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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE CLOUD FOUNDATION, CRAIG)	3:11-cv-00459-HDM-VPC
DOWNER, and LORNA MOFFAT,)	
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
UNITED STATES BUREAU OF LAND)	
MANAGEMENT, KEN SALAZAR, ROBERT)	
ABBEY, GARY MEDLYN, and BRYAN)	
FUELL,)	
)	
Defendants.)	
_____)	

Before the court is the plaintiffs' motion for a preliminary injunction (#10). Defendants have responded (#22), and plaintiffs have replied (#28).

Plaintiffs, a nonprofit organization dedicated to protecting wild horses and two concerned persons,¹ seek to enjoin a Bureau of

¹ At oral argument, defendants properly conceded that plaintiffs have standing to bring this action.

1 Land Management ("BLM") round-up of wild horses in the Triple B,
2 Antelope Valley, and Maverick-Medicine Herd Management Areas
3 ("HMAs"), and the Cherry Springs Wild Horse Territory (collectively
4 the "Triple B Complex" or "HMAs") set to begin on July 16, 2011.

5 **Factual and Procedural Background**

6 Covering just over 1.68 million acres in eastern Nevada, the
7 Triple B Complex is home to a number of different wildlife species,
8 including sensitive migratory birds, greater sage-grouse, antelope,
9 mule deer, and wild free-roaming horses. (Environmental Assessment
10 ("EA") 3-4, 36-38). While livestock grazing is also allowed within
11 the Complex, over the last decade actual grazing has been less than
12 allotted in part due to drought and in part due to competition with
13 wild horses for forage. (*Id.* at 39, 41).

14 In order to manage the wild horses on its lands, the BLM
15 establishes appropriate management levels ("AMLs"), defined by BLM
16 as "the number of wild horses that can be sustained within a
17 designated HMA which achieves and maintains a thriving natural
18 ecological balance in keeping with the multiple-use management
19 concept for the area." (*Id.* at 4). In 2008, BLM prepared a
20 resource management plan ("RMP") which reaffirmed an AML of 250-518
21 wild horses for the Triple B HMA. (*Id.* at 4-5). AMLS of 166-276
22 wild horses for the Maverick-Medicine HMA and 16-27 horses for the
23 Antelope Valley HMA, initially established in a 1993 RMP, were last
24 adjusted to their current levels through final multiple use
25 decisions in 2001. (*Id.* at 5). The AML of 40-68 wild horses for
26 the Cherry Springs Wild Horse Territory was established in a 1993
27 management plan. (*Id.*) The current AMLs for the Triple B Complex
28 thus total between 472 and 889 horses. (*Id.*) The record does not

1 reflect that the plaintiffs objected to the AMLs when they were
2 established or reaffirmed through RMPs and other decisions in 1993,
3 2001, and 2008.

4 In 2006, the BLM removed what it had determined to be excess
5 horses in the Triple B Complex, leaving 610 horses in the Complex.
6 (*Id.*) An aerial direct count inventory of the Complex in November
7 2010 observed 1,832 horses. (*Id.*) Based on this direct count and
8 the historic growth rate of the horses, BLM estimates that as of
9 this summer, the Triple B Complex likely contains about 2,198 wild
10 horses. (*Id.*) This number exceeds the low-range AML by 1,726
11 horses. Accordingly, BLM has determined that it has the obligation
12 under the Wild Free-Roaming Horses and Burros Act to remove the
13 excess horses from the range. 16 U.S.C. § 1333(b)(2).

14 On January 7, 2011, BLM issued a Preliminary Environmental
15 Assessment proposing the gather. The proposal included rounding up
16 all 2,198 horses and re-releasing 472 into the HMAs.² BLM would
17 select horses for release with the goal of skewing the sex ratio to
18 60% male, 40% female. In addition, the mares would be treated with
19 an immunocontraceptive drug designed to prevent pregnancy for two
20 years. Unless adopted or sold, the horses that were not released
21 would be taken to long-term holding facilities in the mid-western
22 or eastern part of the country where they would remain.

23 The Preliminary Environmental Assessment was published for
24 public review and comment. After considering the comments
25 received, BLM issued its Decision Record, Finding Of No Significant
26 Impact and Final Environmental Assessment ("EA") on May 17, 2011.

27
28 ² The EA recognizes that round-ups have historically achieved gather
efficiencies of about 80%. (EA 26).

1 The EA anticipated that the round-up would begin in early July or
2 after October 1, 2011.³ (EA 10 n.2). Pursuant to stipulation, BLM
3 has agreed to wait until July 16, 2011, to begin gathering the wild
4 horses.

5 **Preliminary Injunction Standard**

6 "An injunction is a matter of equitable discretion and is an
7 extraordinary remedy that may only be awarded upon a clear showing
8 that the plaintiff is entitled to such relief." *Earth Island Inst.*
9 *v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (internal quotation
10 marks omitted).

11 To obtain a preliminary injunction, plaintiffs must show: (1)
12 they will probably prevail on the merits; (2) they will likely
13 suffer irreparable injury if relief is denied; (3) the balance of
14 equities tips in their favor; and (4) an injunction is in the
15 public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555
16 U.S. 7, 129 S. Ct. 365, 374 (2008).

17 Alternatively, an injunction may issue under the "sliding
18 scale" approach if there are serious questions going to the merits
19 and the balance of hardships tips sharply in plaintiffs' favor, so
20 long as plaintiffs still show a likelihood of irreparable injury
21 and that an injunction is in the public interest. *Alliance for the*
22 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

23 "Serious questions are those which cannot be resolved one way or
24 the other at the hearing on the injunction." *Bernhardt v. Los*
25 *Angeles County*, 339 F.3d 920, 926-27 (9th Cir. 2003) (internal

26

27 ³ Defendants assert starting the round-up in October was considered
28 only in the event BLM could not secure funding for the gather this year;
because BLM has obtained funding for this year, the round-up is their
priority for this year. (Def. Opp'n 28 n.16).

1 quotation marks omitted) (citing *Republic of the Philippines v.*
2 *Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)). They "need not
3 promise a certainty of success, nor even present a probability of
4 success, but must involve a 'fair chance of success on the
5 merits.'" *Marcos*, 862 F.2d at 1362.

6 **Analysis**

7 **I. Likelihood of Success/Serious Questions**

8 Plaintiffs assert that the BLM's decision violates both the
9 Wild Free-Roaming Horse and Burros Act ("Wild Horse Act"), 16
10 U.S.C. §§ 1331 *et seq.*, and the National Environmental Policy Act
11 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* Judicial review of plaintiffs'
12 claims is governed by § 706 of the Administrative Procedure Act
13 ("APA"). Under the APA, the court must set aside agency decisions
14 that are "arbitrary, capricious, an abuse of discretion, or
15 otherwise not in accordance with law" or "without observance of
16 procedure required by law." 5 U.S.C. § 706(2)(A),(D).

17 Although the review of an agency decision is "searching and
18 careful," the "arbitrary and capricious standard is narrow" and the
19 court cannot substitute its judgment for the agency. *Ocean*
20 *Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir.
21 2005) (internal quotation marks omitted). "This deferential
22 standard is designed to 'ensure that the agency considered all of
23 the relevant factors and that its decision contained no 'clear
24 error of judgment.'" *Pac. Coast Fed'n of Fishermen's Ass'n, Inc.*
25 *v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir.
26 2001). In deciding whether an agency violated the arbitrary and
27 capricious standard, the court must ask whether the agency
28 "articulated a rational connection between the facts found and the

1 choice made." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*,
2 273 F.3d 1229, 1236 (9th Cir. 2001). "Agency action should be
3 overturned only when the agency has 'relied on factors which
4 Congress has not intended it to consider, entirely failed to
5 consider an important aspect of the problem, offered an explanation
6 for its decision that runs counter to the evidence before the
7 agency, or is so implausible that it could not be ascribed to a
8 difference in view or the product of agency expertise.'" *Pac.*
9 *Coast*, 265 F.3d at 1034. A decision that is "inconsistent with a
10 statutory mandate or that frustrate[s] the congressional policy
11 underlying a statute" cannot be upheld. *Ocean Advocates*, 402 F.3d
12 at 859.

13 The court reviews an agency's interpretation of a statute
14 under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*,
15 467 U.S. 837, 842-43 (1984). *Chevron* dictates a two-step process.
16 At step one, "if, employing the traditional tools of statutory
17 construction," the court determines that "Congress has directly and
18 unambiguously spoken to the precise question at issue, then the
19 unambiguously expressed intent of Congress controls." *Nw. Env'tl.*
20 *Defense Center v. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011)
21 (internal quotation marks and citation omitted) (citing *Chevron*,
22 467 U.S. at 843). At step two, if the court determines that the
23 statute is "silent or ambiguous with respect to the specific
24 issue," it must determine "whether the agency's interpretation is
25 based on a permissible construction of the statute. An agency
26 interpretation based on a permissible construction of the statute
27 controls." *Id.* (citing *Chevron*, 467 U.S. at 844).

28

1 **A. Wild Horse Act Violations**

2 Under the Wild Horse Act, the Secretary of the Interior is
3 tasked with protecting and managing the wild horses on the lands it
4 controls. *Id.* §§ 1332(a),(e), 1333(a). BLM, as designate of the
5 Secretary, has a "great deal of discretion" in carrying out its
6 duties, *Am. Horse Prot. Ass'n, Inc. v. Frizzell*, 403 F. Supp. 1206,
7 1217 (D. Nev. 1975) (citing legislative history), but it must do so
8 "in a manner that is designed to achieve and maintain a thriving
9 natural ecological balance." *Id.* § 1333(a).

10 When the Act was passed in 1971, Congress was concerned that
11 wild horses were vanishing from the West; the Act therefore
12 endeavored to protect wild horses "from capture, branding,
13 harassment, or death" and mandated that they "are to be considered
14 in the area where presently found, as an integral part of the
15 natural system of the public lands." 16 U.S.C. § 1331. By 1978,
16 however, conditions had changed, and Congress became concerned that
17 wild horses were beginning to overpopulate and threaten the
18 viability of the range. *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694
19 F.2d 1310, 1316 (D.C. Cir. 1982) (citing H.R. Rep. No. 95-1122,
20 95th Cong., 2d Sess. 23 (1978), which stated: "In the case of wild
21 horses and burros in the Western States, Congress acted in 1971 to
22 curb abuses which posed a threat to their survival. The situation
23 now appears to have reversed, and action is needed to prevent a
24 successful program from exceeding its goals and causing animal
25 habitat destruction."). Congress determined that amendments were
26 required "to facilitate the humane adoption or disposal of excess
27 wild free-roaming horses and burros which because they exceed the
28 carrying capacity of the range, pose a threat to their own habitat,

1 fish, wildlife, recreation, water and soil conservation, domestic
2 livestock grazing, and other rangeland values." Pub. L. 95-514, §
3 2(a)(6), 92 Stat. 1803, 43 U.S.C. § 1901(a)(6). The Act was thus
4 amended to give BLM greater authority to manage the wild horses on
5 its lands and to require BLM to immediately remove "excess" horses.
6 Pub. L. 95-514, § 14.

7 The 1978 amendments "struck a new balance between protecting
8 wild horses and competing interests in the resources of the public
9 range." *Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 450
10 (S.D.N.Y. 2010) (internal quotation marks omitted). In fact,
11 "[t]he main thrust of the 1978 amendments [wa]s to cut back on the
12 protection the Act affords wild horses, and to reemphasize other
13 uses of the natural resources wild horses consume." *Am. Horse*
14 *Prot. Ass'n, Inc. v. Watt*, 694 F.2d at 1316. Thus, the amendments
15 made "explicit what was, at most, implicit in the 1971 Act: public
16 ranges are to be managed for multiple uses, not merely for the
17 maximum protection of wild horses." *Id.* at 1317.

18 The 1978 amendments articulated congressional intent that
19 prompt administrative action be taken to control the excess wild
20 horse population. Section 1333(b)(2) of the amendments states that
21 excess horses shall be removed immediately. As the United States
22 Court of Appeals for the District of Columbia held: "The statute
23 thus clearly conveys Congress's view that BLM's findings of wild
24 horse overpopulations should not be overturned quickly on the
25 ground that they are predicated on insufficient information." *Id.*
26 at 1318.

27 In response to an inquiry by the court at the hearing on this
28 motion, defendants represented that BLM has periodically conducted

1 round-ups in Nevada, fulfilling its obligations under the Act to
2 remove excess horses in order to maintain a thriving natural
3 ecological balance. The round-ups have not historically been
4 detrimental to the horses.

5 Plaintiffs assert that in proposing to conduct the instant
6 round-up, BLM violated the Act in three ways: (1) by failing to
7 make a determination that there were "excess" wild horses before
8 deciding to remove them; (2) by failing to manage the HMA
9 "principally" for wild horses and burros; and (3) by failing to
10 manage the wild horses at the "minimal feasible level."

11 **i. Failure to Make Excess Horse Determination**

12 "Excess" wild horses are those that "must be removed from an
13 area in order to preserve and maintain a thriving natural
14 ecological balance and multiple-use relationship in that area."
15 *Id.* § 1332(f). The BLM is required to maintain an inventory of
16 wild horses on public lands in order to:

17 make determinations as to whether and where an
18 overpopulation exists and whether action should be taken
19 to remove excess animals; determine appropriate management
20 levels of free-roaming horses and burros on these areas of
21 the public lands; and determine whether appropriate
22 management levels should be achieved by the removal or
23 destruction of excess animals, or other options (such as
24 sterilization, or natural controls on population).

25 *Id.* § 1333(b)(1). As stated above, whenever the BLM determines
26 that an overpopulation exists, it must "immediately remove excess
27 animals from the range so as to achieve appropriate management
28 levels." *Id.* § 1333(b)(2).

29 Pursuant to this statutory directive, BLM establishes
30 appropriate management levels ("AMLs") of wild horses on the
31 ranges. *Id.* § 1333(b)(1). AMLs are defined by BLM as "the number

1 of wild horses that can be sustained within a designated HMA which
2 achieves and maintains a thriving natural ecological balance in
3 keeping with the multiple-use management concept for the area.”
4 (EA 4). Range AMLs may be established in a number of ways,
5 including through the preparation of “resource management plans”
6 (“RMPs”). (See Pl. Mot. Ex. 4 at 46); *infra* sec. I.A.ii). AMLs
7 are generally not established or adjusted as part of a decision to
8 round up excess horses. (*Id.* at 47).

9 Defendants assert that the “applicable” RMP setting AMLs was
10 last revised in 2008. The 2008 RMP related only to the Triple B
11 AML, which is by far the largest HMA. (See Def. Opp’n Medlyn Decl.
12 ¶ 21-22 (noting that the 2008 RMP set an AML of 250-518 wild horses
13 for the Triple B HMA but not discussing AMLs for the other HMAs);
14 EA 4-5). The Maverick-Medicine AML was adjusted to its current
15 level through a combination of decisions in 1994, 1998, and 2001.
16 The Antelope Valley AML was last adjusted in 2001, and the Cherry
17 Springs’ AML was established in 1993. (EA 5).

18 Plaintiffs argue that instead of basing its excess horse
19 determination on the “thriving natural ecological balance”
20 standard, BLM improperly relied on the AMLs and the fact that the
21 number of estimated horses exceeded the AMLs. Plaintiffs contend
22 that the AMLs established “several years ago” do not take into
23 account the current ecological state of the HMAs and that a
24 thriving natural ecological balance may change based on several
25 factors, including weather patterns and livestock grazing usage.
26 In fact, plaintiffs assert, the EA contains misleading
27 documentation as to the current state of the Triple B Complex,
28 which they claim is thriving due to the recent record rainfall in

1 the area. Although the EA concludes that wild horses are a
2 "contributing factor" to the failure to meet standards in the HMAs,
3 plaintiffs argue that these statements are conclusory and
4 unsupported by any evidence. They argue that even though the EA
5 ostensibly relied on various standard determination documents
6 ("SDDs") - reports of the ecological state in various discrete
7 areas of the Triple B Complex - those documents do not support a
8 finding that wild horses are threatening the natural ecological
9 balance. Specifically, plaintiffs note, most of the documents do
10 not mention wild horses as a problem, and those that do simply
11 indicate they are a "contributing factor" without identifying the
12 relative degree of contribution. Plaintiffs also assert that BLM
13 exaggerates wild horse forage utilization as compared to livestock.
14 Plaintiffs suggest that most of the environmental degradation
15 within the HMAs is due to livestock grazing.

16 Clearly the BLM is entitled to use the AMLs as a tool in
17 determining whether an overpopulation of horses exists. The BLM
18 has "significant discretion" in establishing AMLs. *In Defense of*
19 *Animals v. U.S. Dep't of the Interior*, 737 F. Supp. 2d 1125, 1134
20 (E.D. Cal. 2010) (citing 16 U.S.C. § 1133(b)). The AMLs here were
21 developed over the course of several years, and involved a
22 determination of exactly how many horses can be sustained within
23 the Triple B Complex while at the same time maintaining a thriving
24 natural ecological balance over the long-term. The establishment
25 of the AMLs thus explicitly considered the very standard plaintiffs
26 assert BLM ignored: a thriving natural ecological balance.

27 Plaintiffs argue here that the AML is not a reliable indicator
28 of a thriving natural ecological balance, however, primarily

1 because it does not consider the recent year of heavy rainfall.
2 That rainfall in the area may have been at record levels in the
3 past year does not render the AMLs unreliable. The BLM is tasked
4 with the long-term health of the range and must manage in line with
5 the multiple-use parameters set by Congress. "[W]ise range
6 management techniques dictate that a given area must be restricted
7 in use to those numbers that can be supported adequately and still
8 allow the range to replenish vegetation." *Am. Horse Prot. Ass'n,*
9 *Inc. v. Frizzell*, 403 F. Supp. at 1209, 1217-18, 1222 (denying
10 plaintiffs' motion for preliminary injunction to stop a wild horse
11 round-up despite the fact that the range had experienced a
12 particularly bountiful year of rainfall and appeared to be
13 flourishing as a result). Defendants correctly assert that one
14 year of above-average rainfall does not mean the rangeland health
15 has been improved over the long-term (Def. Opp'n Fuell Decl. ¶¶ 40-
16 41). In fact, the record reflects that areas of Triple B are still
17 in need of water, and in order to meet the current demand BLM has
18 hauled several truckloads of water to the areas within the Triple B
19 Complex since June. (*Id.* ¶ 18). At the hearing on this motion,
20 defense counsel represented that one of those areas to which water
21 was trucked in June is now dry.

22 Further, "even if some of the HMA's resources are not
23 currently taxed by the existing horse and burros numbers, they soon
24 will be given the animals' rapidly increasing populations." *In*
25 *Defense of Animals v. U.S. Dep't of the Interior*, 737 F. Supp. 2d
26 at 1134. The wild horse population in the Triple B Complex has
27 been growing at a rate of 20-25% annually; from 2006 to the present
28 the number of horses nearly quadrupled from 610 to 2,198. (EA 5).

1 Absent action by BLM, the wild horse population will continue to
2 grow at this rate, and within two years the population will reach
3 an estimated 2,638 horses. (*Id.* at 12). If this were to happen,
4 both the horses and the rangeland would suffer. In fact, the EA
5 warns that if nothing is done the rangeland vegetative and water
6 resources will be taxed such that there will be no potential for
7 their recovery. (*Id.* at 34). A failure of the BLM to intervene,
8 thus, would be a failure to maintain a thriving natural ecological
9 balance within the range.

10 "[T]he test as to appropriate wild horse population levels is
11 whether such levels will achieve and maintain a thriving natural
12 ecological balance on the public lands." *Dahl v. Clark*, 600 F.
13 Supp. 585, 595 (D. Nev. 1984). Although AML is defined by
14 reference to a thriving natural ecological balance and thus
15 explicitly incorporates this standard, BLM's Wild Horse and Burro
16 Management Handbook states: "Justifying a removal [of horses] based
17 on nothing more than the established AML is not acceptable." (Pl.
18 Mot. Ex. 4 at 47). Even so, two courts have upheld excess horse
19 determinations based primarily on the AML. See *In Defense of*
20 *Animals v. U.S. Dep't of the Interior*, 737 F. Supp. 2d at 1133-34;
21 *Cloud Found., Inc. v. Kempthorne*, 2008 WL 2794741, at *1 (D. Mont.
22 2008).

23 In the case at bar, the court does not need to determine that
24 reliance on the AML is sufficient, however. A review of the EA
25 indicates that BLM based its excess horse determination on both the
26 AMLs as well as other evidence indicating that wild horses were
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1 degrading the range habitat.⁴ Specifically, the EA cites data
2 showing moderate to heavy utilization of forage by wild horses and
3 heavy to severe use of riparian areas. (EA 24-25, 34-35).
4 Plaintiffs challenge this data as exaggerating horse forage
5 utilization compared to livestock utilization.⁵ Livestock grazing
6 allotments are controlled through other processes and are not
7 appropriately addressed in this round-up decision.⁶ Plaintiffs'
8 assertions with respect to the livestock have little relevance to
9 the excess horse determination in this case.

10 Because the BLM considered both AMLs and other evidence as to
11 current wild horse impact on the range, the BLM properly decided
12 there were excess horses based on the "thriving natural ecological
13 balance" standard.

14 Further, although the Act directs the BLM to consider the
15 current inventory of horses, information contained in RMPs, and

16 _____
17 ⁴ To plaintiffs' assertion that the EA relied primarily on SDDs that
18 do not support a conclusion that wild horses are contributing to the
19 degradation of the range, defendants respond that the purpose of the SDDs
20 is not to determine the degree of wild horse impact on the range but instead
21 to determine the degree of livestock impact. Plaintiffs reply that pursuant
22 to BLM's own guidance the SDDs are intended to consider *both* livestock
23 grazing *and* wild horse grazing utilization. While the court's own review
24 of the SDDs suggests that their primary purpose is to determine whether
25 livestock are negatively impacting range conditions, the "guidance" cited
26 by plaintiffs does indeed discuss the impact of wild horses. The court need
27 not decide this issue, however. Regardless of the SDDs' intended purpose,
28 the mere absence of discussion of wild horse impacts does not equate with
a conclusion that wild horses are not impacting the range. That the SDDs
do not fully discuss wild horse impacts is therefore not probative.

⁵ Other than this argument, plaintiffs have provided no evidence
suggesting the data is inaccurate.

⁶ As will be discussed in the next section, livestock grazing
allotments are established through the process mandated by the Federal Land
Policy and Management Act of 1976 ("FLMPA"), 43 U.S.C. § 1701, *et seq.*, and
may only be changed through that process. (See *infra* sec. I.A.ii).
Accordingly, the relative contribution of livestock to wild horses to
degradation of the range is an improper consideration here.

1 other relevant factors in determining whether there is an
2 overpopulation, it also allows the BLM to act "in the absence of
3 [that] information . . . on the basis of all information currently
4 available" to it. 16 U.S.C. § 1333(b)(2). The Act therefore
5 directs that horses 'shall' be removed 'immediately' once
6 [BLM] determines, *on the basis of whatever information [it]
7 has at the time of [its] decision*, that an overpopulation
8 exists. The statute thus clearly conveys Congress's view
9 that BLM's findings of wild horse overpopulations should
10 not be overturned quickly on the ground that they are
11 predicated on insufficient information.

12 *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d at 1318 (emphasis
13 original). The BLM is given great deference in both establishing
14 AMLs and in managing the wild horses on its lands. *Habitat for
15 Horses v. Salazar*, 745 F. Supp. 2d at 453; *In Defense of Animals v.
16 U.S. Dep't of the Interior*, 737 F. Supp. 2d at 1133. BLM officials
17 may act on all the information they have at the time of their
18 decision. The declarations cited by defendants in their opposition
19 brief clearly demonstrate that at the time of BLM's decision,
20 officials were aware of a significant horse overpopulation and
21 observed firsthand its effects on the range. (See Def. Opp'n
22 Thompson Decl. ¶¶ 4, 14-16, 23; *id.* Fuell Decl. ¶¶ 4, 15-17, 29).
23 The BLM has the authority to remove excess horses to the degree and
24 in the manner contemplated in this action. Plaintiffs have failed
25 to show either a likelihood of success on, or serious questions
26 going to, the merits of this claim.

27 **ii. Failure to Manage Range "Principally" for Wild Horses**

28 BLM has the authority to designate "specific ranges on public
lands as sanctuaries" for wild horses. *Id.* § 1333(a). Ranges are
defined as being "the amount of land necessary to sustain an
existing herd or herds of wild free-roaming horses and burros,

1 which does not exceed their known territorial limits, and which is
2 devoted principally but not necessarily exclusively to their
3 welfare in keeping with the multiple-use management concept for the
4 public lands." *Id.* § 1332(c).

5 Plaintiffs argue that the definition of a range as land
6 "devoted principally but not necessarily exclusively" to wild horse
7 and burro welfare means that BLM must manage the HMA primarily for
8 the wild horses' benefit. Specifically, plaintiffs argue, BLM's
9 decision in this case effectively devotes the HMAs principally to
10 livestock, as under it the livestock will have five times the
11 amount of animal month units ("AMUs") than the wild horses.
12 Plaintiffs argue that BLM's failure to devote the HMAs principally
13 to the wild horses and burros is a violation of the Act.

14 Defendants respond that neither the law nor the statute
15 supports plaintiffs' assertion. Several courts have held that BLM
16 is required to manage wild horses as part of the public lands and
17 in line with multiple-use policies and that the Act cannot be read
18 to give horses priority over any other species on the range. See
19 *In Defense of Animals v. U.S. Dep't of the Interior*, 737 F. Supp.
20 2d at 1134-35; *Am. Horse Prot. Ass'n, Inc. v. Frizzell*, 403 F.
21 Supp. at 1220-21; see also *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694
22 F.2d at 1317 (holding that BLM must manage herds in line with
23 multiple-use policies). Such a conclusion is unavoidable,
24 defendants argue, in light of BLM's obligation under the statute to
25 immediately remove excess horses that are threatening to degrade
26 the habitat.

27 As the court has observed, the 1978 amendments to the Act
28 expanded BLM's authority to remove excess wild horses from the

1 range if it determined the horse population was threatening a
2 thriving natural ecological balance. "The main thrust of the 1978
3 amendments [wa]s to cut back on the protection the Act affords wild
4 horses, and to reemphasize other uses of the natural resources wild
5 horses consume." *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d at
6 1316.⁷ The amendments made clear that "public ranges are to be
7 managed for multiple uses, not merely for the maximum protection of
8 wild horses." *Id.* at 1317. In fact, even before the 1978
9 amendments, a court in this district rejected a claim that BLM
10 should have reduced the number of livestock on the range instead of
11 removing horses. *Am. Horse Prot. Ass'n, Inc. v. Frizzell*, 403 F.
12 Supp. at 1220-21.⁸ The court correctly held that the regulations
13 and statutes indicated that the range was to be maintained for all
14 the various elements of the ecosystem in line with the multiple-use
15 concept, and that no animal should be given a higher priority than
16 another. *Id.*

17 The language "devoted principally but not necessarily
18 exclusively" must be considered in the context of the plain
19 statutory mandate that horses be protected "in keeping with the
20 multiple-use management concept for the public lands." Under the
21 statute, BLM has an express obligation to remove excess horses from

22
23 ⁷ Plaintiffs argue that this case is inapposite because "it was decided
24 before *Chevron* and never reached the question whether the BLM's current
25 round-up plan violates substantive requirements of the Wild Horse Act."
26 (Pl. Mot. 19). It is unclear what impact either of these things has on the
circuit court's observation, relevant here, that the 1978 Amendments cut
back on wild horse protection and that ranges are to be managed for multiple
uses. Plaintiffs' attempt to distinguish this case is thus unavailing.

27 ⁸ Plaintiffs argue that this case is also inapposite because it did not
28 address the "devoted principally" language at issue here. However, the
"devoted principally" language was part of the statute when the court
decided this case.

1 the range and to devote the range "principally" to the welfare of
2 the remaining non-excess horses, so long as the BLM's determination
3 of "excess" is reasonable.

4 Further, the Federal Land Policy and Management Act of 1976
5 ("FLMPA"), 43 U.S.C. § 1701, *et seq.* also requires BLM to manage
6 public lands under principles of multiple use and sustained yield.
7 *Id.* § 1732(a). The Wild Horse Act functions alongside FLMPA, and
8 in enacting the FLMPA Congress asserted that it was committed to
9 "continue the policy of protecting wild free-roaming horses and
10 burros from capture, branding, harassment, or death, while at the
11 same time facilitating the removal and disposal of excess wild
12 free-roaming horses and burros which pose a threat to themselves
13 and their habitat and to other rangeland values." *Id.* §
14 1901(b)(4).

15 The BLM executes its duties under the FLMPA by preparing
16 "resource management plans" ("RMPs"). *Id.* § 1712. Livestock
17 grazing levels and AMLs are set within the RMPs. Challenges to the
18 allocations set by the RMP must be made through the administrative
19 process. See 43 C.F.R. §§ 1610.1 *et seq.* Accordingly, plaintiff's
20 argument that the range is devoted principally to livestock and not
21 to the wild horses must be asserted through the RMP process. See
22 *In Defense of Animals v. U.S. Dep't of the Interior*, 737 F. Supp.
23 2d at 1134. There is no evidence plaintiffs have ever challenged
24 the applicable RMPs.

25 Because the public lands must be managed with multiple uses in
26 mind, the court concludes that the BLM's decision to allocate the
27 resources as it has done in this case is not arbitrary, capricious,
28 or contrary to law. Plaintiffs have thus failed to show either a

1 likelihood of success on, or serious questions going to, the merits
2 of this claim.

3 **iii. Failure to Manage at the Minimal Feasible Level**

4 Under the Act, BLM is tasked with protecting and managing the
5 wild horses on its lands. 16 U.S.C. §§ 1332(a),(e), 1333(a). BLM
6 must manage the horses at "the minimal feasible level" and "in a
7 manner that is designed to achieve and maintain a thriving natural
8 ecological balance on the public lands." *Id.* § 1333(a).

9 Plaintiffs argue that BLM selected the most invasive
10 alternative for the round-up, Alternative A, rejecting less
11 invasive alternatives, such as Alternative B, which would not have
12 gathered all the horses but only those that were excess. Because
13 BLM selected Alternative A, plaintiffs contend, all of the horses
14 in the Triple B Complex will be gathered and harassed so more
15 horses will be split from family bands, all the mares will be
16 treated with contraceptives and branded with a "freeze mark," and
17 BLM will artificially adjust the sex ratio of horses on the range.
18 Plaintiffs assert this is a violation of BLM's duty to manage at
19 the minimal feasible level.

20 Defendants respond that because past round-ups have managed to
21 gather only about 80% of the existing wild horse population, it is
22 unlikely that all horses on the range will be gathered and
23 disturbed. Further, they argue that the law fully supports all
24 techniques BLM plans to employ in this round-up and that BLM has
25 wide discretion in determining how to manage the wild horses.
26 Finally, they assert that Alternative B would not be less invasive;
27 because the mares would not be treated with contraceptives, the
28 horse population would grow at a faster rate, thus necessitating

1 another gather earlier than would be required under Alternative A.

2 As the defendants correctly point out, gathering non-excess
3 horses into short-term holding facilities and returning them to the
4 range, as well as treating mares with contraceptives, are actions
5 authorized by law. See 16 U.S.C. § 1333(b)(1); *In Defense of*
6 *Animals v. Salazar*, 675 F. Supp. 2d 89, 97 (D.D.C. 2009). The
7 splitting of horses from their family bands would appear to be
8 inevitable in gathers of this type, and removal of excess horses
9 from the range is not only authorized but mandated. 16 U.S.C. §
10 1333(b)(2). Freeze-marking of mares treated with
11 immunocontraceptives is not an action taken without purpose; it is
12 intended to allow the BLM to track treated mares in order to
13 provide insights into gather efficiency and results in only
14 slightly increased stress levels during handling. (EA 27).
15 Alternative B would result in more gathers, and necessarily more
16 interference and potential harassment of the wild horses. (*Id.* at
17 33). Finally, plaintiffs have failed to show that a gather of this
18 magnitude is not warranted in order to protect the rangeland
19 habitat and maintain a thriving natural ecological balance. As
20 discussed above, the horse population has grown at an incredibly
21 fast pace, and their numbers are more than five times the lower
22 range AML. Absent intervention, both the horses and the range will
23 suffer. Accordingly, the court concludes that plaintiffs are not
24 likely to succeed on, and have not shown serious questions going
25 to, the merits of their claim that BLM is not managing at the
26 minimal feasible level.

27 **B. NEPA Violation - Failure to Consider Alternatives to Action**

28 NEPA requires federal agencies to prepare an environmental

1 impact statement ("EIS") for any major federal action that
2 significantly affects the quality of the human environment. 42
3 U.S.C. § 4332(2)(C). Before preparing the EIS, agencies may opt to
4 prepare an environmental assessment ("EA"). *Blue Mountains*
5 *Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.
6 1998) (quoting 40 C.F.R. § 1508.9). If in preparing the EA the
7 agency determines that the project would have no significant
8 impact, it is not then required to prepare an EIS.⁹ 40 C.F.R. §
9 1501.4(b),(e).

10 While the EA, like the EIS, must discuss "appropriate" and
11 "reasonable" "alternatives to recommended courses of action in any
12 proposal which involves unresolved conflicts concerning alternative
13 uses of available resources," 42 U.S.C. § 4332(2)(E); see also 40
14 C.F.R. § 1508.9(b); *Native Ecosystems Council v. U.S. Forest Serv.*,
15 428 F.3d 1233, 1245 (9th Cir. 2005), "an agency's obligation to
16 consider alternatives under an EA is a lesser one than under an
17 EIS," *Native Ecosystems*, 428 F.3d at 1246. "In rejecting any
18 alternatives, the agency must only include *brief* discussions . . .
19 of alternatives required by 42 U.S.C. § 4332(2)(E). . . ." *Id.*
20 (emphasis added). An agency may reject an alternative without
21 detailed discussion so long as it considered the alternative and
22 provided "an appropriate explanation as to why [it] was
23 eliminated." *Id.*

24 The range of reasonable alternatives that must be considered
25 depends on the "nature and scope of the proposed action." *Idaho*
26 *Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992).

27

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⁹ Plaintiffs have not argued here that BLM should have prepared an EIS.

1 For this reason, an agency "cannot define its objectives in
2 unreasonably narrow terms" such that "only one alternative . . .
3 would accomplish the goals of the agency's action." *Nat'l Parks &*
4 *Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070
5 (9th Cir. 2010) (citing *City of Carmel-By-The-Sea v. U.S. Dept. of*
6 *Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)). Even so, agencies
7 are afforded "considerable discretion to define the purpose and
8 need of a project." *Friends of Se. Future v. Morrison*, 153 F.3d
9 1059, 1066 (9th Cir. 1998). Courts review an agency's statement of
10 purpose and need under a "reasonableness" standard. *Id.* at 1066-
11 67.

12 Plaintiffs assert that BLM improperly rejected an alternative
13 that would have reduced livestock grazing levels, thereby requiring
14 removal of fewer wild horses. They assert two bases on which BLM
15 improperly rejected this alternative. First, plaintiffs argue that
16 BLM defined its objective in unreasonably narrow terms - to achieve
17 a low AML of 472 - and therefore all alternatives that did not
18 reduce the wild horse population to 472 were not considered in
19 detail. Second, plaintiffs argue that the reasons BLM gave for
20 refusing to consider this alternative in detail were arbitrary and
21 capricious.

22 First, defendants respond that BLM's purpose and need
23 statement was reasonable because it fully complied with the
24 directives of the Wild Horse Act and the goals and objectives of
25 the relevant RMPs. Second, defendants contend that BLM provided
26 appropriate reasons for rejecting the livestock reduction
27 alternative. Specifically, the EA explained that the livestock
28 alternative was outside the scope of the project and inconsistent

1 with the relevant RMPs, and that changes to livestock grazing
2 allotments must be made through the process outlined in the FLMPA
3 regulations. (EA 16-17; Def. Opp'n Medlyn Decl. ¶ 24). It further
4 explained that it would be inconsistent with BLM's duty to
5 immediately remove excess horses.¹⁰ (EA 16).

6 BLM defined its purpose and need as follows:

7 to remove excess wild horses from the HMAs in order to
8 maintain the wild horse populations within the established
9 AML ranges for the HMAs, to prevent undue or unnecessary
10 degradation of the public lands and to protect rangeland
11 resources from deterioration associated with excess wild
12 horses within the HMAs, and to restore a thriving natural
13 ecological balance and multiple use relationship on the
14 public lands consistent with the provisions of Section 1333
15 (a) of [the Wild Horse Act].

16 While plaintiffs have taken issue with that portion of the
17 definition of purpose requiring as a necessary outcome of the
18 project reduction of the wild horses to within the AML range, the
19 AML explicitly incorporates the "thriving natural ecological
20 balance" standard. It was thus proper and reasonable and not a
21 violation of the law for BLM to define its objectives in this way.
22 The BLM also provided an appropriate explanation as to why it
23 rejected the livestock reduction alternative: it simply could not
24 reduce livestock grazing allotments through the gather process.
25 In opposition to the BLM's stated reasons, plaintiffs argue that
26 reduced livestock grazing would be consistent with multiple use of
27 the range, that the RMPs do not require a minimum grazing allotment
28 for livestock, and that the BLM Handbook itself authorizes

¹⁰ Defendants argue that water sources available during the summer is the limiting factor in the HMAs and that reduction of livestock would only succeed in freeing up forage. (Def. Opp'n Medlyn Decl. ¶ 26).

1 adjustments to AMLs in specific round-up analyses.¹¹ None of these
2 assertions contradicts the fact that livestock allotments may only
3 be changed through amendment of the RMP. In their reply,
4 plaintiffs assert that RMPs may be amended through EAs and specific
5 project proposals, citing 43 C.F.R. § 1610.5-5, and therefore
6 defendants could have altered livestock grazing allotments through
7 the EA for this project. Plaintiffs' argument is without merit.
8 The cited regulation indicates that where a proposed action would
9 "result in a change in the scope of resource uses" the change must
10 be instituted through amendment to the RMP. *Id.* Although the
11 regulation notes that amendments may be made "in response to a
12 specific proposal," it clearly requires that amendments be made
13 after public involvement, preparation of an EA or EIS, interagency
14 coordination and consistency determination and any other data or
15 analysis that may be appropriate. In short, any changes to
16 resource allocations in an RMP must be developed through the
17 official amendment process, even if they are in response to a
18 specific proposal. Nothing in the regulation allows amendment to
19 the RMP through an unrelated EA without first following the
20 established procedure. Further, while the BLM Handbook authorizes
21 changes to AMLs in a variety of ways, including as part of a gather
22 decision, that does not mean livestock grazing levels may also be
23 altered as part of a gather decision.

24 Plaintiffs also contest BLM's assertion that even though it
25 has authority to close areas of the public lands to grazing in

26

27 ¹¹ Although plaintiffs reference increasing AML in their briefs, they
28 do so only in the context of reducing livestock grazing allotments. It thus
appears that plaintiffs are not separately challenging BLM's refusal to
consider in detail the alternative proposing an increase in the AML.

1 order to provide habitat for wild horses or to protect them, the
2 provisions of 43 C.F.R. § 4710.5 are usually applied only in cases
3 of emergency. Plaintiffs assert that nothing in the regulation
4 suggests it is for emergency purposes only. However, the existence
5 of this regulation does not alter the fact that livestock grazing
6 allotments must be reduced through the FLMPA regulatory process.
7 Therefore, BLM's application of the regulation allowing
8 cancellation of grazing only in emergencies is not unreasonable.¹²

9 Accordingly, both the purpose and needs statement and the
10 reasons for rejecting the plaintiffs' proposed alternative were
11 reasonable, and plaintiffs have failed to establish they are likely
12 to succeed on, or that there are serious questions going to, the
13 merits of their NEPA claim.

14 **II. Likelihood of Irreparable Harm**

15 BLM finalized its decision to round up the horses on May 17,
16 2011. Plaintiffs waited until June 29, 2011 - 43 days later - to
17 file their complaint and until July 7, 2011 - 51 days later - to
18 file their motion for preliminary injunction. Defendants argue
19 that this delay counsels strongly against granting the motion
20 because it implies a lack of urgency or impending irreparable harm.
21 A delay of 44 days before filing a complaint and motion for TRO has
22 been held "inexcusable," but in that case the court relied on the
23 delay to *bolster* its decision to deny the injunction, not as the
24 sole reason for it. *Fund for Animals v. Frizzell*, 530 F.2d 982,
25

26 ¹² The court defers to "an agency's interpretation of its own
27 regulations unless that interpretation is plainly erroneous, inconsistent
28 with the regulation, or based on an impermissible construction of the
governing statute." *Nw. Env'tl. Defense Center v. Brown*, 640 F.3d 1063, 1069
(9th Cir. 2011).

1 987 (D.C. Cir. 1975). While this court finds the plaintiffs' delay
2 very troublesome, it is not dispositive on the issue of irreparable
3 harm.

4 Plaintiffs argue that they will be harmed if the gather is
5 allowed to proceed because the wild horse population will be
6 reduced by 80%, horses will be forever split from their natural
7 family groups, mares will be injected with contraceptives, the
8 horses returned to the HMA will be unnaturally skewed to 60% male,
9 and the male horses that are removed will be castrated.

10 The record reflects that not all the horses will be gathered
11 and other horses will be released to the range after the gather.
12 Based on historical data the population will continue to grow at
13 substantial annual rates. In fact, the population growth between
14 July 2006, the date of the last gather, and the present has been
15 nearly 1,600 horses. There is no evidence that treatment of the
16 mares with contraceptives will cause harm. Whether any particular
17 family unit will be divided is speculative. Finally, the
18 historical evidence before this court strongly supports the
19 conclusion that the gather will benefit the horses rather than harm
20 them, as fewer horses competing for limited resources will mean a
21 healthier herd.

22 Plaintiffs argue that insofar as the NEPA claim is concerned,
23 they have suffered injury because BLM failed to follow the
24 statute's procedural requirements, citing *Nat'l Parks &*
25 *Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 n.18 (9th Cir.
26 2011). *Babbitt* noted that "because NEPA is a purely procedural
27 statute, the requisite harm is the failure to follow the
28 appropriate procedures" and that accordingly injunctions were only

1 withheld in NEPA cases in "unusual circumstances." 241 F.3d at 737
2 n.18. In light of its decision in *Winter* that a likelihood of
3 irreparable harm must be shown before an injunction may issued, the
4 Supreme Court explicitly noted that *Babbitt* was wrong to suggest
5 that injunctions should be issued more or less as a matter of
6 course in NEPA cases. *Monsanto Co. v. Geertson Seed Farms*, 130 S.
7 Ct. 2743, 2756-57 (2010). Accordingly, plaintiff's reliance on
8 *Babbitt* is misplaced. Plaintiffs also cite *Sierra Club v.*
9 *Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007), which noted that
10 "[i]n the NEPA context, irreparable injury flows from the failure
11 to evaluate the environmental impact of a major federal decision."
12 To the extent this statement suggests that irreparable harm may be
13 presumed from a NEPA violation, this is simply not the law. *Winter*
14 made clear that in order to obtain a preliminary injunction, the
15 plaintiffs must show a likelihood of irreparable harm - NEPA
16 violation or not.

17 Plaintiffs have failed to establish a likely threat of
18 irreparable harm sufficient to qualify for injunctive relief.

19 **III. Balance of Hardships**

20 Plaintiffs argue that the balance of hardships tips sharply in
21 their favor because they will certainly suffer irreparable harm if
22 the injunction is not granted. Further, they assert that BLM will
23 not face any hardships as it has approved a round-up that begins in
24 fiscal year 2012 (after October 1, 2011), and its assertions that
25 horses will die of starvation or thirst are unsupported, especially
26 in light of the current conditions in the HMAs.

27 Defendants respond that delaying the round-up would lead to
28 irreparable harm to both the horses and the range. They assert

1 that waiting will make the round-up much more difficult and
2 expensive. (Def. Opp'n Fuell Decl. ¶ 47). More importantly, if the
3 excess horses are not removed, the horses will continue to deplete
4 the water and grazing resources on the range. (*Id.* Thompson Decl.
5 ¶ 19; *id.* Fuell Decl. ¶ 42-43, 48). The EA establishes that absent
6 intervention, the horse population will continue to grow at a rate
7 of 20-25% annually, and that within two years the range will be
8 supporting a population of 2,638 horses. (EA 5, 12). The lack of
9 food and water will mean the horses are competing for ever more
10 scarce resources, and many will suffer as a result. (Def. Opp'n
11 Fuell Decl. ¶¶ 42-43). If such an emergency is created, BLM would
12 be required to truck water to the range, costing it both time and
13 expense. (*Id.* Thompson Decl. ¶¶ 17-19; *id.* Fuell Decl. 46).
14 Already this year BLM has had to truck water out to several parts
15 of the Triple B Complex. Defendants also assert that if BLM cannot
16 proceed with the gather this year, it may have to be postponed for
17 another year because there are a limited number of contractors who
18 can conduct the round-up and because of "budgetary realities."
19 Defendants cite *In Defense of Animals v. Salazar*, 675 F. Supp. 2d
20 at 98 as support for its assertions. On the basis of similar
21 arguments, the court there held that the balance of harms tipped in
22 favor of the BLM and denied the injunction in part on those
23 grounds.¹³

24 Most of plaintiffs' assertions of hardship relate to the loss
25 of relationships with horses and the difficulty in observing horses

26

27 ¹³ It is worth noting, however, that the defendants in that case argued
28 that a winter round-up would result in fewer injuries in the area of that
gather, and that postponing until spring or summer would result in more
injuries to the horses.

1 on the range. While the historical data suggest a small percentage
2 of wild horses will perish during the round-up, it is just as
3 likely that other horses will die from lack of food and/or water if
4 this population continues to grow as it has in the past. The EA
5 clearly establishes that if no action is taken, the wild horse
6 population will adversely impact riparian resources within and
7 outside of the HMAs, native plant health would continue to
8 deteriorate, plants would be lost, and soil erosion would increase.
9 (EA 35). Wild horses will continue to overconsume herbaceous
10 vegetative cover and cause trampling damage to riparian areas.
11 (*Id.* at 39). Therefore, the court concludes that the balance of
12 harms weighs in favor of the defendants.

13 **IV. Public Interest**

14 Plaintiffs argue that the public interest favors an injunction
15 because BLM's plan is illegal and subverts congressional intent.
16 Also, preservation of the environment is in the public interest.
17 Defendants assert that the public interest favors denial of the
18 injunction because BLM is required by law to immediately remove
19 excess horses and to manage the range for multiple uses. The court
20 concludes that the public's interest does not favor an injunction
21 where, as here, the BLM has an obligation under the Wild Free-
22 Roaming Horses and Burros Act to immediately remove excess horses.

23 **Conclusion**

24 For the reasons set forth above, the court finds and concludes
25 that plaintiffs have failed to show a likelihood of success, or
26 serious questions going to, the merits, or that they will suffer
27 irreparable injury sufficient to justify the issuance of a
28 preliminary injunction. Further, the balance of hardships and the

1 public interest favor the defendants. Therefore, plaintiffs have
2 failed to establish under the standards of *Winter v. Natural Res.*
3 *Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008), and
4 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
5 Cir. 2011) that they are entitled to a preliminary injunction.
6 Plaintiffs' motion for preliminary injunction (#10) is **DENIED**.

7 **IT IS SO ORDERED.**

8 DATED: This 15th day of July, 2011.

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11 UNITED STATES DISTRICT JUDGE
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