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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

LAURA LEIGH,

Plaintiff,

v.

KEN SALAZAR, et al.,

Defendants.

CASE NO. 3:13-cv-00006-MMD-VPC

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff has moved this Court for a preliminary injunction ("PI") related to gather activity authorized by the Bureau of Land Management ("BLM") at the Owyhee Complex located in northern Nevada. Dkt. No. 14. The Federal Defendants hereby submit their opposition to Plaintiff's motion.

INTRODUCTION

On January 4, 2013, Plaintiff filed a complaint and a motion for a temporary restraining order in an attempt to halt the Owyhee Complex gather that BLM was conducting in northern Nevada. Dkt. Nos. 1, 2. Ultimately, Plaintiff's motion was denied. Dkt. Nos. 15, 16. Notwithstanding the fact that the Owyhee Complex gather is now complete, and there is nothing left to enjoin, Plaintiff still seeks a preliminary injunction from this Court. Dkt. No. 14. Because the gather is complete, the relief that Plaintiff seeks would apply to hypothetical future wild horse gathers on the Owyhee Complex. However, BLM does not intend to conduct another gather on the Owyhee Complex for two to three years, by which time this Court will have resolved the merits of this case on the parties' cross-motions for summary judgment.

In any event, as discussed below, Plaintiff fails to show that a preliminary injunction is justified or appropriate here. In particular, Plaintiff fails to show that she is likely to succeed on the merits of her case because the factual and legal predicates of her challenges to BLM's conduct are fundamentally incorrect. In addition, Plaintiff fails to show that she will suffer any harm, let alone irreparable harm. BLM conducted the requisite analysis and took action consistent with its obligations under the Wild Horse Act, and it is clear that the balance of the hardships tips sharply in favor of the Federal Defendants, and the requested injunction is contrary to the public interest. Accordingly, and for the reasons discussed below, the Federal Defendants respectfully request that this Court deny Plaintiff's motion.

STATUTORY BACKGROUND

The Wild Free-Roaming Horses and Burros Act ("Act" or "Wild Horse Act"), 16 U.S.C. § 1331 et seq., directs BLM to manage wild horses on public lands. BLM "manage[s] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). Since 1971, this responsibility has included oversight and management of wild horses and burros on public lands. See 16 U.S.C. § 1331 et seq. When enacted, Congress was concerned that wild horses were vanishing from the West. Congress wished to preserve the horses as "living symbols of the historic and pioneer spirit of the West," and directed the Secretary to provide for their protection and management. 16 U.S.C. § 1331. Within only a few years of the Act's passage, however, the situation had reversed itself, "and action [was] needed to prevent a successful program from exceeding its goals and causing animal habitat destruction." *Am. Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (quoting H.R. Rep. No. 95-1122 at 1-2 (1978)); *see also Blake v. Babbitt*, 837 F. Supp. 458, 459 (D.D.C. 1993) ("[e]xcess numbers of horses and burros pose a threat to wildlife, livestock, the improvement of range conditions, and ultimately [the horses themselves]") (citation omitted). Accordingly, in 1978, Congress passed amendments to the Wild Horse Act, which provided the Secretary with greater authority and discretion to manage and remove wild horses from the rangeland. *Id.*

The Wild Horse Act grants the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros on federal lands and directs the Secretary to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a) (emphasis added); *see also Fund for Animals v. BLM*, 460 F.3d 13, 15 (D.C. Cir. 2006). "The Bureau (as the Secretary's delegate) carries out this function in 'localized herd management areas'." *Id.*; *see also* 16 U.S.C. §

1332(c); 43 C.F.R. § 4710.3-1 (established in accordance with broader land use plans). *Fund for Animals*, 460 F.3d at 15; *see also* 43 C.F.R. § 4710.1. "Responsibility for a particular herd management area rests with [BLM's] local field and state offices." *Fund for Animals*, 460 F.3d at 15. BLM is prohibited from allowing the range to deteriorate from an overpopulation of wild horses. *See* 16 U.S.C. § 1333(b)(2)(iv).

In each herd management area (or "HMA"), BLM officials are afforded significant discretion to determine their own methods for computing "appropriate management levels" (or "AMLs") for the wild horse and burro populations they manage. 16 U.S.C. § 1333(b)(1). BLM typically uses an AML range for each herd management area, which includes a "low AML" and a "high AML". When the wild horses on a herd management area exceed the high AML, BLM is required to conduct a gather in order to remove the excess wild horses. BLM typically accomplishes this by getting as close to the low AML as possible – thereby ensuring that BLM will not have to return to the herd management area to conduct another gather until as late a date as possible. This benefits the agency from a cost perspective, but it also benefits the wild horse population by minimizing the need for potentially intrusive gather activity at each herd management area to remove excess horses.

Even if a wild horse population does not exceed high AML, however, when a populations exceed the carrying capacity of the range, or when wild horses stray outside of a designated herd management area, BLM is obliged to remove them. *See* 16 U.S.C. § 1332(f) (defining "excess animals" as "wild free-roaming horses or burros (1) which have been removed from an area by the Secretary pursuant to applicable law or, (2) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area"); 43 C.F.R. § 4710.4 (management of wild horses "shall be undertaken with the objective

of limiting the animals' distribution to herd areas"); 43 C.F.R. § 4700.0-5(d) (herd areas are the "geographic area identified as having been used by a herd as its habitat in 1971"). Once BLM has determined "that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, [BLM shall] immediately remove excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2).

The Wild Horse Act does not require that a certain number of horses be retained on the range without regard to the impact on the ecosystem as a whole. Instead, Congress gave BLM broad discretion to take action in a humane manner to remove horses in order to preserve and maintain the habitat for sustained use or to control population growth through the use of fertility controls. *See, e.g., Am. Horse Prot. Ass'n v. Frizzell*, 403 F. Supp. 1206, 1217 (D. Nev. 1975); 16 U.S.C. § 1333(b)(1).

The 1978 amendments to the Wild Horse Act detailed the information that BLM may rely upon in making decisions regarding whether to remove horses:

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

Watt, 694 F.2d at 1318 (emphasis in original); *Babbitt*, 837 F. Supp. at 459 ("[t]he amendments made clear the importance of management of the public range for multiple uses, rather than emphasizing wild horse needs" and "[a]djustments can be made later, but the endangered and

rapidly deteriorating range cannot wait") (citations omitted). In short, BLM, in its expert capacity as the federal agency in charge of managing wild horses, is entitled to an enormous amount of deference when deciding when and how to remove excess wild horses. *Watt*, 694 F.2d at 1318.

FACTUAL BACKGROUND

On October 18, 2012, BLM authorized the gather of wild horses from an area known as "the Owyhee Complex". *See* BLM Decision Records;[1] Environmental Assessment ("EA") at 28.[2] The Owyhee Complex is located 50 miles northeast of Winnemucca and spans two BLM field offices: the Humboldt River Field Office and the Tuscarora Field Office. *Id*. at 1, 28. The Owyhee Complex is approximately 1,055,023 acres in size, although the total gather area is nearly double to encompass wild horses that have moved outside the Complex in search of water, forage and space, due to overpopulation. *See* Dkt. No. 11-1.

The Owyhee Complex is made up of five herd management areas: Little Humboldt, Little Owyhee, Owyhee, Rock Creek, and Snowstorm Mountains. EA at 1. In turn, each herd management area contains a number of wild horse pastures. *See, e.g.*, EA at 8-11. On November 26, 2012, BLM commenced gather activity in the Little Owyhee HMA; BLM completed that portion of the gather on December 19, 2012. *Id*. On January 4, 2013, BLM began gather activity on the Owyhee HMA in order to implement population control measures ("treat and release") and to gather and remove up to 50 wild horses. *Id.* at ¶ 15. BLM halted gather activity on the Owyhee HMA that same day, upon issuance of this Court's order. *Id*. at ¶¶ 17-18.

The appropriate management level for the combined Owyhee Complex (i.e., the total of all five HMAs) is a population range of 621-999 wild horses EA at 5. A population survey

[1] Because the gather area extends over two BLM field offices, each field office issued a Decision Record, available at http://www.blm.gov/nv/st/en/fo/wfo/blm_programs/wild_horses_and_burros/Owyhee_Complex_Wild_Horse_Gather_2012/docs.html (last visited on Jan. 24, 2013).

[2] *See id*. for BLM's Final Environmental Assessment of the Owyhee Complex Gather.

conducted in September 2012 revealed a direct count of 2,267 wild horses within the Owyhee Complex Gather Area. *Id.* At the time that BLM made its decision, the wild horse population was estimated to exceed the low AML of the entire Complex by approximately 1,646 wild horses and was almost four times the low AML or almost two times the high AML of the entire Complex. *Id.* The gather prior to the one challenged here occurred in the summer of 2010 when 1,065 excess wild horses were removed from the range. *Id.* During that gather a total of 1,224 wild horses were captured, 65 mares were treated with a two-year fertility control agent and returned to the range, while 61 stallions were also released. *Id.* Under the October 2012 decisions authorizing gather operations for the Owyhee Complex, BLM planned to remove a total of 850 wild horses in an initial 2012-2013 gather, in conjunction with population control measures.

The Owyhee herd management area is divided into three main pasture areas: Star Ridge, Dry Creek, and Chimney Creek. Dkt. No. 11-1 ¶ 12. Although these areas are fenced, the wild horses are able to move between pastures (through open gates, breaks in the fence, and portions of fences that have been let down to allow for wild horse movement), though the wild horses will typically establish themselves in one pasture or another. *Id.* ¶ 11. The appropriate management level range for the Owyhee herd management area is 139-231. *Id.* ¶ 13. Prior to the gather challenged here, BLM estimated that there were approximately 186 horses in the Owyhee herd management area. *Id.* ¶ 21. Because the availability of water in the Owyhee herd management area is a limiting factor that led to the need to conduct emergency gathers in the past, because there is a high rate of population growth (15-20% annually), and because the wild horse population was within the established appropriate management level range, BLM determined that the Owyhee herd management area was a good candidate for the application of population

control measures that will help slow population growth. *Id*. ¶¶ 14, 19. The decision, therefore, was focused on a "treat and release" approach for the Owyhee herd management area. *Id*. ¶19.

On January 4, 2013, Plaintiff moved for a temporary restraining order in an attempt to halt the gather. Dkt. No. 2. While this Court temporarily granted Plaintiff's motion, Dkt. No. 7, the Court ultimately denied Plaintiff's request and allowed the gather to take place, Dkt. Nos. 15-16. BLM completed the Owyhee Complex gather on January 16, 2013, in compliance with this Court's order. *See* Ex. A ¶ 23. As part of the gather, BLM gathered 192 wild horses from the Owyhee HMA, *id*. ¶ 22, and removed 50 wild horses from the Owyhee HMA, including 45 weanlings and five mares, and released the remaining wild horses back into the Star Ridge pasture, after applying fertility treatment to selected mares. *Id*. BLM does not intend to conduct another helicopter gather at the Owyhee HMA for at least two to three years. *See, e.g.*, EA at 91.

STANDARD OF REVIEW

I. Standard for Preliminary Injunctive Relief

"[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) (citations omitted). Plaintiffs have the burden of proving the need for injunctive relief; defendants bear no burden to defeat the motion. *Granny Goose Foods v. Teamsters*, 415 U.S. 423, 442-43 (1974). Because preliminary injunctive relief is an extraordinary remedy, the power to issue such an injunction "should be sparingly exercised." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (quotation omitted). "It often has been observed that the purpose of the preliminary injunction is the preservation of the status quo and that an injunction may not issue if it would disturb the status quo." 11A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure § 2948 (citations omitted).

In considering whether to grant an application for a preliminary injunction, the Court must examine four factors: (1) whether Plaintiff is likely to succeed on the merits; (2) whether Plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; (3) whether the balance of equities tips in Plaintiff's favor; and (4) whether the public interest would be served by issuance of a preliminary injunction. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (addressing the factors in granting preliminary injunctions).

In light of the Supreme Court's decision in *Winter*, courts must consider all four factors governing preliminary relief, *see Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1019 (9th Cir. 2009) (finding that the district court erred in granting a preliminary injunction because it failed to assess the non-merits factors – irreparable harm, balancing of equities, and the public interest – under the *Winter* standard), and may not issue an injunction based on the mere possibility that there will be irreparable injury, *see American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (plaintiff must show that irreparable injury is likely). In the Ninth Circuit, as an alternative, a plaintiff may demonstrate that there are "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1132 (9th Cir. 2011). Under either test, a plaintiff must still demonstrate that it is likely to suffer irreparable injury absent an injunction (not merely that injury is "possible") and that such an injunction would be in the public interest. *Cloud Found. v. BLM*, 802 F. Supp. 2d 1192, 1197 (D. Nev. 2011) (citing *Cottrell*, 632 F.3d at 1135).

II. Standard for Review of Agency Action

In assessing Plaintiffs' likelihood of success on the merits, the Court must apply the standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (C). The APA

provides that an agency action may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing, *inter alia*, *Overton Park*, 401 U.S. at 419). The Court's only role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.*

ARGUMENT

Plaintiff bears an extremely heavy burden to show that she is entitled to the extraordinary relief of a preliminary injunction, which is only intended to maintain the status quo until a case can be decided on the merits. Here, Plaintiff failed to show that she is entitled to the extraordinary relief that she now seeks. Plaintiff demonstrated no likelihood of success on the merits of her challenge to the now-completed Owyhee Complex gather. Her allegations regarding the nature of the gather, and her legal challenges to the propriety of BLM's actions, are unfounded both as a matter of fact and law. Moreover, Plaintiff failed to show that she will likely suffer irreparable harm if preliminary injunctive relief is not granted. The 2012-2013 Owyhee Complex gather is complete, and BLM does not intend to return to the Owyhee Complex to conduct another helicopter gather for at least two to three years, at which point the merits of this case will have been resolved. There is no irreparable harm that will befall Plaintiff in the interim, particularly from a completed activity designed to improve conditions for wild horses.

Furthermore, Plaintiff fails to show that the balance of the equities tips in her favor. And lastly, Plaintiff fails to show that a preliminary injunction is in the public interest. As such, and for the reasons discussed below, the Federal Defendants respectfully request that this Court deny Plaintiff's motion for a preliminary injunction.

I. Plaintiff is Unlikely to Succeed on the Merits of Her Claims.

In her motion for a preliminary injunction, Plaintiff puts forward three distinct arguments on the merits. Dkt. No. 14 at 19. First, she alleges that BLM gathered wild horses in an inhumane manner during the Owyhee Complex gather. *Id.* Second, she alleges that BLM's decision to remove wild horses from the Owyhee HMA was improper and unjustified. *Id*. Third, she alleges that BLM does not have an adequate methodology to determine whether excess wild horses are present on any given herd management area. *Id*. As discussed below, none of these arguments have merit, and Plaintiff's motion fails as a result.

A. The Owyhee Gather Did Not Result in the Inhumane Treatment of Wild Horses.

Since before the start of the Owyhee gather, BLM took pains to ensure that all horses involved were treated carefully and humanely. BLM staff, contractors, and the APHIS veterinarians have extensive experience and knowledge of wild horses and carry out their responsibilities in a manner designed to minimize stress and injury to the horses. Because Plaintiff has not shown that inhumane treatment occurred or is likely to occur for this or for any future Owyhee gather, Plaintiff has failed to demonstrate a likelihood of success on the merits.

The Wild Horse Act does not define the term "humane." In such an instance, courts look to the agency charged with implementing the statute for guidance as to the meaning of the statutory term. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). BLM's regulations define "humane treatment" as "handling compatible with animal husbandry practices

accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse or burro." 43 C.F.R. § 4700.0-5(e). As the attached declarations make clear, it is the considered opinion of BLM, the expert agency tasked by Congress with handling wild horses, that the Owyhee gather has been conducted in a manner entirely consistent with the regulatory definition of "humane treatment". *See* Exhibits A through D. It is also the opinion of three experienced veterinarians – employed by the United States Department of Agriculture and present at the gather – that there were no instances of inhumane treatment at the gather. *See* Exhibit E through G. These declarations make clear that the specific allegations put forward by Plaintiff are flatly inaccurate, uninformed, or untrue.[3]

Because they thoroughly refute Plaintiff's allegations, the statements made in the seven sworn declarations attached as Exhibits to this brief are sufficient to defeat Plaintiff's arguments on the merits. *See* Exhibits A through G. This Court must accord deference to these declarations – the expert opinions of the agency charged with administering the Wild Horse Act – and not to Plaintiff. *See, e.g., Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) (when examining agency scientific findings, as opposed to simple findings of fact, "a reviewing court must generally be at its most deferential"); *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). In particular, courts disfavor attempts by plaintiffs to create a "battle of the experts" in environmental cases such as these. *See, e.g., Price Road Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997) ("We have consistently rejected [attempts to create a battle of the experts], noting that 'when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified

[3] Plaintiff's still frames and hyperlinks to video available online are selectively edited images, condensing roughly 300 hours of gathering into a montage of only a few minutes. Ex. B ¶¶ 53, 54. As an incomplete and manipulated record of the Owyhee gather, these submissions cannot provide the necessary context and detail for a determination that the gather was at any time conducted inhumanely.

experts even if, as an original matter, a court might find contrary views more persuasive.'") (citation omitted). Even if this Court were inclined to weigh Plaintiff's lay opinions against BLM's experts, the law is clear that BLM is entitled to a great amount of discretion in its execution of the Wild Horse Act's statutory mandate. *See, e.g.*, *Frizzell*, 403 F. Supp. at 1217 (BLM is given wide discretion from courts as to how to gather wild horses). For these reasons, Plaintiff cannot show that BLM has treated horses inhumanely or will do so in the future, and the Court should deny her motion.

i. The Owyhee Gather was Humane in All Respects.

On November 25, 2012, BLM issued Agency Expectations to Ensure Safe and Humane Handling of All Gathered Wild Horses ("Agency Expectations") for the Owyhee gather. *See* Ex. H. The Expectations set forth detailed instructions – to all BLM and contract personnel – for the treatment of horses involved in the Owyhee gather, and specifically included guidelines limiting and regulating the use of electric prods ("hot shots"), the herding of horses in extreme weather, and the treatment of young horses. Ex. A ¶20. After this Court issued its order on January 10, 2013, BLM personnel carefully considered the Court's restrictions on gather activities and worked to ensure compliance with those restrictions. Ex. A ¶ 23. Compliance with BLM and Court guidelines was monitored by the declarants whose sworn statements are attached, including independent veterinarians who monitored the gather. As these declarations make clear, Plaintiff's enumerated allegations of agency misconduct are either factually untrue fatally ignorant of gather procedures and the behavior of wild horses. *See* Compl. 6. BLM's conduct during the gather was the product of professional, careful, and humane decision-making designed to ensure the safety of humans and horses alike. Ex. E ¶ 11.

Importantly, and as declarants of both parties agree, wild horses do not behave like tame horses or like other domesticated livestock. Adult wild horses are large, unpredictable, and powerful animals that are unaccustomed to guidance from humans and that, when anxious or threatened, can injure handlers or other horses. Ex. A ¶¶ 8, 9; Ex. G ¶ 8; Ex. E ¶ 12. A gather is therefore an inherently unpredictable and occasionally dangerous enterprise, one made more difficult by the uneven terrain and distances involved. Shepherd Decl. ¶¶ 7, 17, 18. But while gathering may be an unusual or difficult activity for wild horses, "unusual" or "difficult" activity is not, as Plaintiff argues, "inhumane activity." And because the Wild Horse Act commands humane gathers – not humane treatment in the abstract – BLM can only seek to minimize, not to eliminate, gather-related horse injuries and deaths. Ex. A ¶ 17; Ex. E ¶¶ 46, 47, 49; Ex. G ¶ 22. Occasionally, minimizing these injuries requires BLM to weigh the welfare of a single horse against that of multiple horses, herds, and handlers. Where BLM was forced to strike this balance during the Owyhee gather, it did so in a fashion that agency experts agree is humane under the law. Ex G. ¶¶ 11, 22, 23; Ex. A ¶¶ 17-19; Ex. E ¶ 50; Ex. D ¶ 22. Of the 1,011 wild horses involved in the Owyhee gather, only three horses died during the gather itself, and no additional horses suffered serious injuries of any type. Ex. A ¶¶ 21, 22.

a. Use of Hot Shots Was Isolated, Measured, and Absolutely Necessary to Ensure Safety.

At late stages of a gather, wild horses are corralled into holding areas or trailers. Horses that refuse to move down these paths are prone to anxiety and sudden movement that can injure nearby horses. Ex. F ¶ 16; Ex. E ¶ 33; Ex. C ¶ 30; Ex. D ¶¶ 10. BLM contractors therefore employ a variety of methods to move the horses through the corrals, including body language and posture, voice commands, and flags. Ex. F ¶ 16; Ex. E ¶ 34; Ex. D ¶ 10. Where these methods all fail, and where a wild horse must advance through the corral to ensure the gather's

progress, humane treatment permits the use electric prods, or "hot shots," to spur the horses onwards. Ex. F ¶ 16; Ex. D ¶ 10. Use of hot shots produces similar effects on a variety of livestock, including horses, swine, and cattle. Ex. E ¶ 32. As the Agency Expectations provide, hot shots "may only be used when [wild horse] or human safety is in jeopardy or other handling aids have been tried and are not working." Ex. H ¶ 5. In addition, hot shots cannot be applied to foals and cannot "be applied to sensitive areas such as the face, head, genitals or anus." *Id.*

Based upon first-hand knowledge of gather operations, BLM experts and independent veterinarians attest that hot shots were never used "routinely" during the Owyhee gather. Hot shots were used infrequently, consistent with the Agency Expectations, and on a case-by-case basis as needed. Although the horses gathered in Owyhee were "more stubborn" than usual – therefore necessitating occasional use of the hot shot – this was necessary to ensure the gather was safe and humane. Ex. F ¶ 16; Ex. E ¶¶ 32, 37, 38; Ex. B ¶¶ 48, 49; Ex. C ¶ 31; Ex. D ¶¶ 11, 12. The hot shot was not used prematurely, as a matter of course, on foals, or on sensitive areas. Ex. E ¶ 36; Ex. F ¶ 16; Ex. C ¶¶ 33, 35; Ex. G ¶ 14; Ex. D ¶ 11, 12. Plaintiff's pictures show only the unremarkable fact that BLM occasionally used hot shots, not that hot shots were used so frequently and improperly as to be inhumane.[4] Ex. E ¶ 37, 48; Ex. B ¶¶ 47, 38; Ex. C ¶¶ 32, 34.

b. No Horses Were Driven Through Barbed Wire.

Private fencing crisscrosses large portions of the Owyhee gather area. Access points to the gather area are limited, and all identified ingresses to the area are near at least some fencing. Ex. B ¶ 40. The wild horses are accustomed to this fencing and frequently navigate through its openings. *Id.* On November 28, 2012, nine horses were herded by helicopter to a 16-foot opening in a barbed wire fence. Ex. B ¶ 41. Although over 500 horses were moved through this and

[4] Hot shots do not deliver electric current to a horse merely because they are held: the hot shots must be physically triggered to provide current. Therefore, photographs or video footage of a hand-held hot shot do not imply actual use of the hot shot. Ex. G ¶ 14; Ex. F ¶ 17.

similar gates without incident, the nine horses at issue became agitated and refused to proceed through the gate. Ex. B ¶¶ 41, 42. Eventually, five of the nine horses moved through the opening without incident. Ex. B ¶ 42. The helicopter then began a maneuver designed to usher the remaining four horses away from the fence, but before this maneuver was complete, the horses jumped across the fence. Ex. B ¶ 43. Although some horses did fall during this leap, all horses quickly resumed their progress, and subsequent inspection, including inspection by independent veterinarians, confirmed that none of the horses suffered serious injuries. *Id.*; Ex. F ¶¶ 27, 28. No horse was euthanized following contact with the fence.[5] Experts who witnessed the entire course of events concluded that: (i) the helicopter did not drive the four horses through the fence, and (i) the helicopter's maneuvering near the fence was humane.

BLM does not and did not drive wild horses over or through barbed wire fencing. Ex. G ¶ 16; Ex. F ¶¶ 26, 28. Such a practice would not only be inhumane, it would be counterproductive to the gather's purpose: driving wild horses through fencing would risk injury and impair horses that would slow the gather.

c. Horses Were Humanely Loaded Onto Trailers.

The Agency Expectations provide that "[g]ates and doors will not be deliberately slammed or shut on [wild horses]" and that "[g]ates can be used to push [wild horses] but . . . not . . . in a manner that may catch legs." Ex. H ¶ 6. Occasionally, gates must be pushed against horses to ensure continuous progress through loading areas and avoid undue stress to the animals, and the horses themselves will often butt against gates as the gates are closed. Ex. B ¶ 50; Ex. G ¶ 15; Ex. E ¶ 41. No gates, however, were "slammed" against horses in the Owyhee

[5] The horse that Plaintiff claims was euthanized due to contact with the fence did not, in fact, attempt to leap the fence. This horse, which was blind and afflicted with multiple ailments unrelated to gathering, was euthanized to prevent further suffering. Ex. C ¶¶ 40-42.

gather, and no gates were otherwise used "aggressively" or inhumanely. Ex. B ¶ 52; Ex. G ¶ 15; Ex. E ¶¶40, 42; Ex. D ¶ 21.

d. It is Humane for Wild Horses to Run Moderate Distances Through their Natural Habitat.

Wild horses spend their entire lives in the areas where gathers occur. Because the Owyhee gather did not take place in abnormal or extreme conditions, the wild horses at issue were accustomed to living and exercising under the prevailing conditions. The horses were not, for example, run in inhumanely cold temperatures. The Agency Expectations provide that "[w]hen extreme environmental conditions exist (temperature) during this gather, the overall health and well-being of the animals will be monitored and the [BLM] will adjust gather operations as necessary to protect the animals from climactic and gather related health issues." Ex. H ¶ 22. Contrary to Plaintiff's assertion, temperatures during the November gather were above freezing. Ex. C ¶ 11; Ex. B ¶ 27. As animals that live through periods of extreme cold, snow, and ice, above-freezing temperatures were normal and relatively comfortable for the Owyhee wild horses. Ex. B ¶ 28; Ex. G ¶¶ 12, 13; Ex. E ¶24; Ex. F ¶ 10; Ex. D ¶ 8.

As Plaintiff points out, wild horses can "steam" in above freezing temperatures when warm sweat or water on the horse's back condenses in the cooler air. Ex. F ¶ 10; Ex. D ¶ 10. Condensed sweat or rain water, however, is a poor indictor of stress or fatigue in a wild horse. Instead, experts look to behavior such as lathering (i.e., foaming on the horse's coat) or blowing (i.e., breathing hard) to determine whether a horse is fatigued. Ex. B ¶ 27; Ex. G ¶ 12; Ex. E ¶ 24; Ex. F ¶ 11; *see also* Ex. H ¶ 9 ("It is expected that animals may be tired, sweaty and breathing hard on arrival at a trap, but they will not be brought in by the helicopter in a manner that results in exhaustion, collapse or distress."). None of the wild horses gathered at Owyhee

exhibited lathering or blowing, and agency and independent experts concluded that the horses were not run in inhumanely cold temperatures.[6] Ex. B ¶¶ 28, 29; Ex. G ¶¶ 12, 13; Ex. F ¶¶ 11-13.

Similarly, wild horses are accustomed to running through the uneven terrain of the Owyhee gather area. This terrain is littered with obstacles including ridges, rims, drains, shrubs, rocks, slopes, and animal burrows. Ex. B ¶¶ 23, 26; Ex. E ¶ 29. Gathered horses often show evidence of preexisting wounds, some of which are likely due to trips and falls that occur entirely outside of gathers. Ex. E ¶ 29. Because wild horses are accustomed to uneven terrain and to mild falls, it was entirely humane for BLM to place one of two Owyhee traps near a naturally occurring dip in the terrain. Ex. B ¶¶ 24, 26; Ex. G ¶ 16; Ex. E ¶ 28. The trap was not placed in an abnormally dangerous location, and it was not placed so as to conceal the dip from the horses. Ex. B ¶¶ 24, 26. BLM has no incentive to place a trap site in a dangerous location: that practice, like driving horses through barbed wire fencing, would injure additional horses and hinder the gather's progress. While some horses did trip during the gather, this tripping was not extraordinary and did not result from any inhumane action on the part of BLM. Ex. G ¶¶ 17-18.

e. Humane Treatment Occasionally Demands that Foals are Herded Separately or Weaned.

The Agency Expectations note that

> The contactor will make every effort to ensure that foals are not left behind or orphaned in the field. If a foal has to be dropped from a group being brought to the trap because it is getting too tired or cannot keep up for any reason, the contractor/pilot will document the location of the foal and the description of the mare to facilitate "pairing-up" at temporary holding, (if the foal is young enough to require this). In this case, the contractor will provide trucks/trailers and saddle horses for the retrieval of the young foal(s), and transport the foal(s) to the gather site or temporary holding.

[6] As this behavior implies, neither were the horses run for inhumanely long distances or denied an opportunity to "settle." *See, e.g.*, Ex. E ¶ 27; Ex. F ¶ 14. Plaintiff's claims that distance of travel is correlated with helicopter flight time, *see, e.g.*, Dkt. No. 14 at 1, are contradicted by the reality of gather operations. Ex. A ¶¶ 11, 12.

Ex. H ¶ 8. Although gathers are designed to keep foals with their mares, foals are occasionally left behind by older, faster horses. In particular, foals may be left behind during the final phase of a gather, when helicopters drive multiple herds towards the trap at increasingly high speeds. Ex. A ¶¶ 11, 13. If the herds are prohibited from accelerating as they near the trap, the herds may disperse too soon and prolong the gather. In the expert determination of BLM employees and independent veterinarians, it is more humane to leave the occasional foal behind the herd than to predicate the movements of every herd on every foal, thereby extending gather activities. Ex. E ¶¶ 14-18; Ex. F ¶ 32; Ex. D ¶ 17.

Some foals collected during gathers, including some foals left behind the herd, are old enough to be "weaned." The decision to wean a foal is a case-by-case determination and is humane where a young horse can survive on its own: the process poses no risk to the foal while freeing the mare from providing excess nutrition. Ex. B ¶ 38; Ex E. ¶¶ 22, 23; Ex. G ¶ 19; Ex. D ¶¶ 13-15.

During the Owyhee gather, no foals were prematurely weaned and no foals were driven to exhaustion. Ex. B ¶38; Ex. D ¶ 16. Moreover, every unweaned foal separated from the herd was ultimately reunited with its mare. In support of her assertion that this pattern of conduct was nonetheless inhumane, Plaintiff has provided pictures of a foal transported on horseback and contractors guiding foals along corrals. Plaintiff's claim that foals transported on horseback are necessarily exhausted is false. To the contrary, separated foals are transported on horses (or on trucks or trailers) to prevent exhaustion. Independent experts and veterinarians inspected the foal pictured on horseback and concluded that the foal was healthy and not fatigued. Ex. B ¶ 33; Ex. E ¶¶ 13, 19; Ex. D ¶¶ 18-29. This foal, like other foals separated from the herd, was reunited with its mare. Ex. B ¶¶ 33, 34. Plaintiff's claim that a contractor would guide only an exhausted

foal is also false. The foals in Plaintiff's pictures were guided not because they were too exhausted to walk, but because they simply did not understand where to walk. Ex. F ¶ 31.

ii. Plaintiff Has Not Explained or Supported Her Allegations of Inhumane Treatment

To support her allegations that BLM has inhumanely gathered horses, Plaintiff has provided seven declarations and three "photo logs." Even if the Court were to accord Plaintiff's proffered attachments the same deference due to BLM, the declarations are facially insufficient to support Plaintiff's allegations.

In particular, none of Plaintiff's filings in this case – including her complaint and memorandum of law – have articulated how BLM's conduct during the Owyhee gather was inhumane under the Wild Horse Act and its implementing regulations: Plaintiff has not explained how even a single action during the gather was "[in]compatible with animal husbandry practices accepted in the veterinary community" or "caus[ed] unnecessary stress or suffering to a wild horse or burro." 43 C.F.R. § 4700.0-5(e). To name only one example, Plaintiff has not explained why the operation of helicopters in windy conditions would be somehow incompatible with animal husbandry practices or unnecessarily stressful for a wild horse.[7] Compl. 6. Plaintiff made an identical, unstated assumption in each of her allegations concerning inhumane treatment. At most, therefore, Plaintiff's descriptions of BLM conduct might support inferences that the conduct, had it actually occurred, was "inhumane" as a matter of that word's common use. However, the technical, regulatory-based definition of "humane" – the definition that must govern the Court's disposition of Plaintiff's claim – requires more than lay inferences. Instead, Plaintiff must apply the governing definition to the alleged facts, a burden that she did not meet.[8]

[7] BLM does not place humans, horses, or equipment in jeopardy by flying helicopters in dangerous conditions, and did not do so during the Owyhee gather. Ex. B ¶¶ 30, 31.

[8] Moreover, Plaintiff's exhibits are entitled to no weight. Of the seven declarations Plaintiff has

B. BLM Adequately Justified the Removal of Excess Horses from the Owyhee HMA.

Just as in her motion for a temporary restraining order, Plaintiff argues that BLM lacked the necessary authority to remove wild horses from the Owyhee HMA. Dkt. No. 14 at 19; Dkt. No. 2. After hearing from both parties earlier this month, the Court agreed with the Federal Defendants that Plaintiff was not likely to succeed on the merit of this claim and denied Plaintiff's motion for a temporary restraining order. Dkt. Nos. 15, 16. In response to Plaintiff's renewed argument, the Federal Defendants hereby incorporate by reference the arguments presented in their response to Plaintiff's motion for a temporary restraining order, *see* Dkt. No. 11, which this Court found persuasive in rejecting Plaintiff's argument, Dkt. Nos. 15-16. The Federal Defendants respectfully request that this Court reject Plaintiff's argument here for the very same reasons.

C. Plaintiff's "Methodology" Argument is Improper and Without Merit.

In the instant motion, Plaintiff also advances a new "excess horses" argument, claiming that BLM lacks the proper information and methodology to adequately determine whether excess wild horses are present on any given herd management area that BLM oversees. Dkt. No. 14 at 19. This argument fails for several reasons, as discussed below.

i. Plaintiff's Argument is Impermissible.

As an initial matter, Plaintiff's argument is an impermissible programmatic challenge. In her "methodology" argument, Plaintiff is not alleging that BLM failed to comply with the

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offered, only four are from professionals whose work arguably involves the care of horses. Of these, none are from individuals who personally witnessed the Owyhee gather. At best, these declarations may support a conclusion that Plaintiff's incomplete and inaccurate narrative contains instances of inhumane treatment. The declarations cannot, however, support a conclusion that the Owyhee gather itself was in any way inhumane.

National Environmental Policy Act, *see* Dkt. No. 1,[9] and she is not challenging BLM's decision to gather wild horses from the Owyhee Complex (i.e., the relevant final agency action), Dkt. No 14 at 2.[10] Instead, Plaintiff is alleging a program-wide failing that is not specific to the Owyhee gather. Dkt. No. 14 at 19. That is impermissible in an APA case such as the instant lawsuit.

"The Supreme Court has made clear that the APA does not allow 'programmatic challenges' … but instead requires that there be a specific final agency action which has an actual or immediate threatened effect." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*"); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) (noting that "a 'programmatic challenge' to agency policy is improper" (quoting *Lujan*, 497 U.S. at 891)). "Under the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891; *see SUWA*, 542 U.S. at 62. Plaintiff's "methodology" argument fails to challenge a discrete or final agency action. Instead, Plaintiff argues that BLM's Wild Horse and Burro Program does not have the tools necessary to identify excess wild horses on any herd management area. *See, e.g.*, Dkt. No. 14 at 19 ("BLM really has no method of determining 'excess horses'"). This is precisely the type of challenge that the Supreme Court found impermissible, and Plaintiff's argument must be rejected as a result. *See Lujan*, 497 U.S. at 890.

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[9] Plaintiff did not raise a claim under the National Environmental Policy Act ("NEPA") in her complaint. Dkt. No. 1. Accordingly, she cannot raise a NEPA argument in her PI motion (i.e., that deficiencies exist in the document that BLM prepared in accordance with NEPA – the Environmental Assessment). If Plaintiff believes that the gather was not properly analyzed under NEPA, she would need to bring a NEPA claim in order to properly challenge BLM's activity.

[10] Plaintiff expressly stated that she is not challenging BLM's final agency action with regard to the Owyhee gather. Dkt. No. 14 at 2 ("There is no challenge on how the defendants came to their records of decision ('RODs') even though the plaintiff doesn't agree with those RODs"). Rather, Plaintiff is challenging the alleged lack of a program-wide methodology for identifying excess wild horses. *See, e.g., id.*

ii. BLM had Sufficient Information and Methodology.

Even if Plaintiff's argument was not barred by Supreme Court precedent, which it is, Plaintiff's argument is without merit. Plaintiff argues that BLM must prepare a better methodology for identifying excess wild horses before conducting a wild horse gather. Dkt. No. 14 at 19-20. Not so. While the definition of "excess horses" is made clear by the Wild Horse Act, *see* Dkt. No. 11 at 12-13, Congress did not specify which elements BLM must rely upon in order to determine if there is an overpopulation of wild horses on a herd management area. Rather, Congress "exhorted" BLM "to consider (i) the inventory of federal public land, (ii) land use plans, (iii) information from environmental impact statements, [and] (iv) the inventory of wild horses. But the Agency is explicitly authorized to proceed with the removal of horses "in the absence of the information contained in (i-iv)." *Watt*, 694 F.2d at 1318 (emphasis added); 16 U.S.C. § 1333(b)(2)(iv) (BLM may make an excess determination "on the basis of all information currently available" to the agency). In other words, Congress left it up to BLM to decide what factors to rely upon when making an excess determination. The case law and the 1978 amendments make clear that BLM may conduct gather activities based on whatever information is currently available. Indeed, BLM, in its expert capacity as the federal agency in charge of managing wild horses, is entitled to an enormous amount of deference when deciding when and how to remove wild horses from the range. *Watt*, 694 F.2d at 1318. Congress entrusted BLM, not Plaintiff, to make those decisions, based on the information available.

Moreover, contrary to Plaintiff's assertions, it is agency practice to move forward with a wild horse gather only after BLM has sufficient information to justify the gather. BLM's guidance states:

> Before issuing a decision to gather and remove animals, the authorized officer shall first determine whether excess [wild horses and burros] are present and

> require immediate removal. In making this determination, the authorized officer shall analyze grazing utilization and distribution, trend in range ecological condition, actual use, climate (weather) data, current population inventory, wild horses and burros located outside the HMA in areas not designated for their long-term maintenance and other factors such as the results of land health assessments which demonstrate removal is needed to restore or maintain the range in a [thriving natural ecological balance].

BLM's Wild Horses and Burros Management Handbook at 19.[11] This is precisely what BLM did here. Ex. B (describing the need for the gather); Dkt. No. 11-1 at ¶¶ 22-28 (discussing water availability concerns); EA at 1 (discussing drought and a lack of forage, water and space due to overpopulation); EA at 5 (discussing "escalating situation" that prompted the need to remove excess wild horses to protect the herd and rangeland resources); EA at 5-6 (discussing wild horses leaving the Complex in search of forage, water and space).

In short, Plaintiff failed to show that BLM was arbitrary or capricious in using the information and methodology available to the agency prior to authorizing the gather. The language of the Act makes clear that Congress entrusted BLM to use its best judgment as to when to remove excess wild horses, based on whatever information was available to the agency. That is what happened here. BLM must be accorded deference as the expert agency in the field, and this Court must presume that BLM is acting in accordance with the law, absent evidence to the contrary. *Overton Park*, 401 U.S. at 416. Plaintiff's argument fails as a result.

II. Plaintiff Failed to Demonstrate Irreparable Harm.

Plaintiff also failed to show that she will suffer irreparable harm absent the issuance of a preliminary injunction. A specific finding of irreparable harm to the movant is one of the most important elements for the court to consider in deciding whether emergency injunctive relief is warranted. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (an

[11] BLM's Wild Horses and Burros Management Handbook is available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.11148.File.dat/H-4700-1.pdf (last visited Jan. 24, 2013).

injunction should issue only if it is "needed to guard against any present or imminent risk of likely irreparable harm.").[12] As an initial matter, Plaintiff's strategy of delay is strong evidence of an absence of irreparable harm. *See infra* at 26-27.

In any event, in order for Plaintiff to show that she is likely to suffer irreparable harm, she must at least show that a preliminary injunction is necessary to prevent something from happening. *See, e.g.*, 11A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure § 2948 ("It often has been observed that the purpose of the preliminary injunction is the preservation of the status quo and that an injunction may not issue if it would disturb the status quo") (citations omitted). Here, given the fact that the Owyhee Complex gather is complete, a preliminary injunction to maintain the status quo is wholly unnecessary. BLM does not intend to return to conduct the next gather at the Owyhee Complex for at least two to three years.[13] *See, e.g.*, EA at 91. By that time, the merits of this case will have been resolved on summary judgment. Accordingly, a denial of Plaintiff's motion will not prejudice Plaintiff. *See, e.g., Park Vill. Apartment Tenants Ass'n*, 636 F.3d at 1160 (an injunction will not issue if the person or entity seeking injunctive relief shows a mere "possibility of some remote future injury" or a "conjectural or hypothetical" injury). This militates strongly against granting the motion. *See*

[12] Whether a requested injunction is likely to harm the non-movant is "legally irrelevant" to the irreparable harm analysis. *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011).

[13] While it is possible to speculate that some unforeseen, unexpected circumstance could arise that would force BLM to return to the Owyhee Complex for a gather sooner than the agency presently anticipates, such speculation is not sufficient grounds to justify the extraordinary remedy of a preliminary injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 106 n.7 (1983). Rather, the "extraordinary" and "drastic" remedy of an injunction may issue only where a violation exists and must be narrowly tailored to remedy that violation. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009).

Mazurek, 520 U.S. at 972 (citations omitted) (a preliminary injunction is an "extraordinary and drastic" remedy); *Rey*, 577 F.3d at 1022 (a preliminary injunction must be narrowly tailored).[14]

Lastly, to whatever extent Plaintiff might be harmed by a future gather, that harm is not irreparable in light of the fact that wild horse gathers are designed to promote the health of the wild horses, thereby ensuring the continued existence of thriving, free-ranging herds on the range. *See Cloud Found. v. BLM*, 802 F. Supp. 2d 1192, 1207-08 (D. Nev. 2011). Irreparable harm to an individual interested in studying and enjoying a herd of horses cannot result from BLM improving the health of the herd.

III. The Balance of the Equities and the Public Interest Favor Denial.

As discussed above, BLM does not intend to conduct another helicopter gather at the Owyhee Complex for at least two to three years, and this case will be resolved on summary judgment before that occurs. In other words, denial of Plaintiff's motion will not result in any prejudice to the Plaintiff. Accordingly, the balance of the equities does not tip in Plaintiff's favor.

Indeed, if this Court were to enjoin BLM from conducting gather activities until this case could be resolved on the merits, the Court would effectively enjoin a vacuum. With no gather planned, this Court could not possibly narrowly tailor an injunction. The Court would not know the gather methods, the size of the herd, the topography, the condition of the range, and any number of other critical factors. An injunction that is not narrowly tailored would be inconsistent with applicable law, *see, e.g.*, *Rey*, 577 F.3d at 1022, and would certainly be inequitable.[15]

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[14] The Federal Defendants anticipate that Plaintiff may rely upon *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012) in an attempt to rebut this argument. But that decision, which dealt with mootness, is inapposite here. The Federal Defendants do not assert that the motion is moot. Rather, we argue that a denial of the motion will not result in prejudice or irreparable harm.

[15] Also, if this Court were to impose the types of restrictions in a preliminary injunction order that it imposed in its order denying Plaintiff's motion for a temporary restraining order, Dkt. No. 15, such conditions would not only violate the "narrowly tailored" requirement, but would also violate the general principle that preliminary injunctions are meant to preserve the status quo,

The public interest favors denying Plaintiff's motion as well. Blocking future gathers would interfere with BLM's mandate to manage for multiple uses of the range and to remove horses determined to be in excess of a thriving, natural ecological balance. This mandate directly relates to the public interest. Future gathers are necessary to promote a thriving, natural ecological balance and to protect the range from deterioration associated with overpopulation and to protect the wild horses themselves.

IV. Plaintiff's Own Delay Counsels Strongly Against Granting Her Motion.

The alleged urgency of Plaintiff's motion was entirely of her own making. BLM made public its decision to conduct a gather in the Owyhee herd management area on October 18, 2012. Tuscarora Field Office Decision Record at 2 ("it is anticipated that the Owyhee HMA will be the only area gathered within the [Tuscarora Field Office] based on funding and holding space limitations").[16] At that time, Plaintiff could have pursued two of her three merits arguments. Because BLM authorized the gather of wild horses from the Owyhee HMA on October 18, 2012, Plaintiff's "high AML" argument was ripe for review. Similarly, because BLM relied upon the information available leading up to October 18, 2012, Plaintiff's "methodology" argument was also ripe for review. There were no facts that Plaintiff needed to wait to develop in order to pursue these arguments. And while Plaintiff may have not had the alleged facts necessary to pursue her "inhumane treatment" argument on October 18, 2012, it is clear that she could have pursued this claim much earlier than she did. *See, e.g.*, Dkt. No. 2-2 at 2 (alleging significant use of cattle prods on November 30, 2012). If she had, her challenge could have been resolved via an

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rather than alter them. *See supra*. Such conditions would also raise significant concerns regarding Fed. R. Civ. P. 65, which requires that a preliminary injunction describe in reasonable detail the act or acts restrained, particularly given the lack of knowledge about the details of a future gather that the Court would be enjoining.

[16] Available at http://www.blm.gov/nv/st/en/fo/wfo/blm_programs/wild_horses_and_burros/Owyhee_Complex_Wild_Horse_Gather_2012/docs.html (last visited on Jan. 24, 2013).

orderly schedule, and BLM's contractor would not have stood idle out on the range for a week, costing taxpayers roughly $140,000. Dkt. No. 11-6 at ¶ 20. But Plaintiff chose to wait until the first day of the Owyhee HMA gather to file her complaint. Dkt. No. 1. She then waited until later that Friday afternoon to file her "emergency motion", depriving this Court of the decision space necessary to make a fully informed ruling. *See* Dkt. No. 2. Indeed, Plaintiff timed her filing in a manner that prevented this Court from even hearing from the Federal Defendants prior to ruling on Plaintiff's "emergency motion". *Id*.; Dkt. No. 7. Plaintiff filed her motion for a preliminary injunction the following week. *See* Dkt. No. 14. Plaintiff's strategy of delay counsels strongly against granting emergency injunctive relief. Dkt. No. 11 at 16-17 (citing to numerous cases holding that delay in seeking relief shows a lack of irreparable harm). Indeed, the fact that Plaintiff waited nearly three months to file her complaint and her motion for emergency relief is "inexcusable." *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975) (where a plaintiff waited 44 days to file a complaint and a motion for a TRO, the court found such action to be "inexcusable"). Plaintiff's motion should be denied as a result.

V. Plaintiff's Requested Relief is Overbroad.

Even if Plaintiff were entitled to emergency relief of some kind, which she is not, the relief requested by Plaintiff is overbroad. Dkt. No. 14 at 20.

A. Plaintiff's Request for New Population Surveys is Overbroad

For example, Plaintiff asks this Court to direct BLM to prepare population surveys prior to any gather activity in the Owyhee Complex over the course of the next decade. *Id*. It would be wholly inappropriate to grant this request.

As an initial matter, when Congress amended the Wild Horse Act in 1978, Congress made clear that BLM can remove excess wild horses "*on the basis of whatever information [the*

agency] has at the time of [its] decision." *Watt*, 694 F.2d at 1318. This directly refutes Plaintiff's assertion that she is entitled to injunctive relief that would compel BLM to prepare new population studies prior to every gather. Indeed, BLM was explicitly authorized to proceed with the removal of horses if such information was not available. *Id*. In short, BLM, in its expert capacity as the federal agency in charge of managing wild horses, is entitled to an enormous amount of deference when deciding when and how to remove wild horses from the range, and Plaintiff is not entitled to the relief that she seeks. *Watt*, 694 F.2d at 1318.

In any event, Plaintiff's requested relief is not narrowly tailored to address Plaintiff's alleged injury but rather to satisfy Plaintiff's desire to personally oversee (or to convince a judge to personally oversee) BLM's Wild Horse and Burro program. This is inappropriate. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799-800 (9th Cir. 2005) (injunctive relief must be "narrowly tailored" to remedy the specific violation at issue). Indeed, Plaintiff's request for relief goes directly against the whole concept of preliminary injunctions, which are intended to maintain the status quo, not create new substantive requirements. *See supra*.

Lastly, Plaintiff's request f, namely that population surveys be provided to the public 30 days prior to removal, has no basis in the law. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) ("There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.") (citation omitted).

B. Plaintiff's Request for Humane Care Guidelines is Overbroad.

Plaintiff's request that BLM be compelled to issue humane care guidelines is similarly overbroad. *See* Dkt. No. 14 at 20. It is not the place of a court to direct a federal agency to issue

agency guidance after deciding the merits of a case, let alone a motion for a preliminary injunction.[17] *See generally Vermont Yankee Nuclear Power Corp. V. Natural Res. Def. Council*, 435 U.S. 519, 549 (1978) (a court may not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004) (Courts are "to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve," because, otherwise, "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management"). Indeed, such an order would be contrary to the governing principles of injunctive relief. *See, e.g., Park Vill.*, 636 F.3d at1160 ("[a] mandatory injunction ... is particularly disfavored. In general, mandatory injunctions are not granted unless extreme or very serious damage will result[,] and are not issued in doubtful cases.") (quoting *Marlyn Nutraceuticals v. Mucos Pharma Gmbh & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)); *see also Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cnty.*, 550 F.3d 770 (9th Cir. 2008) (recognizing that preliminary injunctions are meant to preserve the status quo, not result in mandatory injunctions, which are "particularly disfavored") (citation omitted).

Moreover, in order to provide parties with fair notice of their duties under a court order, injunctive relief must be highly specific. "Injunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion." *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007) (citation omitted); *see also Rhoades v. Reinke*, 671 F.3d 856, 860 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 608

[17] As it happens, as part of an effort to develop guidance on a number of issues that involve BLM's Wild Horse and Burro program, BLM finalized a national humane care guidance document on January 23, 2013. The document was the product of months of work, and its creation was in no way motivated by the instant litigation.

(2011). Federal Rule of Civil Procedure 65 codifies this requirement, noting that injunctions must be specific in terms and "describe in reasonable detail and not by referring to the complaint or other document -- the act or acts to be restrained or required." Fed. R. Civ. P. (65)(d). "This mandate for specificity ensures that those against whom an injunction is drawn receive fair and precise notice of what conduct is prohibited." *Halo Mgmt., LLC v. Interland, Inc.*, 308 F. Supp. 2d 1019, 1027 (N.D. Cal. 2003) (citation omitted).

Even if it were the proper role of the public to dictate what is humane and inhumane to BLM, which it is not, Plaintiff has not provided the Court with any means by which it can meet this standard of precision. Gathers are complex and unpredictable projects – dependent upon hundreds of case-by-case decisions – where human and horse safety is constantly at stake. Determinations concerning herd speed and movement, helicopter tactics, and weaning, for instance, are often decisions that must be made in the moment, and that involve dozens of variables. Any injunction purporting to govern this activity with precision must account for the gather's complexity, and must do so, in part, by including detailed, informed guidance for many individual gather processes. Plaintiff's overbroad and undefined request for relief therefore weighs strongly against a preliminary injunction. Instead, Plaintiff's generalized request asks this Court to issue ambiguous and unprincipled instructions that, by their nature, contradict sound agency expertise and veterinary advice. Any injunction stemming from Plaintiff's submissions would be impermissibly vague and could hamstring agency discretion at times when that judgment is most needed to protect the safety and well-being of both humans and wild horses.

CONCLUSION

For the reasons discussed above, the Federal Defendants respectfully request that this Court deny Plaintiff's motion for emergency injunctive relief.

Dated: January 24, 2013

Respectfully Submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

LAURA LEIGH,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

CASE NO. 3:13-cv-00006-MMD-VPC

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Erik E. Petersen
ERIK E. PETERSEN