

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' REPLY BRIEF

William S. Eubanks II
MEYER GLITZENSTEIN & EUBANKS LLP
3206 Norwood Court
Fort Collins, CO 80525
(970) 703-6060
beubanks@meyerglitz.com

David Zaft
CALDWELL LESLIE & PROCTOR, PC
725 South Figueroa Street, 31st Floor
Los Angeles, CA 90017
(213) 629-9040
zaft@caldwell-leslie.com

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GLOSSARY

AML	Appropriate Management Level
APA	Administrative Procedure Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
LRMP	Land and Resource Management Plan
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
WHT	Devil's Garden Wild Horse Territory

INTRODUCTION

The Forest Service's responses to Plaintiffs' arguments suffer from the same fatal defects that permeated the Service's decision in the first instance, namely the Service's refusal to acknowledge the development, formal adoption, and implementation of a deliberate, decades-long policy to manage federally protected wild horses in the Middle Section of the Devil's Garden Wild Horse Territory ("WHT"). Instead, the Service continues to insist that its longstanding policy was nothing more than an "administrative error" that was never formally adopted in any decision document or incorporated into agency policy or practice. But the record firmly establishes this was not the case.

The Forest Service was aware of the presence of wild horses in the Big Sage and Boles allotments in the early 1970s. Yet the agency inexplicably omitted these allotments when it established the initial boundaries of the two-part WHT in 1975. In the mid-1980s, however, the Service expanded the WHT boundaries to include allotments in the Middle Section and began managing wild horses there. After the agency formally incorporated the Middle Section into the WHT in the 1991 Forest Plan for the Modoc National Forest, it established *minimum* management levels for wild horses in at least two Middle Section allotments—Big Sage and Boles—and repeatedly relocated horses that were found outside the larger WHT to the Middle

Section. From 1994 until 2012, the Service continued to apply these management levels to the Middle Section.

None of the decisional or supporting documents that accompanied the Service's final action acknowledged this important history or the agency's longstanding assignment and use of minimum management levels for horses in the Middle Section. Instead, the Service solely relied on the status of *other* areas within the Middle Section—the Avanzino and Triangle lands—when explaining its 2013 decision to remove it from the WHT, and the agency erroneously claimed that it had never set management levels for horses in the Middle Section. Because the Service's explanation for its decision to “zero out” horses in the Middle Section was disconnected from the facts, and because it never identified—much less analyzed—how reversing the agency's longstanding practice would impact the wild horse population at Devil's Garden, its decision is arbitrary and capricious and violated the Administrative Procedure Act (“APA”).

In addition, the Forest Service ran afoul of the procedural safeguards mandated by the National Forest Management Act (“NFMA”) and the National Environmental Policy Act (“NEPA”). The agency relied on its erroneous construction of the facts to characterize the elimination of 23,000 acres from the WHT as a “non-significant” Forest Plan amendment in order to avoid taking a hard

look at the environmental consequences of this major change in management approach. Because the agency never acknowledged that it had established and applied minimum wild horse management levels in various parts of the Middle Section, the Service failed to grapple with the fact that the elimination of those areas indisputably constitutes a significant amendment of the Forest Plan that required the same procedures that were used to develop the Forest Plan in the first instance, including the preparation of an Environmental Impact Statement (“EIS”).

For all of these reasons, Plaintiffs respectfully request that the Court vacate the Forest Service’s decision to eliminate the Middle Section from the WHT and remand this matter to the agency for further consideration.

I. THE FOREST SERVICE’S REMOVAL OF THE MIDDLE SECTION FROM THE DEVIL’S GARDEN WILD HORSE TERRITORY WAS ARBITRARY AND CAPRICIOUS.

The Forest Service’s primary argument, i.e., that the Middle Section “was not—and could not have been—properly incorporated into the Territory,” Federal Appellees’ Brief (“Fed. Br.”) at 32, is both factually and legally erroneous. This contention rests on a highly selective reading of the record that ignores how the Forest Service modified its management approach for the Devil’s Garden WHT in the mid-1980s, how it formally incorporated those changes into the 1991 Forest Plan, and how it thereafter actively managed wild horses in the Middle Section for

more than two decades in accordance with the Forest Plan. Likewise, the Service's claim that the Wild Horse Act prohibited any modification of wild horse territory boundaries is unsupported and at odds with longstanding agency practice. Finally, the agency's justification for eliminating the Middle Section from the WHT, which the Service concedes "is of less than ideal clarity," Fed. Br. at 27, 32, lacks a rational connection to the facts underlying the agency's decision.

A. The Forest Service Incorporated the Middle Section Into the WHT in the 1991 Forest Plan and Thereafter Established Minimum Population Targets for Middle Section Allotments.

As the Forest Service explained in its 2013 Environmental Assessment ("EA"), in the mid-1980s the Service "adjusted the WHT boundary" and "incorporated about another 23,631 acres of land," thereby "increasing the WHT to approximately 258,000 acres in size." JA0261.¹ The EA further states that, when the Forest Plan for the Modoc National Forest was issued in 1991, "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."

¹ All sides agree that the original, two-part WHT was established in 1975—four years *after* the 1971 passage of the Wild Horse Act. It is not known what steps the Forest Service took in 1975 to set the original boundaries of that WHT, but documents from 1972 and 1974 show that wild horses were found in the Boles and Big Sage allotments at that time—i.e., outside of the later-established 1975 WHT boundaries. *See* JA0863 (wild horses spotted "along Boles Creek, and the west side of Boles Meadows" in 1972); JA0807 (1974 map showing herd summer range spilling over from Emigrant into the (unidentified) Big Sage allotment).

JA0264 (emphasis added); *see also* JA0585-86 (1991 Forest Plan stating that “[t]he Forest has one wild horse territory of about 258,000 acres located on portions of the Doublehead and Devil’s Garden Ranger Districts”). This is consistent with the Forest Plan itself which unequivocally stated that the Service “is legally obligated to manage horses within a 258,000-acre wild horse territory.” JA0584. As Plaintiffs explained in their Opening Brief (at 10-11), and as the Service concedes (Fed. Br. at 11 n.5), a second change in the management direction from the mid-1980s—the abandonment of a single population target of 300 or 305 horses in favor of utilizing a population *range* of 275 to 335 horses—was also incorporated into the 1991 Forest Plan. *See* JA0264; JA0585-86. Neither the addition of the Middle Section nor the use of a population range appears in the 1975, 1980, 1981 and 1982 Wild Horse Management Plans.

While the Service attempts to downplay the significance of the Forest Plan’s formal adoption of these two management directions from the mid-1980s, Plaintiffs previously described the extensive planning and public participation that went into the development and finalization of the 1991 Forest Plan. *See* Opening Br. at 11-13. As numerous courts have explained, this process is very extensive and the final plan (or LRMP) is not arrived at casually. *See, e.g., Sierra Club v. Marita*, 46 F.3d 606, 608-09 (7th Cir. 1995) (describing the “quite elaborate”

process for developing and finalizing an LRMP subject to “extensive public participation and comment”); *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1470-71, 1473 (9th Cir. 1994) (explaining the detailed steps taken to develop an LRMP); *Wyoming Sawmills, Inc. v. U.S. Forest Serv.*, 179 F. Supp. 2d 1279, 1301-02 (D. Wyo. 2001) (same). While the agency now asserts that the 25-year old description of the WHT in the governing Forest Plan is “erroneous,” Fed. Br. at 42, it has not identified any contemporaneous record evidence that would support this conclusion.²

Moreover, after issuing the 1991 Forest Plan, the Forest Service took concrete steps to implement its newly-formalized “legal[] obligat[ion]” to manage

² The Service makes two additional statements regarding the 1991 Forest Plan that must be addressed. First, it asserts that the Forest Plan deemed the “1982 Territory Plan” to be consistent with the direction taken in the Forest Plan. Fed. Br. at 14. In fact, the cited page in the Forest Plan, page A-1, does *not* specify the version of the Wild Horse Management Plan to which it pertains. JA0588. As the Service admits, the only specific Management Plan referenced in the Forest Plan is the 1985 WHT Management Plan, which the Service claims does not exist. JA0585-86. Moreover, the 1991 Forest Plan expressly stated that, to the extent that any of the resource plans, including the existing Wild Horse Territory Management Plan (whether the 1982 or the 1985 revision), were inconsistent with the Forest Plan, they were deemed updated to be consistent with the 1991 Forest Plan. JA0578, JA0588. The Service concedes that this global statement applied to the use of an AML range, which was adopted in the mid-1980s instead of the single population target utilized in the 1975, 1980, 1981 or 1982 WHT Management Plans, *see* Fed. Br. at 15-16, but it inexplicably rejects this statement’s application to the functionally indistinguishable change in management of the Middle Section that originated at the same time as the AML change. The Service cannot have it both ways.

wild horses in the Middle Section. JA0584. The Service established management levels—“designated management herd minimum sizes”—for grazing allotments in the Middle Section beginning in 1994. The Service’s Wildhorse Inventory for that year shows that the agency distributed the total minimum size of 285 wild horses for the Territory across allotments throughout the Territory, including the Middle Section:

- In the former East range allotments, the Service established minimum herd targets of 60 horses for the Emigrant allotment, and 35 horses for the Pine Spring allotment. JA0857.
- In the former West range, the Service established minimum herd targets of 30 horses for the Surveyors Valley allotment, 20 horses for the Dalton allotment, and 30 horses for the Mowitz allotment. *Id.*
- Importantly—and in accordance with the direction incorporated into the 1991 Forest Plan—the Service also established minimum herd targets of 20 horses for the Big Sage allotment, and 40 horses for the Boles allotment. *Id.* As the Service concedes, *both* of these allotments “are within the disputed area.” Fed. Br. at 35.³

In short, contrary to the agency’s assertion that “the Forest Service never set appropriate management levels for horses on the allotments (or the portions of allotments) within the disputed area,” Fed. Br. at 43, 16, the Service did in fact

³ The Service also established a minimum herd size of 40 horses for the Timbered Mountain allotment, which is located on both the former East range *and* the Middle Section. *See* Fed. Br. at 35 n.13.

specifically establish *minimum* population levels for horses in the Middle Section, representing 20% of the overall minimum population level for entire WHT.

The agency continued to actively apply these minimum management levels to the Big Sage and Boles allotments in 1996 (JA0855), 1997 (JA0853), 1998 (JA0851), 2002 (JA0850) and 2004 (JA0849). Indeed, as late as 2010, the Service utilized a minimum herd size for Big Sage of 20 horses, and collective minimum herd size of 45 horses for two parts of the Boles allotment, which had been incorporated into the newly-created Carr grazing allotment. JA0848. In all of these years, horses were found in the Big Sage and Boles allotments. *See* JA0849-51, JA0853, JA0855, JA0857.⁴

⁴ As Plaintiffs noted in their Opening Brief (at 17), wild horses have been found in Big Sage and Boles areas going back to the early 1970s. Indeed, the 1974 map of herd ranges cited by the Service (Fed. Br. at 8), shows that the summer range for the Emigrant unit in the East range spilled over onto the Big Sage allotment to the west. *Compare* JA0807 (1974 map), *with* JA0302 (showing Middle Section allotments). This is consistent with the agency's subsequent observation of wild horses in Big Sage in 1979. JA0864. Similarly, wild horses were spotted "along Boles Creek, and the west side of Boles Meadows" in 1972, *before* the Service established the original WHT in 1975. JA0863. The Forest Service has never explained why it did not include these areas of public lands in its 1975 two-section WHT. The fact that there is evidence that horses were using these lands in the 1970s also refutes the argument by the Intervenor-Appellees that Plaintiffs seek to mandate an "ever-expanding" WHT, a position that Plaintiffs have *never* advanced. (Intervenors' Br. at 5, 19.) Instead, Plaintiffs merely seek to preserve the WHT boundaries that the Service first established thirty years ago in the mid-1980s and have managed for wild horse use ever since.

Thus, from at least 1994 until the Forest Service issued its second scoping notice in December 2012, the Service established and continuously applied *minimum* management levels for wild horses in Middle Section allotments to comply with the 1991 Forest Plan. *See* JA0730, JA0732. While the Service now asserts that these reports were “not decision documents,” Fed. Br. at 35, this contention misses the mark. The applicable “decision document” was the 1991 Forest Plan developed after years of analysis and stakeholder participation, pursuant to which the Service was explicitly required to manage a target population of 275 to 305 horses on a single WHT comprising “258,000 acres.” JA0585-86. The Wildhorse Inventory reports establish that the Service did exactly that.

The Service also erroneously contends that the agency’s “management activities from the 1970s to the present show that the agency has treated the disputed area as distinct from the Territory, conducting periodic gathers and removing horses from the disputed area.” Fed. Br. at 33; *see also id.* at 43 (asserting that the Service “continued removing wild horses from the disputed area even after adoption of the 1991 Forest Plan”). But this claim is also refuted by the record, which demonstrates that the Service conducted periodic gathers in *all* parts of the larger Territory, including the Middle Section *and* the East and West ranges,

when the population of horses exceeded the management levels adopted in the 1991 Forest Plan and further specified in the designated management herd minimum sizes used from 1994 on. JA0356; JA0849-51, JA0853, JA0855, JA0857.

The 2013 EA's "Wild Horse Gather History" relied on by the Service (Fed. Br. at 43) shows that between 2003 and 2009, wild horses were removed from Middle Section allotments (Big Sage and Boles), East range allotments (Emigrant and Pine Springs), and West range allotments (Surveyors and Mowitz). JA0356. Indeed, the three largest "gathers" were from Emigrant (197 horses), Timbered Mountain (103 horses), and Surveyors (92 horses), which are either *not* in the Middle Section or, in Timbered Mountain's case, include both East range and Middle Section lands. *Id.* As the Service concedes, the purpose of *all* of these "gathers" was not to totally *eliminate* horses from any of these areas, but rather "to achieve the AMLs established in the 1991 Forest Plan." JA0355. Accordingly, the record plainly demonstrates that, prior to the decision under review, the Service took seriously the Forest Plan's mandate that the agency was "legally obligated" to manage wild horses throughout the single 258,000-acre WHT. JA0584.

Moreover, numerous statements in the agency's Wildhorse Inventory reports make clear that the agency consistently treated the Big Sage and Boles allotments

as a part of the WHT. In the 1990 report, for example, the Service noted that “[e]ight horses and one foal were observed in the West Grizzlie C&H Allotment” which “is outside of the wild horse territory. . . . Every effort should be made to return these animals to the territory or they should be removed.” JA0774. While that survey *also* identified 11 horses in Big Sage and 67 horses in Boles in the Middle Section, the report did *not* recommend that all of the horses in those allotments be removed. JA0773; JA0774. Instead, the report recommended including Boles in the “[r]ecommended capture area” alongside “Mowitz, Surveyors, and Emigrant Spring C&H Allotments,” and the captures from these areas were intended only to *reduce* and not eliminate the number of horses there, consistent with the designated minimum herd management sizes. JA0774. And *no capture at all* was recommended for Big Sage, presumably because the population there was below the minimum management level for that allotment. Thus, the Service treated these Middle Section allotments the same as the other allotments *inside* the WHT. Notably, this was *before* the issuance of the 1991 Forest Plan, and demonstrates that the Service already considered Boles and Big Sage to be part of the WHT.

Likewise, in 1992, the Wildhorse Inventory report stated that “[t]en horses were observed in the West Grizzlie C&H allotment” which “is outside of the wild

horse territory. Every effort should be made to return these animals to the territory and/or removed.” JA0862. While the survey also showed that 4 horses were observed in Big Sage and 29 in Boles, the Service did not recommend their removal. JA0861; *see also* JA0862 (recommended capture areas for 1992 were “W. Grizzlie, Surveyor’s Valley, Timbered Mtn., Emigrant, and Dalton” but not Big Sage or Boles).

Indeed, the Service relocated horses from areas outside the larger Territory *to allotments within the Middle Section*. In 1993, the Service found 3 horses in the Blue Mountain allotment outside of the Territory, and stated that they “NEED TO BE RELOCATED TO THE BOLES ALLOTMENT.” JA0860. And in 1994 and 1996, the Service continued to observe signs of horses in the Blue Mountain allotment and each time it stated that “THIS AREA IS OUTSIDE OF THE WILD HORSE TERRITORY AND THESE HORSES SHOULD BE MOVED BACK OVER TO THE TIMBERED RIDGE AREA (BOLES ALLOTMENT).” JA0858, JA0856.

In sum, far from showing that the Service had adopted “zero AML” for wild horses in the Middle Section allotments as the Service contends, the record clearly demonstrates that the Service established minimum management levels for horses in the Big Sage and Boles allotments, observed horses in those allotments during

each inventory, and never recommended removing all of the horses found there. By contrast, when the Service observed horses outside of the larger WHT, such as in the West Grizzlie and Blue Mountain areas, it stated that all of the horses had to be removed, and on multiple occasions, it moved them from Blue Mountain *to the Middle Section*. When Big Sage or Boles was included in the “capture area” in a particular year, it was because the horse population had grown too large for that allotment, and it was treated the same as other allotments in the WHT that had similar population growth. In light of this record, the Service’s contention that the Middle Section was never included in the Territory is meritless.

B. The Forest Service’s Inclusion of the Middle Section Was Within the Agency’s Authority.

The Forest Service also erroneously argues that the Wild Horse Act foreclosed the agency from exercising its discretion to modify the Territory’s boundaries to incorporate the Middle Section, *see* Fed. Br. at 37, but cites no case for this far-reaching limitation on agency authority under the Act. This counterintuitive argument is groundless for several reasons.

First, the Service’s litigating position contravenes the agency’s *own* Handbook dealing with its duties under the Wild Horse Act, which specifically authorizes the Service to “adjust territorial boundaries” in the “Forest Land and

Resource Management Plan,” Forest Service Manual § 2260.41 (Jan. 2003) (Plaintiffs’ Addendum at A-048), as it did here in the 1991 Forest Plan.

Second, longstanding agency practice demonstrates that the Wild Horse Act authorizes boundary adjustments of this type. For example, the Forest Service’s sister agency which manages the vast majority of the nation’s wild horses—the Bureau of Land Management (“BLM”)—regularly adjusts the boundaries of its wild horse territories (which it refers to as “herd management areas”) pursuant to the Wild Horse Act, including by expanding territories to accommodate current wild horse use and other relevant considerations. *See, e.g., Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 442-43 (S.D.N.Y. 2010) (noting that, in 1999, “BLM . . . added a portion of North Piceance to the herd management area” despite the fact that, when the BLM initially prepared a land use plan for that area in 1975, “[n]o wild horses were found in North Piceance”); BLM, April 2008 ROD for the Surprise Resource Management Plan, at 4 (determining that wild horse “HMA boundaries would be redrawn (notably, 30,600 acres would be added to the Fox-Hog HMA, increasing its size to 127,618 acres)”), available at

<http://www.blm.gov/style/medialib/blm/ca/pdf/surprise.Par.18713.File.dat/Surprise ROD2008.pdf>.⁵

Third, as explained above, the Service's assertion that no wild horses existed in the Middle Section when the Service established the original boundaries for the WHT in 1975 is at odds with the agency's own documents. Rather, the 1974 map of herd ranges cited by the Service, *see* Fed. Br. at 8, shows that the summer range for horses in the Emigrant unit in the East range spilled over onto the Big Sage allotment to the west. *Compare* JA0807 (1974 map), *with* JA0302 (showing Middle Section allotments.) This fact, coupled with routine observations of wild horses in Big Sage and Boles in the 1970s (JA0863, JA0864), are more than sufficient to support the agency's later modification of the WHT boundaries to include all of the public lands where wild horses existed, and its subsequent decision to formally ratify this change in the 1991 Forest Plan. JA0261, JA0264.

⁵ The Court may take judicial notice of BLM's decision document because it is an official public document located on the federal government's own website. *See Oregon Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1112 n.14 (9th Cir. 2010) (taking "judicial notice of [agency's] public documents" that are "not in the record" in APA case); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of information on agencies' websites in APA case); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of material on government website and citing supportive cases).

C. The Forest Service’s Justification for the Removal of the Middle Section from the Territory Is Illogical and Arbitrary and Capricious.

When reviewing the Forest Service’s December 2012 proposal to eliminate the Middle Section from the WHT, it is notable that no one challenged the Service’s decision in the mid-1980s to add Middle Section allotments—including Big Sage and Boles—to the WHT, the formal incorporation of this change in the 1991 Forest Plan, or the Service’s ongoing management of wild horses in the Middle Section for two decades after the Forest Plan was adopted.

In light of the agency’s longstanding and unchallenged policy of actively managing wild horse use in the Middle Section, it was incumbent on the Forest Service to articulate a “a reasoned analysis” for its sudden reversal of this policy. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). As the Service repeatedly admits, however, the agency’s explanation for the change was “of less than ideal clarity.” Fed. Br. at 27, 32. Indeed, on this record, the Service’s explanation was not merely imprecise, but lacked *any* “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

When the Service first announced its proposal to eliminate the Middle Section in December 2012, the sole explanation it gave for redrawing the WHT

boundary was that “[t]he Avanzino and Triangle private ranch lands which lay in between the West and East home ranges were not included in the [1975] WHT” JA0731, and thus “[a]n administrative error was made in expanding the WHT beyond the herd’s known territorial limits.” JA0732. In the 2013 EA, the Service repeated this reasoning: “Inclusion of the Triangle Ranch lands (which were not acquired by the Forest Service until 1976, nearly five years after the 1971 WFRHBA passed) was clearly in error.” JA0264. The EA also asserted that “zero AML allocations were assigned to this acquired land.” *Id.*⁶

The Service’s explanation is not merely unclear and hard to discern. Instead, its reasoning, which is based solely on the current and historical existence of private land on the Avanzino and Triangle allotments, is completely inapplicable to the overwhelming majority of the area comprising the Middle Section (75%) that was *never* private land. *See* JA0261 (noting that the size of the Middle Section is 23,631 acres); Fed. Br. at 38 (noting that “[a]pproximately 5,923 acres of the disputed area were privately owned in 1971”). Nowhere did the agency address these facts when explaining its decision to eliminate the Middle Section. Nor did it ever address the fact that the majority of the Middle Section

⁶ Similarly, all of the technical reports that preceded the EA only discussed the Avanzino and Triangle lands when discussing the agency’s decision to eliminate the Middle Section. *See* Opening Br. at 24-28.

consisted not of the Avanzino and Triangle allotments, but instead consisted of portions of the Timbered Mountain, Carr (including Boles), Big Sage, and Pine Springs allotments, all of which were *public* lands at all relevant times as the Service later admitted. *See* D.E. 9 (JA0059-75), ¶¶ 3, 61. Nor did the Service *even acknowledge* the fact that it had assigned minimum wild horse management levels to at least two Middle Section allotments, which represent 20% of the total minimum management level for the entire WHT, and had actively managed horses on those allotments for decades in compliance with the 1991 Forest Plan.⁷

The gaping flaws in the Forest Service’s reasoning, which have never been addressed by the Service, establish that the Service’s decision was arbitrary and capricious. “Agency action based on a factual premise that is flatly contradicted by the agency’s own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard.” *City of Kansas City, Mo. v. Dep’t of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991); *see also Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (“Reasoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its

⁷ As noted above, *supra* at 7 n.3, a third allotment where horses were managed, Timbered Mountain, included both East range and Middle Section lands prior to the adoption of the 2013 WHT Management Plan.

departure from established precedent.”); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (“[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2123 (2016) (rejecting agency’s decision that “gave little explanation for its decision to abandon its decades-old practice”).

Finally, while the Service contends that it adequately explained its decision by asserting that the inclusion of the Middle Section was merely to further “administrative convenience,” the first time this ill-defined phrase appears *anywhere* in the record is in the agency’s December 2012 scoping statement that first announced the change. JA0731. The Service cannot point to a single contemporaneous document from the 1980s, 1990s, or the 2000s that supports its newly minted assertion that the Middle Section was added in the mid-1980s for “administrative convenience,” and the Service has never explained how the inclusion of the Middle Section, and the use of *minimum* management levels there, would have made the administration of the Territory more “convenient.” Indeed, the Service appears to have invented this phrase to justify its sudden reversal of its decades-long practice of actively managing horses in the Middle Section, presumably to appease livestock ranchers (including Intervenors) that were

pressuring the Service to reduce the size of the WHT. *See* Opening Br. at 20-23.

The APA exists precisely to prevent this type of opaque decision-making by requiring an agency to be transparent in its processes and to provide a reasoned explanation for its decision that is based on the record. *City of Kansas City, Mo.*, 923 F.2d at 193-94. Permitting an agency to cite vaguely to “administrative convenience” any time it desires to reverse longstanding policies would fundamentally subvert these important APA safeguards.

Instead of pointing to the record to justify this major management change, the *only* document the Service cites in support of its “administrative convenience” explanation is a July 2014 email written months *after* this action was filed. *See* Fed. Brief at 13 n.6. As an initial matter, courts “do not generally give credence to such post hoc rationalizations, but rather ‘consider only the regulatory rationale actually offered by the agency during the development of the regulation.’” *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002), *quoting Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 469 (D.C. Cir. 1998). Even if it were proper to consider this post-decisional email, it merely repeats the same, flawed explanation the Service gave in its December 2012 scoping notice and its 2013 EA—i.e., the “Triangle Ranch & Avanzino areas were private & excluded from the WHT”—but omits any explanation that would justify the removal of the vast majority of the

Middle Section that was *never* private, and that included the Big Sage and Boles allotments. JA0767. And, in direct conflict with the Service’s assertion that the agency assigned “zero AMLs” to the Middle Section, Mr. Irvin’s email confirms that he “also assigned Administrative AML’s to the Grazing Allotments for ease of managing the existing horses & the areas they were inhabiting.” *Id.*

In short, the sole explanation given by the Forest Service for eliminating over 23,000 acres from the WHT—that it was privately held in 1971—is inapplicable to most of the eliminated area, and the agency never acknowledged, much less addressed, the fact that it had been actively managing wild horses for decades on allotments in the Middle Section that *were* publicly held in 1971, all in conformance with the direction it formally and expressly adopted in the 1991 Forest Plan. On this basis, the Forest Service’s decision does not even remotely constitute reasoned decision-making necessary to survive an APA challenge.⁸

⁸ Both the Service and the Intervenor discuss the recent population growth of wild horses at Devil’s Garden (Fed. Br. at 16-18; Intervenor’s Br. at 2, 10), but this is irrelevant to consideration of the decision to remove the Middle Section. The Service has never claimed that removal of the Middle Section was intended to reduce the wild horse population or improve range conditions. In fact, the EA states that under the “no action” alternative, utilization standards and desired range conditions would be achieved even if the existing AML range remained in place (JA0295); *see also* JA0315 (noting that “the direct (trampling) and indirect (hydrologic changes, disturbance leading to weed vulnerability and spread) impacts on threatened, endangered and sensitive species and habitats would be about the same” for the “no action” and selected alternatives (Alternative 2).

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

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

Plaintiffs previously explained that NFMA obligated the Service to formally amend its 1991 Forest Plan in order to adopt a highly significant change in management in which the Service would eliminate 23,631 acres from the WHT and no longer manage any wild horses there. *See* Opening Br. at 48-53. In response, the Service failed to directly address Plaintiffs' arguments and instead the agency merely repeats its erroneous claim that the formal incorporation of the Middle Section into the WHT in the 1991 Forest Plan was "of no practical consequence . . . because the Forest Service never set appropriate management levels for horses on the allotments (or the portions of allotments) within the disputed area, and has continued removing wild horses from the disputed area even after adoption of the 1991 Forest Plan." Fed. Br. at 43. As explained above, the record conclusively shows that this objection lacks merit.

In addition, the need for a more formal and detailed Forest Plan amendment process in this case is evident from the Forest Service's wholesale failure to

Indeed, retaining the Middle Section allotments may be beneficial to improving range conditions because it would give the Service more flexibility in dispersing the wild horse population throughout a larger WHT.

acknowledge, much less address, the impacts resulting from the removal of the Big Sage and Boles allotments from the WHT. From at least 1994 through 2010, Middle Section allotments were assigned 20% of the minimum wild horse population for the entire WHT, and horses inhabited and utilized these allotments during this entire period, as well as during prior years. Had the Service undertaken the more thorough amendment process required by NFMA, the agency would have been obligated to address the effects of removing these lands from the WHT as part of this major management shift. *See* 16 U.S.C. § 1604(f)(4).

Hence, because the Service has not set forth any adequate justification for failing to subject this highly consequential and fundamentally different approach for managing wild horses at Devil's Garden to the formal NFMA procedures that are required for significant amendments of this type, the Service erred in forgoing the statutory procedures that apply to this action.

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.

If the Court deems the elimination of over 23,000 acres from the WHT a significant amendment to the 1991 Forest Plan, then the Service was also required under NFMA to follow the same procedures that applied to its adoption of the

1991 Forest Plan and prepare an EIS. 36 C.F.R. §§ 219.7(c)(1), 219.13(b)(3); *see also American Wildlands v. U.S. Forest Serv.*, No. 97-CV-160-M-DWM, 1999 U.S. Dist. Lexis 22243, at *17-20 (D. Mont. Apr. 14, 1999).

Independent from NFMA's requirements, the agency's decision not to prepare an EIS was also arbitrary and capricious because it failed to carry out the steps required under NEPA to support the issuance of an EA. *See Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340-41 (D.C. Cir. 2002).

As a threshold matter, the Forest Service failed to identify the relevant—and obvious—environmental impacts that will likely result from the elimination of the Middle Section. The Service argues that by “correcting an erroneous description [in the Forest Plan], the agency’s conclusion that the effects of its action will not be significant is reasonable because the 2013 Territory Plan does not substantially alter the prior management direction for the disputed area.” Fed. Br. at 46-47; *see also id.* at 47 (“[T]he record indicates that when the horse population is at or close to the appropriate management level, horses generally do not emigrate from the Territory into the disputed area.”). But these statements only serve to highlight the agency’s total failure to identify, much less subject to a hard look, the relevant environmental concerns relating to its decision.

The record demonstrates that, not only *did* horses continuously inhabit and utilize the Middle Section for decades, they did so *as a result of* the Forest Service's deliberate management decisions. As discussed above, the agency expressly and formally incorporated the Middle Section into the Territory in the 1991 Forest Plan and then specifically allocated 20% of the minimum wild horse population management level to Middle Section allotments, and has been actively managing wild horses on those allotments for decades. Because the EA turns a blind eye towards the Forest Service's own legally binding Forest Plan and the agency's longstanding management strategy adopted to comply with the Forest Plan—instead insisting that no AMLs were ever assigned to the Middle Section and the mid-1980s map was nothing more than an “administrative error”—there is nothing in the record upon which the Court can determine that the Service ever took a “hard look,” or, for that matter, even a sideways glance, at these crucially important environmental concerns as required by NEPA.

Indeed, contrary to the Service's contentions, *see* Fed. Br. at 45, the EA and the various reports do not contain *any* discussion of the environmental effects that eliminating the Big Sage and Boles allotments would have on the herds that lived there for decades, or on the overall wild horse population at Devil's Garden. Nor did the agency give consideration as to how the Middle Section herds may

facilitate genetic interchange with neighboring herds to the east and the west. Instead, the Service seeks to rely on its NEPA analysis concerning the separate decision to change the AML for the WHT, but the elimination of a large block of public lands from the middle of the WHT where horses have been actively managed for decades presents unique environmental and related concerns that are not covered by (or related to) the Service's evaluation of changing the AML. The failure to consider and analyze the import of *this* consequential change in wild horse and resource management cannot be squared with NEPA and its regulations.

Finally, because the Forest Service's decision was based on multiple false premises that are belied by the record (e.g., the Middle Section is comprised of lands that were private at the time the Service designated the WHT, and no management levels were assigned to Middle Sections allotments), the agency likewise failed to make a convincing case for deciding to forgo an EIS.

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

Even if an EA were permissible here, the Service was required to at least explain how it concluded that the removal of the Middle Section from the WHT would "not have a significant effect on the environment." *Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C. 1991) (citation omitted).

As explained above and in Plaintiffs' Opening Brief (at 58-61), the EA's discussion of the elimination of the Middle Section is based on demonstrably false premises—that the Service never formally incorporated the Middle Section into the WHT, that the Middle Section primarily consisted of two allotments that had been private land, and that the agency assigned the Middle Section a zero AML for wild horse management purposes.

Because the EA and the decision underlying it had these crucial facts wrong, the EA never identified, much less analyzed, the effect that the permanent elimination of the Middle Section would have on wild horses or other natural resources located there, and thus its explanation—that the original addition of the Middle Section was done for “administrative convenience”—is woefully inadequate to satisfy the legal standard set forth in NEPA and its regulations. Not only did the Service fail to explain what it meant by “administrative convenience” under these circumstances, but more importantly the Service failed to acknowledge that its purported “administrative convenience” rationale cannot be reconciled with either the agency's own formal incorporation of the Middle Section in its 1991 Forest Plan, or the Service's subsequent utilization of minimum wild horse management levels for Middle Section allotments for nearly two decades in compliance with the Forest Plan.

In short, contrary to the Service's assertion, there never was a "full and frank consideration" of the impacts of the decision to remove the Middle Section. Fed. Br. at 53. Instead, from the moment the Farm Bureau told the Service on October 31, 2012 that the Farm Bureau wanted to re-scope the project in order to change the WHT boundaries, *see* JA0876, all of the technical reports expressly assumed that the entire Middle Section *would* be eliminated. *See* Opening Br. at 24-29. Because the decision was a foregone conclusion, these reports contained no discussion regarding the effects to wild horses that would result from eliminating the Middle Section from the Devil's Garden WHT. As this Court has repeatedly held, NEPA obligates agencies to "consider every significant aspect of the environmental impact," which includes "tak[ing] a 'hard look' at the environmental effects of a major federal action *and consequences* of that action." *Public Emps. for Env'tl. Responsibility v. Hopper*, 827 F.3d 1077, 1081-83 (D.C. Cir. 2016) (quotation marks and citations omitted). Here, the Service plainly has not taken that hard look at the consequences of eliminating more than 23,000 acres of public land from a longstanding wild horse territory.

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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/s/ William S. Eubanks II

William S. Eubanks II
MEYER GLITZENSTEIN & EUBANKS LLP
3206 Norwood Court
Fort Collins, Colorado 80525
(970) 703-6060

DATED: December 5, 2016

/s/ David Zaft

David Zaft
CALDWELL LESLIE & PROCTOR, PC
725 S. Figueroa Street, 31st Floor
Los Angeles, California 90017
(213) 629-9040

Attorneys for Plaintiffs-Appellants

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 6,755 words.

DATED: December 5, 2016

/s/ William S. Eubanks II

William S. Eubanks II
MEYER GLITZENSTEIN & EUBANKS LLP
3206 Norwood Court
Fort Collins, Colorado 80525
(970) 703-6060
beubanks@meyerglitz.com

CERTIFICATE OF SERVICE

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

Party: Defendants-Appellees United States Forest Service, *et al.*
Counsel: Mark Haag

Party: Defendants-Appellees California Cattleman's Association, *et al.*
Counsel: Caroline Lobdell

DATED: December 5, 2016

/s/ William S. Eubanks II

William S. Eubanks II
MEYER GLITZENSTEIN & EUBANKS LLP
3206 Norwood Court
Fort Collins, Colorado 80525
(970) 703-6060
beubanks@meyerglitz.com