

CASE No. 15-5332
SCHEDULED FOR ORAL ARGUMENT ON JANUARY 11, 2017

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN WILD HORSE PRESERVATION CAMPAIGN;
CARLA BOWERS; RETURN TO FREEDOM,

Plaintiffs-Appellants,

v.

THOMAS J. VILSACK, Secretary, U.S. Department of Agriculture; THOMAS L.
TIDWELL, Chief, U.S. Forest Service; AMANDA McADAMS, Forest Supervisor,
Modoc National Forest, U.S. Forest Service,

Defendants-Appellees,

v.

CALIFORNIA CATTLEMEN'S ASSOCIATION; CALIFORNIA FARM BUREAU
FEDERATION; PUBLIC LANDS COUNCIL; NATIONAL CATTLEMEN'S BEEF
ASSOCIATION; MODOC COUNTY; WILLIAM FLOURNOY; CAROLYN CAREY;
JAMES PETER CAREY; MIKE BYRNE,

Intervenors for Defendants-Appellees.

On Appeal from The United States District Court for the District of Columbia,
Case No. 14-cv-485, Hon. Amy Berman Jackson

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties*

The parties who appeared in the district court, and also are parties in this Court, are:

1. Plaintiffs-Appellants: American Wild Horse Preservation Campaign; Carla Bowers; Return To Freedom.
2. Defendants-Appellees: Thomas J. Vilsack; Thomas L. Tidwell; Amanda McAdams.
3. Intervenors-Appellees: California Cattlemen's Association; California Farm Bureau Federation; Public Lands Council; National Cattlemen's Beef Association; Modoc County; William Flournoy; Carolyn Carey; James Peter Carey; Mike Byrne.

B. *Rulings Under Review*

The rulings under review are the final Order (Docket Entry ("D.E.") 31 (JA0095)) and Memorandum Opinion (D.E. 32 (JA0096-145)) entered by the district court on September 30, 2015 denying Plaintiffs' motion for summary judgment and granting Federal Defendants' cross-motion for summary judgment.

C. *Related Cases*

Counsel are unaware of any related cases pending in this or any other court.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants American Wild Horse Preservation Campaign and Return To Freedom—501(c)(3) non-profit organizations—and Carla Bowers, an individual, state that they have no parent corporations or any publicly held corporations that own 10% or more of their stock.

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GLOSSARY

APA	Administrative Procedure Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding Of No Significant Impact
LRMP	Land and Resource Management Plan
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
WHT	Devil's Garden Wild Horse Territory

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action against the U.S. Forest Service (“Forest Service” or “Service”) pursuant to 28 U.S.C. § 1331. The district court denied Plaintiffs’ motion for summary judgment, granted Defendants’ cross-motion for summary judgment, and denied Intervenor-Defendants’ cross-motion for summary judgment as moot on September 30, 2015. Plaintiffs filed a notice of appeal on November 25, 2015. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Plaintiffs are two non-profit organizations—American Wild Horse Preservation Campaign and Return to Freedom—and one individual, Carla Bowers. As attested to in several declarations, *see* D.E. 20-1 (JA0082-87) & D.E. 20-2 (JA0088-92), Plaintiffs and their members have aesthetic, recreational, and other cognizable interests in observing wild horses that have historically roamed on public lands at issue in this case, and the organizational Plaintiffs also suffer resource injury as a result of having to monitor, educate their members and supporters about, and advocate against and counteract the Service’s decision that forms the subject of this appeal. Accordingly, Plaintiffs have established standing to bring this case, which Defendants have not contested.

STATEMENT OF ISSUES

For more than twenty-five years, the Devil’s Garden Wild Horse Territory (“WHT”) has consisted of a single, contiguous territory totaling approximately 258,000 acres, as expressly prescribed by the Forest Service’s 1991 Land and Resource Management Plan for the Modoc National Forest (the “1991 Forest Plan”). In 2013, the Service, at the behest of the Modoc County Farm Bureau, eliminated 23,631 acres (the “Middle Section”) from the WHT, thereby “zeroing out” the wild horses from the Middle Section and separating the WHT into two isolated units. The issues raised in this appeal are:

1. Whether the Forest Service’s decision to eliminate the Middle Section from the WHT violated the Wild and Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (the “Wild Horse Act”), and was arbitrary and capricious, when the agency’s sole justification for the boundary change was its announcement in 2012 that it had been managing the Middle Section as part of the WHT for more than two decades due to an undocumented “administrative error” arising from the Service’s erroneous—and since disavowed—claim that the majority of these lands had been privately owned in 1971 when Congress passed the Wild Horse Act.

2. Whether the Service violated the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (“NFMA”), by forgoing the formal forest plan revision

process and instead labeling the elimination of the Middle Section as a “non-significant” amendment to the 1991 Forest Plan, when the governing 1991 Forest Plan expressly directed the inclusion of the Middle Section in the WHT.

3. Whether the agency failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m (“NEPA”), by failing to prepare an Environmental Impact Statement or otherwise taking a “hard look” at the environmental impacts arising from the loss of the Middle Section, and instead made the conclusory determination that removal of the Middle Section will have no effect on federally protected wild horses or their habitat.

ADDENDUM

Pertinent statutory and regulatory provisions are set forth in the Addendum.

STATEMENT OF THE CASE

This action has important implications for how the Forest Service manages the nearly two hundred million acres of national forests. In 2013, the Service decided to eliminate wild horses from public lands running through the center of the Devil’s Garden WHT, which both eliminated a significant part of the WHT containing important meadows and water sources for wild horses and completely foreclosed one of the primary uses of these public lands. More than two decades

earlier, the Service formally incorporated these lands into the WHT as part of the management prescriptions it adopted in the 1991 Forest Plan.

The sole reason given by the Forest Service for its abrupt reversal in the management approach for Devil's Garden is that the Middle Section had been added in 1991 solely for "administrative convenience" and that this had been improper because the majority of the Middle Section was privately held in 1971 when Congress passed the Wild Horse Act. However, the Service proffered no record evidence supporting its assertion of "administrative convenience," and in fact, as the Service has since conceded, the evidence conclusively demonstrates that the majority of the Middle Section was comprised of lands that were publicly held as part of the Modoc National Forest in 1971.

The loss of the Middle Section is a fundamental and significant change in the management approach to the WHT. The Middle Section contains important meadows and water sources that were previously available to wild horses, and it also provided an important conduit for genetic interchange of wild horses. The Forest Service informally added the Middle Section to the WHT in the mid-1980s, and then formally adopted this management approach in the 1991 Forest Plan. By summarily reversing this long-held practice and formal decision, the agency is permitting special interests to re-shape the management prescriptions in Modoc

National Forest through an abbreviated process based on a demonstrably false premise. At minimum, given that the governing 1991 Forest Plan mandated a single, contiguous WHT, the Service was obligated to satisfy all procedural safeguards imposed by NFMA and NEPA before modifying this prescription. For myriad reasons, the agency's decision to eliminate the Middle Section is arbitrary and capricious and cannot be upheld on this record.

STATEMENT OF THE FACTS

A. Statutory Framework

1. Wild Horse Act

Underlying this dispute are the protections afforded to wild horses on our nation's public lands. In 1971, Congress unanimously passed the Wild Horse Act. This law provides that "wild-free roaming horses and burros shall be protected from capture, branding, harassment, [and] death," and that they must be "considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331. The Act directs the Forest Service to "protect and manage wild free-roaming horses and burros as components of the public lands." *Id.* § 1333(a). On public lands that are home to wild horses, "[a]ll management activities shall be at the minimal feasible level." *Id.*

In 1980, the Service adopted regulations requiring it to “[a]dminister wild free-roaming horses and burros and their progeny on the National Forest System in the areas where they now occur (wild horse and burro territory) to maintain a thriving ecological balance considering them an integral component of the multiple use resources.” 36 C.F.R. § 222.61(a)(1). The agency must “[e]stablish wild horse and burro territories in accordance with the Act and continue recognition of such territories where it is determined that horses and/or burros will be recognized as part of the natural system.” *Id.* § 222.61(a)(3).

2. *National Forest Management Act*

Enacted in 1976, NFMA established a formal two-step process for forest planning. *See generally Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998). First, the Service must “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a). Each land and resource management plan (“LRMP”) must “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” *Id.* § 1604(e)(1). This statutory process requires meaningful “public participation in the development, review, and revision of land management plans.” *Id.* § 1604(d).

Second, once an LRMP is developed, NFMA mandates that all subsequent agency action in that forest comply with it. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002); *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999). Thus, “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). Like other site-specific plans, “Wild Horse and Burro Territory plans are to conform with the Forest land and resource management plans.” Forest Service Manual § 2263.11 (Jan. 2003); *see also* 43 C.F.R. § 4710.1 (analogous requirement for Bureau of Land Management, providing that “[m]anagement activities affecting wild horses and burros . . . shall be in accordance with approved land use plans”).

If the Service determines that part of an LRMP is no longer valid and must be modified, the agency must amend the plan subject to NFMA’s formal procedures. 16 U.S.C. § 1604(f)(4); *see Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005). While non-significant amendments require fewer procedural safeguards, “[i]f an amendment to a[n] Forest Plan would be ‘significant,’ . . . then NFMA mandates substantial public involvement, planning, and input, requiring, in essence, the Forest Service to conduct the same complex planning process applicable to promulgation of the original plan.”

Citizens' Committee to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1032 (10th Cir. 2002) (quotation marks and citation omitted); *see also* 16 U.S.C. § 1604(f)(4) (amendments to LRMP resulting in a “significant” change must follow the procedures applicable to the development and revision of LRMPs).

3. *National Environmental Policy Act*

Congress enacted NEPA “to promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. To achieve NEPA’s substantive goals, Congress mandated that agencies evaluate the environmental impacts of federal actions and consider reasonable alternatives that might avoid or minimize impacts. *Id.* § 4332(C). An agency must prepare an Environmental Impact Statement (“EIS”) for every “major Federal action [] significantly affecting the quality of the human environment.” *Id.* Only if an agency determines that an action will not result in significant environmental impacts may it avoid preparing an EIS, in which case the agency still must prepare a less-detailed Environmental Assessment (“EA”) and a Finding of No Significant Impact (“FONSI”) setting forth the specific grounds for why an EIS is not necessary. *See* 40 C.F.R. §§ 1501.4(b), (c), 1508.9, 1508.27.

B. Facts Underlying Plaintiffs' Claims

1. The Establishment of the Devil's Garden WHT and the Mid-1980s Modifications

Wild horses have lived in the area now known as the Devil's Garden WHT since the late 1800s. *See* JA0231; JA0649.¹ While there were sporadic efforts to extirpate the wild horse population at Devil's Garden in the early- to mid-1900s, and periodic roundups severely reduced the population through the early 1950s, sufficient numbers of wild horses remained to ensure their survival once the Wild Horse Act was enacted. *See* JA0231; JA0649-50.

In 1975, the Service created the Devil's Garden WHT and issued its first Wild Horse Territory Management Plan. JA0645-68. The 1975 Management Plan identified two non-contiguous units covering approximately 236,000 acres and a population objective of 300 or 305 horses. *See* JA0650-51, JA0658-60, JA0666-67. The Service revised the Wild Horse Management Plan in 1980, 1981, and 1982. JA0608-39. Throughout this period, the Forest Service maintained the two-unit WHT and a population objective of 300 or 305 horses. JA0633-41 (1980 Management Plan stating that WHT consisted of "two large units" encompassing "236,000 acres" and that population objective was either "305 horses" or "300"); JA0627 (partial copy of 1981 Management Plan stating that "management level"

¹ Joint Appendix citations are notated with "JA ____."

was “305 head”); JA0612-18 (1982 Management Plan stating that WHT was “two large units” of “236,000 acres” and that “proposed level” was 305 horses).

In the mid-1980s, the Service made two modifications to the management approach for the Devil’s Garden WHT. First, “[d]uring the mid-1980’s,” the Service “incorporated about another 23,631 acres”—approximately 36 square miles—into the WHT to create a single, contiguous WHT comprising approximately 258,000 acres. JA0261; *see also* JA0262-63 (maps showing the WHT expansion). The lands that were added to the WHT—referred to as the “Middle Section” because they joined the two pre-existing wild horse units—include portions of five grazing allotments: Triangle, Avanzino, Carr, Big Sage, and Timbered Mountain. *See* D.E. 9 (JA0059-75), ¶¶ 39, 61.²

Second, the Service changed from a single population target of 300 or 305 horses to utilizing a population *range* of 275 to 335 horses. *See* JA0585-86. This was a change from the approach provided in the 1975, 1980, 1981 and 1982 Wild Horse Management Plans, all of which used a single target number instead of a population range.

² The WHT overlaps with several livestock grazing “allotments,” which are Forest Service administrative boundaries and are conceptually distinct from the WHT boundaries. *See* JA0768 (showing allotment boundaries in red and the two-unit WHT boundary in yellow); JA0557 (showing color-coded allotments, but excluding the Middle Section).

2. *The 1991 Forest Plan Formally Incorporates the Mid-1980s Management Changes*

On November 27, 1991, the Forest Service completed the formal planning process for the Modoc National Forest and issued its final LRMP (the “1991 Forest Plan”). *See* JA0576. This was the culmination of an extensive planning process involving twelve years of work, over 45 public meetings and workshops, multiple open houses and extensive outreach to, and input from, members of the public and various agencies, organizations, and other stakeholders. JA0597. Hundreds of people participated in public meetings and provided testimony on a variety of topics. *Id.* In 1989, the Service convened working groups composed of local government representatives, industry (including ranchers), environmental organizations, and the California Department of Fish and Game, to evaluate various issues and propose consensus solutions. *Id.* The 1991 Forest Plan “reflect[ed] the recommendations of these groups.” *Id.*

As part of this planning process, “[a]ll existing resource management plans were re-examined by the Forest’s interdisciplinary planning team.” JA0578. The planning team specifically determined that the existing Wild Horse Management Plan for the Devil’s Garden WHT was “consistent with, and . . . appropriate for, the Forest Plan” *Id.* Concerning the two management changes that the Forest Service had adopted in the mid-1980s, the 1991 Forest Plan stated:

The Forest has one wild horse territory of about 258,000 acres located on portions of the Doublehead and Devil's Garden Ranger Districts. Fulfilling requirements of the Act, the Forest prepared the Wild Horse Management Plan in 1985, which identifies a population objective of 275-335 animals to manage.

JA0585-86.³

It is undisputed that, after this extensive public process, the 1991 Forest Plan formally and deliberately incorporated the two changes in management approach that the agency had adopted in the mid-1980s: the use of a population objective of 275-335 horses rather than a single, fixed number, and the addition of the Middle Section to form a single, contiguous WHT. The 1991 Forest Plan further stated that, to the extent the existing Wild Horse Territory Management Plan (whether the 1982 or the 1985 revision) was inconsistent with the Forest Plan, it was deemed updated to be consistent with the formal 1991 Forest Plan. JA0578, JA0588. Thus, as the Service now concedes, “the Forest Service made the decision to

³ While the Service now postulates that this reference to the 1985 Management Plan was a mistake and was intended to reference either the 1975 or the 1982 Management Plans, *neither* of those earlier management plans “identifies a population objective of 275-335 animals to manage.” That objective is *only* mentioned in the 1991 Forest Plan and, based on the reference therein, the 1985 Management Plan. However, the Service did not include a copy of the 1985 Management Plan in the administrative record, and only included a partial copy of the 1981 Management Plan. D.E. 32 at 6 (JA0101); JA0621-28.

manage wild horses on about 258,000 acres, which represents the number designated for wild horse management in the mid-1980s.” JA0264.

The Service has not formally revised the 1991 Forest Plan; it remains the operative management plan today.

3. *The Five Grazing Allotments Comprising the Middle Section*

The Middle Section that was included in the WHT in the mid-1980s and then formally incorporated in the 1991 Forest Plan is comprised of portions of five grazing allotments: the northern portion of the “Triangle Exchange Lands,” which the Service acquired as public lands in 1976; Avanzino, the majority of which has always consisted of public lands; and portions of the Carr, Big Sage and Timbered Mountain allotments, all of which have been public lands since before the WHT was created in 1975.

a. *The Triangle Exchange Lands*

In August 1976, the Service acquired most of what it called the “Triangle Exchange Lands” (or the “Triangle Allotment”). JA0799. As of the 1976 acquisition, almost all of the Triangle Exchange Lands—which include Boles Meadows, Round Valley, Fairchild Swamp and Antelope Plains—were publicly held as part of the Modoc National Forest. JA0799-800. A 1979 map confirms that only two small parcels in the Triangle Exchange Lands—Point Ranch in the

Round Valley unit, and Carey Ranch in the Boles Meadows unit—were privately held at that time. JA0801. Because the Forest Service’s acquisition of these lands postdated the 1975 WHT Management Plan, they were not part of that plan.

JA0803 (1979 EA noting that “[n]one of the Triangle Lands Management Unit are included within” the five wild horse management units from the 1975 plan).

While the Triangle Exchange Lands were not initially included in the WHT, the northern part of the Triangle Exchange Lands, including all of Boles Meadows and most of Round Valley, was incorporated into the WHT in the mid-1980s. *Compare* JA0800 (showing the Triangle Exchange Lands), *with* JA0868 (2003 map showing the single, contiguous WHT incorporating the northern portion of the Triangle Exchange Lands); *and* JA0263 (agency map dating the inclusion of the Middle Section in the WHT in 1980). Following the inclusion of these public lands into the WHT, the Service established a population objective for Boles Meadows, as evidenced by “Wildhorse Inventory” forms from 2002 and 2004 showing a herd management goal for Boles of 40 horses. JA0849-50. By contrast, the 1980 Management Plan did not include a population goal for Boles. JA0643.

Wild horses have used the Triangle Exchange Lands continuously since the early 1970s and likely before that time. *See* JA0863 (1972 flight notes observing “bunches of 5 to 9 head [of wild horses] along Boles Creek, and the *west side of*

Boles Meadows”) (emphasis added); JA0805 (1979 report noting summer use of Boles Meadows); JA0782 (1988 helicopter survey showing 19 horses in Boles); JA0768-69 (wild horses identified around Boles Meadows during censuses in 1979–1990); JA0773 (1990 survey showing 67 horses in Boles); JA0850 (2002 helicopter survey showing 64 horses at Boles); JA0430 (removing four wild horses from Triangle in 2003); JA0849 (2004 survey showing 113 horses at Boles); JA0559 (identifying ten wild horses in Triangle in 2012); JA0845 (2012 document estimating five to ten wild horses inhabiting Triangle).

b. Avanzino

The Avanzino Allotment (“Avanzino”) is a relatively small strip of land between the Timbered Mountain Allotment (to the east), the Carr and Triangle Allotments (to the west), and the Big Sage Allotment (to the south). *See* JA0768. As with the adjacent Triangle area, Avanzino contains important water sources. *Id.*; JA0839-40, ¶ 9. At all relevant times, roughly 59% has been publicly held as part of the Modoc National Forest, and 41% of Avanzino has been privately owned. *See* JA0261. Wild horses have been found in Avanzino. *See* JA0850 (2002 inventory showing two bands of wild horses (totaling 11 individuals) in Avanzino); JA0845 (noting six wild horses in Avanzino during a 2010 inventory and estimating that 20-80 wild horses inhabited Avanzino); JA0559 (observing 80

wild horses in Avanzino in 2012); JA0544 (wild horses moved from the Timbered Mountain Allotment into Avanzino in 2012); JA0768 (identifying wild horses in Avanzino from 1979–1990). Plaintiffs have never taken the position that the *private* lands in Avanzino must be included in the WHT.

c. Carr, Big Sage, and Timbered Mountain

The majority of the Middle Section consists not of the Triangle Exchange and Avanzino lands, but of portions of three other allotments on public lands: (1) the southeast section of the Carr Allotment (the northwest portion of the Middle Section); (2) the northwest section of the Big Sage Allotment (the southeast portion of the Middle Section); and (3) the central-western portion of the Timbered Mountain Allotment (the northeast portion of the Middle Section). *See* D.E. 9 (JA0059-75), ¶ 39 (“Federal Defendants admit that the 1991 Forest Plan included portions of the Big Sage, Timbered Mountain, Carr, and Pine Springs Allotments in the Devil’s Garden WHT for administrative convenience.”); *id.*, ¶ 61 (“Federal Defendants admit that the majority of the middle area was never part of the Triangle or Avanzino Ranches, and consist [sic] of portions of the Big Sage, Timbered Mountain, Carr and Pine Spring Allotments”); JA0868 (showing single WHT and grazing allotments); JA0770 (showing (in orange shaded areas) portions of the Carr, Timbered Mountain, and Big Sage Allotments adjacent to the two-part

WHT adopted in 2013 (outlined in yellow)); JA0483 (showing, in light green, the portion of the Timbered Mountain Allotment in the Middle Section (to the west of the purple line) and showing, in purple, the portion of the Carr Allotment in the Middle Section (to the east of the purple line)).

As with Boles Meadows in the Triangle allotment, after these areas were incorporated into the WHT in the mid-1980s, the Service set population targets for them, as demonstrated by its “Wildhorse Inventory” forms from 2002 and 2004 identifying designated herd management goals for Big Sage (20 horses) and Timbered Mountain (40 horses). JA0849-50. By contrast, the 1980 Management Plan did not include these areas in the unit-specific population targets. JA0643. Importantly, the Big Sage allotment is not part of the smaller two-unit WHT. *See* JA0557.

The portions of the Carr, Big Sage, and Timbered Mountain Allotments that are part of the Middle Section have been utilized by wild horses for decades. *See, e.g.*, JA0768 (map with census results from 1979-1990 showing six wild horse identifications in the southeast corner of the Carr Allotment, two in the northwest corner of the Big Sage Allotment, and two in the central-western portion of the Timbered Mountain Allotment); JA0839-40, ¶ 9.

4. *Wild Horses' Use of the Middle Section*

Extensive evidence in the census data showing the presence of wild horses in the Middle Section is not surprising. With numerous meadows and water sources, the Middle Section is “prime territory that would historically have been used by wild horses.” *See* JA0839, ¶ 7. Indeed, there are “no geographical boundaries that would naturally prohibit wild horses from using the middle section” for forage and water and to travel between the eastern and western portions of the WHT. *Id.* The Middle Section is home to several high-quality habitats for wild horses, including Boles Meadow and Round Valley in the Triangle Allotment, and Dutch Flat, Williams Valley, and Graves Valley in the Big Sage Allotment. JA0839-40, ¶ 9. In addition to their historical use of the Middle Section, wild horses were recently documented throughout the Middle Section in February 2013. JA0432-33.

Based on available evidence, Marla Bennett—a federal government biologist with extensive experience studying wild horses in the western United States, including at Devil’s Garden, *see* JA0837-38, ¶¶ 2-4—observed that it “is highly likely that the middle section of the WHT . . . is actually currently part of the home ranges of several horse bands and certainly part of a migratory corridor” for wild horses. JA0842, ¶ 15. Ms. Bennett stated, “in my professional opinion, there is

every reason why wild horses would have historically used the middle section . . . due to the availability of water and forage in the area.” *Id.*, ¶ 16.

C. Procedural History

1. *The Forest Service’s 2011 Scoping Letter*

After twenty years of managing horses in accordance with the 1991 Forest Plan, the Service issued a scoping letter in July 2011 in which it “prop[os]ed to update the Devils Garden Plateau Wild Horse Territory Plan which will guide management of wild horses on Modoc National Forest for the next 15-20 years.” JA0757-66; *see also* JA0677-78 (June 2011 initiating letter). The proposed actions were limited to reviewing the population level within the WHT, including analyzing whether “the current appropriate management level (AML) of [275 to] 335 head, as established in the Modoc National Forest LRMP, 1991 continues to be valid, and if not determine the optimum number of animals the Territory will support on a yearlong basis.” JA0758. Plaintiffs submitted comments on the initial scoping letter expressing concerns about, *inter alia*, reductions to the wild horse AML that would effectively prioritize livestock use of the WHT. *See* JA0745-50, JA0753-56.

Nowhere in the scoping letter did the Service even raise the possibility that it was considering eliminating the Middle Section from the WHT. Rather, the letter

expressly referred to the single, larger WHT that was adopted in the mid-1980s and formally incorporated into the 1991 Forest Plan. *See* JA0757 (“[t]he Devils [sic] Garden Plateau Wild Horse Territory is approximately 268,750 acres in size”); JA0765-66 (map showing the single, contiguous WHT including the Middle Section).

2. *The Modoc County Farm Bureau Takes Charge of Developing the Revised Management Plan*

The Forest Service subcontracted the development of the revised WHT plan to an entity representing local grazing interests. In August 2012—over one year after the Service issued the scoping letter—the Modoc County Farm Bureau (“Farm Bureau”) entered into an agreement with the Service to develop the new management plan for the WHT. *See* JA0878-901; JA0877 (“The entire plan development, not just the data collection, will now be funded through a new challenge cost share agreement between the Forest and the Modoc County Farm Bureau.”). Under this agreement, the Farm Bureau agreed to collect all of the data on wild horses, draft a monitoring report, prepare the draft EA and final EA, and oppose any appeal of the agency’s decision. JA0891. In return, the Service paid the Farm Bureau \$203,000. JA0893.

The Farm Bureau was not a disinterested party. Its purpose “is to protect and promote agricultural interests in Modoc County,” including the grazing

allotments that overlap with the WHT that are used to feed the cattle that compete with horses. JA0878-79. The Farm Bureau “has many members whose livelihoods depend on grazing operations affected by the ever-expanding wild horse herd within or adjacent to” the WHT. JA0879.

Almost immediately after signing this agreement, the scope of the WHT plan revision was dramatically revised. On October 31, 2012, Susan Stokke, Field Manager for the Farm Bureau’s project, *see* JA0906, informed the Forest Service that *the Farm Bureau* wanted to change the WHT boundaries. *See* JA0876 (“Based on all the advice I have received, I have decided to re-scope this project. I spoke with Suzie [Stokke] today and it seems that not only are we adding a Plan Amendment (in the form of a new plan) but *we may find a need to change boundaries.*”) (emphasis added).⁴

Ms. Stokke then prepared a job description for the specialist who would develop the new WHT management plan. *See* JA0906-907. The responsibilities included monitoring “wild horse use *outside* the WHT” in areas with “Horses

⁴ Ms. Stokke is the wife of Sean Curtis, the Director of the Farm Bureau. *See* JA0751-52. Mr. Curtis also is the Modoc County employee centrally involved in the development of the new WHT management plan, as confirmed by the declaration he submitted in support of the ranching intervenors in this case. *See* D.E. 15-5 (JA0076-81).

Present,” *including* the Avanzino and Triangle areas in the Middle Section. *Id.* (emphasis added). Hence, although the WHT still formally included the Middle Section, the Farm Bureau—in developing the new Wild Horse Territory Management Plan—had begun treating the Middle Section as no longer part of the WHT.⁵

3. *The December 2012 Scoping Letter*

Based on the Farm Bureau’s push to change the WHT boundaries, the Forest Service quickly issued a new scoping letter on December 14, 2012 in which it publicly proposed—for the first time—to eliminate the Middle Section of the WHT.⁶ *See* JA0729-44. Revising the description of the WHT from the July 2011 scoping letter, the new letter stated that the WHT comprised only “232,520 acres of federal land,” JA0730, and that the Service proposed to “return to the management of wild horses within the WHT boundary established in 1975.” JA0732. The Service justified its proposal as follows:

During the mid-1980’s, the MDF [Modoc National Forest] appears to have adjusted the WHT boundary for administrative convenience. . . . An administrative error

⁵ Notably, the job description listed Big Sage as an allotment “within the WHT” although the Service would later eliminate it from the WHT entirely. JA0907.

⁶ Although it appears that, from December 2012 forward, the Farm Bureau carried out most of the work discussed herein on behalf of the Forest Service, to avoid confusion Plaintiffs will attribute all such efforts to the Service.

was made in expanding the WHT beyond the herd's known territorial limits.

JA0731-32. Citing no evidence, the new scoping letter asserted that only the 1975 map—and not the map included with the initial scoping letter or the formal 1991 Forest Plan—reflects the “territorial limits” of wild horses in the area as of 1971 when the Wild Horse Act was enacted. *See* JA0732.

According to the new scoping letter, the WHT boundary needed to be redrawn because the “Avanzino and Triangle private ranch lands which lay in between the West and East home ranges were not included in the [1975] WHT” and were incorporated into the WHT in the 1980s “for administrative convenience.” JA0731. The scoping letter did not address the fact that—as Federal Defendants have now conceded in their Answer—“the majority of the middle area was *never* part of the Triangle and Avanzino Ranches and were [sic] part of the Modoc National Forest *at all relevant times.*” D.E. 9 (JA0059-75), ¶ 3 (emphases added). These areas include portions of the Timbered Mountain, Carr, and Big Sage allotments. *Id.*, ¶ 61.

Plaintiffs submitted comments to the scoping letter, *see* JA0716-28, JA0711-15, in which they specifically objected to the new proposal to eliminate the Middle Section. JA0717, JA0712. They noted that the Service had “offer[ed] no data

regarding this acreage” (*i.e.*, the Middle Section) and inquired about the results of the 1971 wild horse census. JA0717.

4. *The December 2012 Resource Monitoring Report*

The same month that the Service issued its new scoping letter in which it first proposed eliminating the Middle Section, it issued the “Resource Monitoring Report” for the WHT. *See* JA0556-59. Notably, this report *already assumed* that the Middle Section had been eliminated from the WHT. Directly contradicting the statement in the governing programmatic document—the 1991 Forest Plan—that the WHT was a single unit comprising 258,000 acres that the Forest Service “is legally obligated to manage [for] horses,” JA0584, the Resource Monitoring Report proclaimed that the WHT comprised only 232,521 acres and was split into two separate sections. *See* JA0557.

The report’s treatment of different parts of the Middle Section is inconsistent. For example, in one map, the Service excluded from the WHT the southeastern section of the Carr Allotment and the center-western section of the Timbered Mountain Allotment that are part of the Middle Section. *See* JA0557, Map 1. On the very next page, however, the Service presented a map which *includes* the southeastern section of the Carr Allotment and the center-western section of the Timbered Mountain Allotment in the WHT but excludes the rest of

the Middle Section. *See* JA0558, Map 2. The same two maps also present conflicting information about areas entirely outside the Middle Section that the Report assumed were eliminated, including the northeastern corner of the Pine Springs Allotment and the northwestern portions of the WHT that fall within the Carr Allotment. *Compare* JA0557, Map 1, *with* JA0558, Map 2. The Report offers no explanation for these discrepancies.

5. The January 2013 AML Evaluation

In January 2013, the Forest Service released the Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level (“AML Evaluation”), which borrowed heavily from (and in many cases directly copied from) the Resource Monitoring Report. *See* JA0476-555. As with the Resource Monitoring Report, the AML Evaluation treated the Middle Section as already having been eliminated from the WHT. *See* JA0482-83. The Service asserted without any citation that “[a]lthough the Triangle and Avanzino Ranch lands were included in the WHT boundary in the [1991] Forest Plan as a result of an administrative error, the AML was established as 0 wild horses for the two areas.” JA0481. The rationale for why “the AML was established as 0 wild horses” for the Triangle or Avanzino Allotments was:

This is because the Triangle Ranch lands were acquired in 2006 [sic] (nearly five years after the passage of the 1971 WFRHBA)

and the high percentage of unfenced private land in the Avanzino Ranch.

*Id.*⁷

The AML Evaluation did not mention that the Middle Section includes not just lands from the Triangle and Avanzino Allotments, but also portions of the Carr, Timbered Mountain, and Big Sage Allotments, which have been owned by the Service at all relevant times, and parts of which were assigned wild horse population objectives since the mid-1980s. *See* JA0482, Map 1 (showing public lands in green, and private lands in white); D.E. 9 (JA0059-75), ¶¶ 48, 61; JA0849-50. Nor does the AML Evaluation mention that 59% of Avanzino is *not* unfenced private land but rather is part of the publicly held Modoc National Forest. JA0261.

Indeed, while the AML Evaluation sought to “zero out” the wild horse AML in these areas, it also demonstrated that wild horses were using the Middle Section. For example, several of the Forest Service’s maps confirm that the eliminated section of the Timbered Mountain Allotment is wild horse habitat. *See* JA0554 (showing three “key areas” in the carved-out portion of the Timbered Mountain Allotment, west of the grey, concave boundary in the center of the map); JA0551 (showing areas of “moderate,” “light,” and “slight” use by wild horses in the same

⁷ Plaintiffs assume the reference to 2006 as the year “the Triangle Ranch lands were acquired” was an error and should read “1976.”

eliminated section, and including a smaller map in the lower right-hand corner showing the eliminated sections of the Timbered Mountain Allotment). Likewise, the eliminated portion of the Carr Allotment is subject to “heavy” use by wild horses. JA0500 (the orange-shaded section in the southeast corner adjacent to Avanzino , which is also depicted, in the smaller map in the lower-right hand corner, as the orange-shaded section east of the grey boundary).

6. *The February 2013 Wild Horse Specialist Report*

In February 2013, the Service produced a “Wild Horse Specialist Report.” JA0423-75. Like the Resource Monitoring Report and the AML Evaluation, the Specialist Report assumed the elimination of the Middle Section from the WHT. It claimed that the WHT “consists of approximately 232,521 acres,” JA0423, and depicts the WHT as comprising two, separate units. *See* JA0424. Like the Resource Monitoring Report, the maps in the Specialist Report show inconsistent approaches regarding which parts of the Middle Section would be eliminated from the WHT. *Compare* JA0424, Map 1, *with id.*, Map 2.

The Specialist Report addresses, in general terms, the elimination of the Middle Section. It states that “the long-term needs of the Devils Garden wild horse herd” would be met by “future management of two distinct home ranges: West and East,” rather than by the larger, contiguous WHT that had been in place since

the mid-1980s. JA0443. Without any analysis or explanation, the Wild Horse Specialist concluded that removing the Middle Section and splitting the WHT into two smaller units “has no effect on wild horses or their habitat and is consistent with Forest Plan goals.” *Id.* It provided no data concerning wild horses’ natural migratory and movement patterns to support this assumption. It also did not explain how eliminating the Middle Section and dividing the WHT into two separate parts was “consistent” with the 1991 Forest Plan, which formally adopted the larger, single WHT.

7. *The Draft EA*

In May 2013, the Forest Service released its Draft EA for the revised Devil’s Garden WHT Management Plan. JA0706-10. The Draft EA “*proposes* to return to the management of wild horses within the WHT boundary established in 1971,” even though it was clear from the Resource Monitoring Report, AML Evaluation, and the Wild Horse Specialist Report that the agency had already effectively eliminated the Middle Section from the WHT.⁸ *See* JA0710 (emphasis added). The Draft EA *itself* also assumed that the Middle Section had already been

⁸ In fact, the boundaries for the WHT were not established in 1971; instead, as explained above, the first time that the Service established boundaries for the WHT was in 1975. *See* § B.1, *supra*.

eliminated by repeatedly asserting that the WHT comprised only “232,520 acres of federal land.” JA0707, JA0709.

In their comments to the Draft EA, Plaintiffs opposed the elimination of the Middle Section. They specifically noted that wild horses always had been present in the Middle Section, and that the Service had offered no evidence to the contrary nor any evidence supporting any “administrative error.” JA0683, JA0698-99. Plaintiffs again inquired about the 1971 wild horse census—documentation of which the Service had not (and still has not) disclosed. *See* JA0684.

8. *The Final EA*

On August 26, 2013, the Forest Service issued the Final EA, in which the agency adopted the proposed action from the Draft EA with minor modifications. *See* JA0257-412. As in the Draft EA, the Final EA “*proposes* to return to the management of wild horses within the WHT boundary established in 1971,” JA0264 (emphasis added), even though the Service had assumed for almost a year that the WHT boundary *already* had been changed. Each of the three action alternatives in the EA proposed to eliminate the Middle Section:

Establish a boundary for the WHT *based on the long-term needs of the Devil’s Garden wild horse herd* and within the herds’ known territorial limits (1971 WFRHBA) rather than for administrative convenience. This boundary will provide for future management of two distinct home ranges: West and East.

JA0278 (Guideline 5C) (emphasis added); JA0372 (same). The EA does not explain how a smaller, bisected WHT is “based on the long-term needs of the Devil’s Garden wild horse herd” or what was meant by “administrative convenience.” JA0372.

The Final EA concedes that the Service, in its 1991 Forest Plan, deliberately “made the decision to manage wild horses on about 258,000 acres” in the WHT, but it asserted without any explanation or citation that “an AML was not established for the added lands” and that “zero AML allocations were assigned to the acquired land,” *i.e.*, the Middle Section. JA0261-64. In fact, as noted above, population targets *had* been established for, and applied to, portions of the Middle Section, including Big Sage (20 horses), Boles (40 horses), and Timbered Mountain (40 horses). JA0849-50.

As with the Draft EA, *see* JA0708, the Final EA asserts that the inclusion of the Middle Section was “[a]n administrative error,” but offers no evidence in support of this explanation. JA0264. Nor does the Final EA provide any historical or scientific support for the Service’s claim that “few, if any, wild horses were found” in the Middle Section. JA0261. To the contrary, the Final EA includes evidence of the continuing presence of wild horses in the Middle Section. *See* JA0356 (four wild horses in the Triangle lands in 2003); JA0357 (five wild horses

observed in Avanzino in 2010, eighty wild horses identified in Avanzino in 2012, and ten wild horses identified in Triangle in 2012); JA0358 (59 wild horses counted in Avanzino and Triangle in 2013); JA0359 (map showing wild horse observations in 2013, including in the Big Sage Allotment).

The only justification offered by the Forest Service for the decision to eliminate the Middle Section is its assertion that, as of 1975, there was “[l]ittle or no use by wild horses” of the Middle Section “due to the number of fences and the ongoing livestock operationson [sic] this *privately owned land*.” JA0409 (emphasis added.) However, as noted above, the Service has admitted that this explanation is erroneous: “the majority of the middle area was never part of the Triangle and Avanzino Ranches and were part of the Modoc National Forest at all relevant times.” D.E. 9 (JA0059-75), ¶¶ 3, 39, 48, 61.

In response to twelve comments that wild horses used the Middle Section in 1971, the Final EA does *not* claim that no wild horses inhabited the Middle Section in 1971. *See* JA0409-10 (Response to Comment 2-5). Rather, the Forest Service asserts that:

As the Triangle Lands were under private ownership at the time the act was passed, and Avanzino remains 41% private property, they did not meet the criteria for being included into the Territory. . . . As the lands were private, there *may have been some incidental use* of the areas by wild horses, however *it is likely* wild horse use was excluded *for the*

most part as the forage was needed for the livestock operations.

Id. (emphases added). The EA does not identify any evidence supporting its speculation that wild horses “likely” did not inhabit the Middle Section “for the most part” in 1971, but rather *confirms* that there is at least “incidental use” of horses on these lands at this time. And because the majority of the Middle Section consisted of lands from *other* allotments that were *always public*—portions of Timbered Mountain, Carr and Big Sage—the Service’s explanation was nonresponsive.

9. *The FONSI and the 2013 WHT Management Plan*

On August 27, 2013, the Service issued a Decision Notice & Finding of No Significant Impact (“FONSI”), *see* JA0211-24, which incorporates by reference the EA and the supporting specialist reports. *See* JA0211. The Service formally selected “Alternative 2,” which it concluded “would not pose significant short or long term adverse effects” on the “quality of the human environment considering the context and intensity of impacts,” and “[t]hus, an environmental impact statement will not be prepared.” JA0211, JA0217-18.

The FONSI states that the “boundary of the territory would be returned to the one established at the passage of the WFRHBA of 1971 . . . bringing it into compliance with the Act.” JA0215. The FONSI does not explain this assertion, or

how it is reconcilable with the fact that the WHT was not established until 1975.

The FONSI instead states that “[p]roposed activities are consistent objectives [sic] in the Modoc National Forest Land and Resource Management Plan, as amended . . . and applicable law and regulations.” JA0218.

On August 27, 2013, the Service also issued the new Devil’s Garden Plateau Wild Horse Territory Management Plan, *see* JA0225-56, which was attached to the FONSI and adopted by the agency’s decision. *See* JA0211-12. The Plan incorporates the boundary modifications. *See* JA0230-31, JA0235.

10. Plaintiffs’ Administrative Appeal

Plaintiffs timely appealed the agency’s decision on November 18, 2013. *See* JA0808-44. The Forest Service denied that appeal on January 2, 2014. *See* JA0146-210.

D. Proceedings in the District Court

Plaintiffs sought judicial review of both the elimination of the Middle Section and changes to the AML range. *See* D.E. 1 (JA0013-58). Upon review of the parties’ cross-motions for summary judgment, the district court framed its analysis of the WHT boundary change as follows:

[T]he Court is limited to reviewing the Forest Service’s conclusion that the references to a single, contiguous wild horse territory were the result of “[a]n administrative error,” . . . and determining whether that 2013 conclusion

was consistent with the evidence before the agency at the time the decision was made.

D.E. 32 at 14 (JA0109).

The district court ruled for Defendants, finding that the Service did not act arbitrarily and capriciously in eliminating the Middle Section from the WHT more than twenty years after it was formally incorporated in the 1991 Forest Plan. Despite the fact that the Service's addition of the Middle Section in the mid-1980s was expressly incorporated into the 1991 Forest Plan after extensive public involvement, the court concluded that "plaintiffs cannot point to any formal plan implementing a territorial change." *Id.* at 16 (JA0111). The district court also concluded that the Middle Section "could not have been properly incorporated into the Devil's Garden WHT," *id.* at 21 (JA0116), because "significant portions of the disputed territory were privately held and would not have qualified for inclusion in the WHT." *Id.* at 22 (JA0117). Thus, the court adopted the agency's rationale that the incorporation of the Middle Section was both an "administrative convenience" and an "error" that the Forest Service was free to reverse without a formal Forest Plan amendment or an EIS, and found that this change did not violate the Wild Horse Act, NFMA, or NEPA. The court also rejected Plaintiffs' challenge to the AML modifications in the new WHT Management Plan.

SUMMARY OF ARGUMENT

1. The district court's ruling that the Forest Service did not act arbitrarily or capriciously in eliminating the Middle Section is in error for multiple reasons.

First, the Service's claim that it never formally incorporated the Middle Section into the WHT—and, instead, that its incorporation was a mere oversight—is undermined by the irrefutable fact that the agency *did* incorporate the Middle Section as part of the most formal process that the Service has undertaken (or could undertake) with respect to the Modoc National Forest, i.e., the adoption of the 1991 Forest Plan. This document—the result of twelve years of public planning by the Service—sets forth the agency's binding management prescriptions for the forest. With respect to wild horse management, the 1991 Forest Plan clearly adopted the management direction taken by the Forest Service in the mid-1980s: “The Forest has one wild horse territory of about 258,000 acres located on portions of the Doublehead and Devil's Garden Ranger Districts.” JA0585-86. Thus, as the 1991 Forest Plan directed, “[u]nder the Wild Horses and Burros Act, the Forest is *legally obligated* to manage horses within a [single] 258,000-acre wild horse territory.” JA0584 (emphasis added). Given the express conditions of the 1991 Forest Plan, it was arbitrary and capricious for the Service, twenty years after formally incorporating the Middle Section into the WHT, to

abruptly reverse this decision based on a *post hoc* and completely unsubstantiated assertion that the previous boundary modification had been an administrative oversight.

Second, contrary to the district court's conclusion, there was nothing preventing the Service from incorporating the Middle Section into the WHT in the 1991 Forest Plan, notwithstanding the Service's erroneous claim—since disavowed in the trial court—that the majority of Middle Section had previously been privately owned. As noted above, the majority of the Middle Section was *not* privately owned at the time the Wild Horse Act was passed, but instead consisted of portions of the Carr, Timbered Mountain, and Big Sage allotments, all of which were *publicly* owned. Moreover, 59% of Avanzino was also publicly owned at all relevant times. And once the Forest Service acquired the Triangle Exchange Lands in 1976, there was nothing stopping it from including those public lands in the WHT based on the known and historical presence of wild horses.

In short, the district court erred in accepting the Forest Service's assertions without addressing their obvious inconsistencies in the record.

2. The district court also erred by finding the Forest Service complied with NFMA's requirements for amending the 1991 Forest Plan. Contrary to the Service's conclusory assertions, the elimination of over 23,000 acres from the

WHT, including important meadows and water sources, is not the type of “non-significant” modification to the 1991 Forest Plan that the Service may make without complying with NFMA’s procedural safeguards. Thus, because the elimination of the Middle Section constituted a fundamental change in the management prescription for this WHT—regardless of the rationale underlying the shift—the Service violated NFMA’s mandate requiring a formal Forest Plan amendment process and “public involvement comparable” to the preparation of a Forest Plan in the first instance, 16 U.S.C. § 1604(d), (f).

3. The district court erred in finding that the Service complied with NEPA’s safeguards. To the contrary, the Forest Service failed to prepare an EIS despite the inevitable significant environmental impacts that will result from eliminating the Middle Section from the WHT and separating the wild horses into two isolated territories, nor did the Service even purport to take a “hard look” in the EA or FONSI at these issues or at whether the agency should maintain the status quo—i.e., continuing management of the single, larger WHT—as a reasonable alternative to the adopted action. Instead, every alternative that the Service reviewed assumed that the Middle Section had already been eliminated from the WHT, thus demonstrating that the EA and FONSI were merely intended to paper over a predetermined decision that the agency had already made.

ARGUMENT

I. STANDARD OF REVIEW

A district court's grant of summary judgment receives de novo review. *Cuddy Mountain*, 137 F.3d at 1376. Under the Administrative Procedure Act ("APA"), this Court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). In making this determination, the Court must "immers[e]" itself in the record, *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976), and conduct a "thorough, probing, in-depth review" of the facts to determine whether the agency's decisions were based on the "relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

The court must assess whether the agency "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence" before it. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While an agency may deviate from its prior policy or practice, it "is obligated to supply a reasoned analysis for the change," lest its action be deemed arbitrary and capricious. *Id.* at 42.

II. THE DISTRICT COURT ERRED BY FINDING THAT THE FOREST SERVICE PROPERLY REMOVED THE MIDDLE SECTION FROM THE WHT

A. The District Court's Conclusion that the Middle Section Was Never Formally Incorporated Into the WHT Disregards the 1991 Forest Plan

The district court's erroneous conclusion that the elimination of the Middle Section from the WHT did not violate the APA is predicated on a flawed interpretation of the record. The court found that "plaintiffs can point to nothing in the Administrative Record showing that an actual incorporation [of the Middle Section] ever took place. No formal process was invoked, and there is no record of any official decision." D.E. 32 at 13 (JA0108). In fact, the record contains a crucial document that demonstrates actual incorporation of the Middle Section into the WHT, one which was repeatedly cited by all parties in their briefing and represents the *embodiment* of a formal process and an official decision: the 1991 Forest Plan for the Modoc National Forest, which is still in effect today.

As the Service conceded in its August 2013 EA, "[d]uring the mid-1980's, the [Modoc National Forest] appears to have adjusted the WHT boundary for administrative convenience." JA0261; *see also* JA0263 (map from undated "Devil's Garden Plateau Wild Horse Territory Plan" showing the single, contiguous WHT). The agency also concedes that the new boundaries for the

WHT were thereafter formally adopted in the 1991 Forest Plan: “In 1991, the MDF issued its Forest Plan. In this Plan, the Forest Service *made the decision* to manage wild horses on about 258,000 acres, *which represents the number designated for wild horse management in the mid-1980s.*” JA0264 (emphases added).

Contrary to the district court’s conclusion, the adoption of the larger WHT in the 1991 Forest Plan constituted both a “formal process” and a “record of an official decision.” Under NFMA, planning involves “the formal identification of purpose and need . . . , the establishment of planning criteria . . . , and the collection of data.” *Citizens for Env’tl. Quality v. United States*, 731 F. Supp. 970, 977 (D. Colo. 1989). The result of this deliberative process is an LRMP for a particular national forest. The LRMP “provides a framework for integrated resource management and for guiding project and activity decisionmaking on a national forest, grassland, prairie, or other administrative unit.” 36 C.F.R. § 219.2(b)(1).

The development of the Plan is based on a set of management prescriptions, each of which sets forth a strategy for managing all of the major resources of the forest. Each management prescription provides for various levels of goods and services and addresses issues and concerns raised in the public participation process.

Citizens for Env’tl. Quality, 731 F. Supp. at 977.

Once an LRMP is approved, it “*defines* the ‘management direction’ for the forest” and “constitutes a program for all natural resource management activities and *establishes management requirements* to be employed in implementing the plan.” *Id.* (emphases added). “Implementation of the LRMP is achieved through individual site-specific projects, *and all projects must be consistent with the LRMP.*” *Id.* (emphasis added); *see also* 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(e) (“Any resource plans . . . developed by the Forest Service that apply to the resources or land areas within the planning area must be consistent with the plan components”). This includes wild horse territory management plans. *See* Forest Service Manual § 2263.11 (Jan. 2003).

It is unassailable that the formal 1991 Forest Plan for the Modoc National Forest was, as NFMA requires, the result of an extensive planning effort, one that involved more than twelve years of work and 45 public meetings and workshops, and multiple open houses. JA0597. Hundreds of members of the public actively participated. *Id.* As part of this planning process, “[a]ll existing resource management plans were re-examined by the Forest’s interdisciplinary planning team.” JA0578. One result of this extensive planning was that, when the 1991 Forest Plan was approved, the Forest Service formally adopted the two management changes concerning the WHT that it had taken in the mid-1980s,

namely that “[t]he Forest has one wild horse territory of about 258,000 acres” and “a population objective of 275-335 animals to manage.” JA0585-86. Both the larger WHT and the use of a population range represented changes from the 1975, 1980, 1981 and 1982 WHT Territory Management Plans. *See* Statement of Facts, § B.2., *supra*. To the extent the existing Wild Horse Territory Management Plan deviated from the Forest Plan, it was deemed expressly updated to be consistent with the 1991 Forest Plan. JA0578, JA0588.

Thus, contrary to the district court’s groundless finding that “[n]o formal process was invoked” and “there is no record of any official decision,” D.E. 32 at 13 (JA0108), the inclusion of the Middle Section in the WHT was the result of the *most formal process* the Service has undertaken (or could undertake) with respect to the Modoc National Forest, *viz.* the development of its first and (to date) only LRMP in conformance with NFMA. Similarly, the Service’s formal approval of the 1991 Forest Plan constituted the only “record” of an “official decision” required for adoption of the agency’s formal decision to add the Middle Section to the Devil’s Garden WHT, as is the case with any LRMP adopted under NFMA.

Accordingly, because the Forest Service *did*, in fact, formally incorporate the public lands of the Middle Section into the WHT in 1991 after an extensive and deliberative public process, the Service’s primary rationale in its 2013 decision for

removing the Middle Section—*i.e.*, that the agency was merely correcting an administrative error—is entirely unsubstantiated and therefore constitutes a paradigmatic arbitrary and capricious change in agency position lacking any coherent explanation in the record. *See Encino Motorcars, LLC v. Navarro*, No. 15-415, 579 U.S. ___, 2016 WL 3369424, at *5 (June 20, 2016) (rejecting regulation in which an agency “gave little explanation for its decision to abandon its decades-old practice” of applying a particular statute). For that reason alone, the ruling below must be reversed.

B. The District Court Was Mistaken In Concluding that the Middle Section Could Not Have Been Incorporated Into the WHT

The district court also concluded that the Service lacked the authority to incorporate the Middle Section into the WHT. D.E. 32 at 21 (JA0116). Here, too, the district court erred.

In reaching this conclusion, the court relied on three subsections of 36 C.F.R. § 222.60. *Id.* Subsection (b)(13) of that regulation merely defines wild free-roaming horses and burros as “all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat.” 36 C.F.R. § 222.60(b)(13). Because all of the horses in the Devil’s Garden WHT fall within this definition, this subsection is irrelevant. Neither Plaintiffs nor

Defendants contend that the wild horses at issue were “introduced onto the National Forest System on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership.” *Id.*

The district court also cited subsection (b)(14) in its decision, but as with subsection (b)(13), this subsection is inapplicable. Subsection (b)(14) defines a wild horse and burro *range*, which is a special designation that the Service may apply to all or part of a wild horse territory. 36 C.F.R. § 222.60(b)(14); *see also* 36 C.F.R. § 222.61(a)(3) (authorizing the agency to “designate areas within [wild horse] territories as a specific wild horse and burro range” in some situations). Because the Service has never designated a wild horse range in the Devil’s Garden WHT, this subsection is also irrelevant.

Finally, the district court cited subsection (b)(15), which defines a wild horse territory as “lands of the National Forest System which are identified by the Chief, Forest Service, as lands which were territorial habitat of wild free-roaming horses . . . at the time of the passage of the Act.” 36 C.F.R. § 222.60(b)(15). However, nothing in this regulation prevents the Service from adjusting the boundaries of a wild horse territory, as it did in the mid-1980s, in order to reflect a better understanding of the horses’ territorial range or changed circumstances such as the acquisition of formerly private land. To the contrary, the Forest Service Manual on

wild horse management specifically states that “Regional Foresters are authorized to abolish territories *or adjust territorial boundaries* if justified in the Forest Land and Resource Management Plan.” Forest Service Manual § 2260.41 (Jan. 2003) (emphasis added); *see also id.*, § 2261.31 (providing that the Service should consult with state wildlife agencies on “[p]roposals to modify boundaries of established wild horse and burro territories”).

Here, the Service did *not* designate “the territorial habitat” of wild horses at Devil’s Garden in 1971. Instead, it first proposed the boundaries of the WHT in 1975, and it then revised that designation in the mid-1980s after acquiring the Triangle Exchange Lands, and the revised WHT incorporated the northern part of the Triangle Exchange Lands as well as portions of the already-public lands in the Timbered Mountain, Carr, and Big Sage allotments. It was this revised territory, not the original two-part territory, which the Forest Service formally incorporated into the 1991 Forest Plan. To the extent any member of the public disagreed with the single, contiguous WHT, they had the opportunity to comment on, and ultimately challenge, the 1991 Forest Plan, but no such challenge was ever lodged.

Finally, the district court credited the Forest Service’s *post hoc* rationale for removing the Middle Section, *i.e.*, “[a]t the time of the passage of the Wild Horses Act, significant portions of the disputed territory were privately held and would not

have qualified for inclusion in the WHT.” D.E. 32 at 22 (JA0117). The court never came to grips with the fundamental flaw in the Service’s purported justification, namely that, as the Forest Service has admitted, *the majority of the Middle Section was never private land*. Indeed, while the agency wholly disregarded this critical fact throughout the development of the 2013 WHT Management Plan, Defendants have since admitted that “the majority of the middle area was never part of the Triangle or Avanzino Ranches, and consist [sic] of portions of the Big Sage, Timbered Mountain, Carr and Pine Spring Allotments.” D.E. 9 (JA0059-75), ¶ 61; *see also id.*, ¶ 39. On that basis alone, the district court should have found that the Service failed to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” and held that the elimination of the Middle Section was arbitrary and capricious. *State Farm*, 463 U.S. at 43 (citation omitted).

Moreover, 59% of the Avanzino Allotment was *always* publicly held. JA0261. And Defendants have not cited any authority or legislative history that would have prevented the Service from including the northern section of the acquired Triangle lands (including Boles Meadows) when it made this boundary change, especially given the evidence of historical wild horse use there. JA0863. Thus, contrary to the district court’s conclusion, there was no legal obstacle

preventing the Service from including the public lands of the Middle Section in the WHT in the mid-1980s based on current and historical use of these areas, and then formalizing that change in the 1991 Forest Plan.⁹

In sum, because there had been no prior administrative oversight in formally incorporating the Middle Section into the WHT and there were no legal obstacles to including these public lands in the WHT to reflect current conditions and changed circumstances, there is no basis in the record upon which this Court may uphold the Service's elimination of the Middle Section.

III. THE FOREST SERVICE FAILED TO COMPLY WITH NFMA AND NEPA WHEN IT ELIMINATED THE MIDDLE SECTION

Even assuming the Forest Service were merely correcting an administrative oversight in eliminating the Middle Section—which is *not* borne out by the record—the loss of more than 23,000 acres of public lands that for more than two

⁹ The Service unlawfully eliminated more than just the Middle Section from the WHT. For example, the northeastern portion of the Pine Springs Allotment, the northern edge of the WHT in the Carr Allotment, and the northeastern corner of WHT in the Carr Allotment also were eliminated from the WHT in August 2013. The Forest Service has never provided any explanation for eliminating these areas from the WHT. Plaintiffs specifically objected to these modifications. *See* JA0844, ¶ 20. The district court only focused on the Triangle Exchange and Avanzino lands, and never addressed the Service's failure to justify the removal of the remaining portions of the Middle Section, or these other areas that the agency eliminated from the WHT. As this Court has explained, that cannot pass muster under the APA. *See Delaware Dep't of Nat. Res. v. EPA*, 785 F.3d 1, 14-15 (D.C. Cir. 2015) (“refus[ing] to engage with the commenters” arguments renders an action “arbitrary and capricious on that ground alone”).

decades had been legally authorized for wild horse use through the binding 1991 Forest Plan required the agency, at minimum, to comply with mandatory procedural safeguards under NFMA and NEPA due to a substantial change in the status quo. The district court erred in upholding the Service's minimal approaches under both statutes, which cannot withstand close scrutiny.

A. The Elimination of the Middle Section Was a Significant Change to the 1991 Forest Plan Requiring a Formal Amendment

As discussed, the Service's decision to abolish the Middle Section from the WHT contravenes the management decision formally incorporated into the 1991 Forest Plan, which mandated that the agency must manage a single, contiguous 258,000 acre WHT. *See* JA0584 (“Under the Wild Horses and Burros Act, the Forest is *legally obligated* to manage horses within a [single] 258,000-acre wild horse territory.”) (emphasis added). Despite making drastic changes to the WHT boundary and eliminating a significant amount of acreage, the agency ignored NFMA's requirement for formally amending the 1991 Forest Plan.

NFMA requires the Service to “develop, maintain, and, as appropriate, revise” LRMPs. 16 U.S.C. § 1604(a). All site-specific “[r]esource plans ... and other instruments for the use and occupancy of National Forest System lands *shall be consistent* with the land management plans.” *Id.* § 1604(i) (emphasis added); *see also* 36 C.F.R. § 219.10(e). The Forest Service Manual provides further

guidance, stating that the agency may only “adjust territorial boundaries if justified in the Forest [LRMP].” Forest Service Manual § 2260.41 (Jan. 2003). The Manual also instructs that: (1) “Wild Horse and Burro Territory plans are to conform with the Forest [LRMPs],” *id.* § 2263.11; (2) territory plans must be in “compliance with the management direction identified in ... Forest [LRMPs],” *id.* § 2263.1; and (3) the agency’s policies include “[r]ecogniz[ing] wild horse-burro territory boundaries in Forest [LRMPs],” *id.* § 2260.3(5).

The Service’s elimination of the Middle Section violates each of these mandates. The 1991 Forest Plan provides that “[t]he Forest has one wild horse territory of about 258,000 acres” that the Service “is legally obligated to manage.” JA0584-85. Because the removal of the Middle Section reduces the WHT to a two-unit 232,500-acre area, it directly contravenes the management direction established in the still-operative 1991 Forest Plan. Faced with this major inconsistency, the Service was obligated, at bare minimum, to formally amend the 1991 Forest Plan. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005) (“If the Forest Service thinks any provision of the [LRMP] is no longer relevant, the agency should propose amendments . . . in a process complying with NEPA and NFMA, rather than discount its importance in environmental compliance documents”).

Instead of formally amending the 1991 Forest Plan in conformance with NFMA, however, the Service merely asserted that it did not have to do so because of its self-serving and conclusory statement that the action only consists of “non-significant Forest Plan amendments.” JA0212, JA0221. Although, in certain circumstances, an LRMP may be modified absent the formal NFMA amendment process, that is the case only where the Service analyzes the proposed action and sets forth evidence establishing that “such amendment would [not] result in a significant change in such plan.” 16 U.S.C. § 1604(f)(4). As the Ninth Circuit has explained, “[u]nder the relevant statute and regulation, the correct procedure depends on the scope of the amendment. ‘Significant’ amendments require *a lengthy and detailed amendment process.*” *Lands Council v. Martin*, 529 F.3d 1219, 1227 (9th Cir. 2008) (emphasis added); *see also Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1032 (significant amendments require “the same complex planning process applicable to promulgation of the original plan”).

To determine whether a particular amendment is significant, the deciding official must refer to the guidelines in the Forest Service Manual. *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1033; *Prairie Wood Prods. v. Glickman*, 971 F. Supp. 457, 463 (D. Or. 1997). Examples of non-significant changes include:

1. Actions that do not significantly alter the multiple-use goals and objectives for long-term land and resource management.
2. Adjustments of management area boundaries or management prescriptions resulting from further on-site analysis when the adjustments do not cause significant changes in the multiple-use goals and objectives for long-term land and resource management.
3. Minor changes in standards and guidelines.
4. Opportunities for additional projects or activities that will contribute to achievement of the management prescription.

Forest Service Manual § 1926.51 (Jan. 2015).

While the Service concluded that the elimination of 23,631 acres—*i.e.*, 36 square miles or nearly 10% of the WHT—was a non-significant amendment to the 1991 Forest Plan, JA0266, JA0278; D.E. 32 at 26 (JA0121), the decision to eliminate the Middle Section does not fit readily into any of the above examples. Far from not significantly altering the multiple-use goals and objectives in the 1991 Forest Plan, the decision to “zero out” horses from the 23,631 acres that form the Middle Section completely eliminates one of those multiple-use goals—*i.e.*, use by federally protected wild horses—from the affected areas.

Nor is this decision merely an “adjustment” to the boundaries or management prescriptions for the WHT resulting from “on-site analysis” of

conditions there. The Service's removal of the Middle Section completely eliminates one of the multiple uses from 10 percent of the WHT and splits a contiguous territory into two isolated territories. Whereas prior to the change, the Middle Section was managed for use by horses, livestock, and wildlife, the Forest Service's decision changes the goal, objectives, and output for the affected area by *completely removing* one of these multiple uses. As courts have found, such a change in management prescriptions constitutes a "significant amendment" under NFMA. *See Am. Wildlands v. U.S. Forest Serv.*, No. 97-CV-160-M-DWM, 1999 U.S. Dist. Lexis 22243, at *9-20 (D. Mont. Apr. 14, 1999) (rejecting Service's finding of non-significance under NFMA where "the amendment significantly changes the 'goals, objectives and outputs' for the Elkhorns by placing other activities such as mining, timber, and grazing on par with wildlife conservation").

In short, while the agency may make minor modifications to an LRMP to reflect on-site conditions without engaging in a formal amendment process, the elimination of 23,631 acres from the WHT at issue here instead reflects a significant and fundamentally different approach to managing horses at Devil's Garden. As such, this highly consequential change in the status quo—which will indisputably affect wild horses, livestock, wildlife, and other resources located in the Middle Section—obligated the Service to follow the formal NFMA procedures

that apply to significant amendments to LRMPs, 16 U.S.C. § 1604(f)(4). The agency's failure to adhere to this statutory process renders the decision arbitrary and capricious.

B. The Forest Service Also Violated NEPA In Two Distinct Ways

1. Because the Elimination of the Middle Section Constitutes a Fundamental Change in the Status Quo and Will Result in Significant Environmental Impacts, an EIS Was Required

Here, the Forest Service prepared an EA and FONSI—rather than a more rigorous EIS—despite the fact that this action eliminates more than 23,000 acres of public lands from the Devil's Garden WHT that wild horses have been able to access for more than three decades. For two independent reasons, the Service's failure to prepare an EIS under the circumstances is arbitrary and capricious.

First, because the elimination from the WHT of this large area of public lands—which served as a key corridor connecting the two isolated units that now comprise the WHT and therefore facilitated genetic interchange and provided access to meadows and water sources for the past three decades—is undoubtedly a “significant amendment” to the 1991 Forest Plan for purposes of NFMA, *see supra* at 48-53, that alone requires an EIS because “NFMA mandates substantial public involvement, planning, and input, requiring, in essence, the Forest Service to conduct the same complex planning process applicable to promulgation of the

original plan.” *Citizens’ Committee to Save Our Canyons*, 297 F.3d at 1032 (quotation marks and citations omitted); *see also* 16 U.S.C. § 1604(f)(4).

Thus, because the 1991 Forest Plan was itself developed pursuant to an extensive public process—and the Service *prepared an EIS* in approving the Forest Plan, JA0576—in amending the 1991 Forest Plan in this manner, the agency had no choice but to follow the same procedures that applied to adopting the 1991 Forest Plan in the first instance, *i.e.*, preparing an EIS. *See* 36 C.F.R. § 219.7(c)(1) (“A new plan or *plan revision requires preparation of an environmental impact statement*”) (emphasis added); *id.* § 219.13(b)(3) (“A proposed amendment that may create a significant environmental effect and thus require preparation of an environmental impact statement is considered a significant change in the plan for the purposes of the NFMA”). Therefore, the Forest Service’s failure to prepare an EIS here—when undertaking a significant amendment to the governing 1991 Forest Plan—is in flagrant violation of NEPA, as well as NFMA. *See Am. Wildlands*, 1999 U.S. Dist. Lexis 22243, at *17-20 (finding that “the amendment significantly changes the ‘goals, objectives and outputs’” and thus holding that “the amendments to the forest plans should have been accompanied by an Environmental Impact Statement”).

Second, even if this were a situation not involving a significant amendment under NFMA, the Service's failure to prepare an EIS would nevertheless constitute arbitrary and capricious decisionmaking under NEPA. This Court's "long-established standard" for reviewing an agency's decision not to prepare an EIS is:

First, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.

Grand Canyon Trust v. F.A.A., 290 F.3d 339, 340-41 (D.C. Cir. 2002) (citation omitted). With respect to the crucial issue of the Service's elimination of the Middle Section, the EA and FONSI fail to satisfy *any* of these requirements.

At the outset, the EA does *not* "identif[y] the relevant environmental concern" because it fails to examine *in any way whatsoever* the impact of the elimination of the Middle Section on the wild horse population at Devil's Garden or on members of the public who have long observed federally protected horses in those locations, due to the agency's erroneous insistence that it was merely correcting a boundary error. Even if the Service were simply correcting an administrative oversight—which it was not—there are nevertheless significant

environmental impacts that will result as a consequence of that action now that wild horses are prohibited from accessing these public lands after more than three decades of those lands being available for their use, and after a longer period of use that likely predated the Wild Horse Act. Hence, the agency's failure in its EA and FONSI to analyze *at all* the impact that the elimination of access to the meadows and water sources in the Middle Section will have on wild horses, or the impact that separating the population into two non-interacting herds will have on the genetic viability of the population, provides the Court with no basis to determine either that the Service "accurately identified the relevant environmental concern" or took "a 'hard look' at the problem in preparing the EA." *Grand Canyon Trust*, 290 F.3d at 340-41.¹⁰

Moreover, the Service failed "to make a convincing case" for its FONSI in lieu of an EIS. *Id.* at 341. Like the EA, the FONSI simply does not address the impact of the removal of the Middle Section on wild horses or other natural

¹⁰ It is evident from the record that the NEPA process as it relates to the Middle Section was nothing more than a *post hoc* attempt to justify the removal of the Middle Section at the behest of the Farm Bureau, an interested party that was heavily involved in—and received significant federal funding for—developing the wild horse strategy adopted by the Forest Service in its EA. *See supra* at 20-33. Given the Farm Bureau's close involvement in the EA preparation process—including by successfully urging the Service to eliminate the Middle Section and treating the Middle Section in all pre-decisional documents as *already* eliminated from the WHT—it is not surprising that the Service never conducted *any* analysis as to the environmental impacts of eliminating the Middle Section from the WHT.

resources located on these public lands. Rather, the FONSI incorporates the EA by reference and hence suffers from the same defects. The Service's central premise—that because the elimination of the Middle Section “corrects a boundary established for administrative convenience, this amendment has no effect on wild horses or their habitat,” JA0372—strains credulity. In fact, as discussed, pertinent record evidence suggests just the opposite: the elimination of the Middle Section will substantially alter the environmental status quo in the WHT by limiting wild horses' access to forage, water, and other resources in the Middle Section, and by severing connectivity and natural genetic interchange that has existed between wild horse bands throughout the contiguous WHT for at least 30 years. *See* JA0839-44, ¶¶ 9-11, 15, 19.

By the same token, not only did the Forest Service fail to analyze the significant environmental impacts of eliminating the Middle Section but the agency did not even consider any “changes or safeguards in the project [that could] sufficiently reduce the impact to a minimum.” *Grand Canyon Trust*, 290 F.3d at 341. For example, had the Service prepared an EIS evaluating the environmental impacts of eliminating more than 23,000 acres of public lands from the middle of this WHT and analyzing reasonable alternatives to that action, the agency may have adopted a final decision in which *some* of the Middle Section is removed

from the WHT without entirely foreclosing wild horses from crucial meadows and water sources and without severing genetic interchange between isolated populations. Absent this analysis, however, the agency's failure to prepare an EIS for this action that will result in significant environmental impacts cannot pass muster under this Court's NEPA precedents.¹¹

2. *Even if an EA Were Appropriate, It Failed to Take a Hard Look at the Loss of the Middle Section*

As explained, rather than analyzing what effect the elimination of the Middle Section would have on wild horses, the EA simply writes off the 33-year-old Middle Section as an “administrative error.” *Supra* at 39-43. By sweeping this crucial issue under the rug, the Service flouted NEPA and its regulations.

NEPA mandates that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 858 (D.D.C.

¹¹ In addition to failing this Court's test espoused in *Grand Canyon Trust*, the Service's failure to prepare an EIS is arbitrary and capricious for an additional reason. The elimination of the Middle Section (and access to its meadows and water sources), in combination with the loss of genetic interchange, triggers several NEPA “significance” factors identified at 40 C.F.R. § 1508.27(b)—e.g., this action is highly controversial, will result in uncertain effects to now-isolated wild horse bands and their genetic viability, and sets a precedent for future management actions in the WHT—and the existence of even *one* such factor triggers the need to prepare an EIS. See *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218-19 (D.D.C. 2003) (“[T]he presence of one or more of these factors should result in an agency decision to prepare an EIS.”).

1991) (quotation marks and citation omitted). Where an action will “*not* have a significant effect on the environment,” agencies may issue a less rigorous EA so long as it “explains how the agency reached that conclusion.” *Id.* at 859 (citing 40 C.F.R. § 1508.13).

Here, other than a few fleeting references to “administrative error” and “administrative convenience,” *see* JA0261, JA0264, and the erroneous explanation—since disavowed—that the Middle Section was comprised mostly of “private lands” in the 1970s, *see* JA0409, the EA contains no analysis concerning the elimination of the Middle Section. Likewise, the EA does not even purport to assess the environmental impacts caused by the removal of the Middle Section. The EA lacks *any* scientific data supporting its bald claim that the elimination of more than 23,000 acres of public lands, including important meadows and water sources, somehow is “based on the long-term needs of the Devil’s Garden wild horse herd.” JA0278; *see also* JA0372 (same). Rather, the EA asserts, without explanation, that “[a]s [the elimination of the Middle Section] corrects a boundary established for administrative convenience, this amendment has no effect on wild horses or their habitat.” JA0372. This conclusory statement defies logic and relevant scientific principles. *See* JA0842-44, ¶¶ 17, 19.

This is not a case of an EA “assessing difficult questions regarding scientific and technical disputes,” necessitating deference to the agency’s expertise. *Watkins*, 808 F. Supp. at 859 (citing cases). Here, the Service conducted *no analysis whatsoever* as to the impact that permanently eliminating the central portion of a wild horse territory would have on wild horses (or other natural resources) located there. *See* JA0353-84. The EA admits as much: “[w]ild horse populations outside the [new, two-unit] territory *were not considered* as it is assumed they will be removed.” JA0365 (emphasis added). Notably absent is any analysis as to how this action would impact the ability of the WHT’s remaining wild horses (i.e., in the East and West units) to access essential resources such as forage and water in the Middle Section, which they have used for decades, and to migrate seasonally and reproduce in a manner that supports genetic interchange and the overall health of the population. *Cf.* JA0839-44, ¶¶ 9-11, 15-17, 19. These critical failures render the EA patently inadequate under NEPA.

Moreover, the Service’s underlying motivation for abolishing the Middle Section and for failing to conduct even a cursory review of its environmental effects—*i.e.*, to accede to the desires of the Farm Bureau, *see supra* note 10—makes crystal clear that the agency did not seriously consider reasonable alternatives to eliminating the Middle Section as required by NEPA, *see* 40 C.F.R.

§§ 1502.14, 1508.9(b), but instead utilized the EA to paper over and justify a decision concerning the Middle Section that had already been made well before the final decision was issued. *See* 40 C.F.R. § 1502.2(g) (requiring that NEPA review “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made”); *id.* § 1502.5 (NEPA review “will not be used to rationalize or justify decisions already made”). These violations, too, require vacatur and remand. *See Metcalf v. Daley*, 214 F.3d 1135, 1142-45 (9th Cir. 2000) (NEPA review “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made,” and rejecting an EA because “[i]t is highly likely that because of the Federal Defendants’ prior written commitment to the Makah and concrete efforts on their behalf, the EA was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment”).

In light of the Service’s utter failure even to analyze the environmental impacts of—or consider reasonable alternatives to—the agency’s elimination of more than 23,000 acres of public lands in the Middle Section from wild horse use, the agency has failed to take the “hard look” required by this Court’s NEPA precedents. *See Pub. Emps. for Env’tl. Responsibility v. Hopper*, 827 F.3d 1077,

1083 (D.C. Cir. 2016) (rejecting NEPA review that failed to “consider every significant aspect of the environmental impact” because “[a]gencies must take a ‘hard look’ at the environmental effects of a major federal action *and consequences* of that action”) (quotation marks and citation omitted).

In sum, the eradication of the Middle Section requires an EIS, or, at minimum, an EA that actually takes a “hard look” at the relevant issue by analyzing its impacts and evaluating reasonable alternatives. By violating NEPA and its regulations with respect to the Middle Section, the Service’s actions were arbitrary, capricious, and not in accordance with law.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court declare the Forest Service’s elimination of the Middle Section arbitrary and capricious, and vacate and remand that decision to the Service for further consideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 13,930 words.

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CERTIFICATE OF SERVICE

I, William S. Eubanks II, hereby certify that on December 5, 2016, I served copies of Plaintiffs-Appellants' Final Opening Brief on the following parties by way of electronic mail (ECF filing):

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