-Appellees are harmed by the presence of any wild horses within the Checkerboard because horses compete with cattle for forage ignores the fact that a portion of the forage on the public lands within the Checkerboard is specifically reserved for wild horses. *See, e.g.*, Dept. of Interior, BLM Green River Resource Management Plan (October 1997) at 23 ("Wild horse herd management will be directed to ensure that adequate forage . . . will be available to support" wild horses); *United States ex. rel. Bergen*, 848 F.2d at 1507 ("[N]othing of Lawrence's [] has been 'taken.' Certainly, his federal grazing leases are not damaged as a portion of the animal unit months ("AUMs") for those leases is reserved for wildlife . . . ."). Accordingly, the equities and the public interest fully favor an injunction under the circumstances to ensure that BLM complies with federal law before the challenged roundup proceeds.

IV. NO BOND SHOULD BE REQUIRED

This Court should not require AWHPC to post a bond to obtain an injunction pending appeal under Fed. R. App. P. 8(a)(2)(E) because requiring a bond would have a chilling effect on public interest litigants seeking to protect the environment. *See, e.g., California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (no bond); *Davis*, 302 F.3d at 1126 ("[W]here a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered.").

CONCLUSION

For all the foregoing reasons, the Court should enjoin BLM from proceeding with the proposed roundup until the Court can resolve the merits of this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of September, 2014, I electronically filed the Appellant's Rule 8(a) Emergency Motion for An Injunction Pending Appeal using the CM/ECF system, which will then send a notification of such filing to the following:

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