

No. 15-5332  
**ORAL ARGUMENT SCHEDULED JANUARY 11, 2017**

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

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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,  
Defendants-Appellees.

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

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**FINAL ANSWERING BRIEF OF APPELLEES**

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**CERTIFICATE AS TO  
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the Federal Defendant-Appellees certify as follows:

**A. Parties and Amici**

All parties, intervenors, and amici appearing in the district court and in this Court are listed in Appellants' Opening Brief.

**B. Rulings Under Review**

The rulings under review are the final Order, Docket Entry ("D.E.") 31, and Memorandum Opinion, D.E. 32, entered by the district court (Honorable Amy Berman Jackson) on September 30, 2015.

**C. Related Cases**

Counsel for Federal Defendant-Appellees are unaware of any related cases pending in this or any other court.

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## GLOSSARY

AML	appropriate management level
EA	environmental assessment
EIS	environmental impact statement
FONSI	finding of no significant impact
JA____	Joint Appendix
NEPA	National Environmental Policy Act
Territory	The Devil's Garden Plateau Wild Horse Territory
WHT	wild horse territory

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

The district court entered final judgment for Defendants-Appellees Thomas Vilsack *et al.* (collectively “the Forest Service”) on September 30, 2015. D.E. 31 (JA0095). Plaintiffs-Appellants American Wild Horse Preservation Campaign *et al.* (collectively “the Campaign”) filed their notice of appeal on November 25, 2015, within the 60 days required by Fed. R. App. P. 4(a)(1). D.E. 33 (JA0093). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Appellants’ Statutory Addendum.

## STATEMENT OF ISSUES

The Campaign challenges the Forest Service’s 2013 decision approving a revised territory management plan (the “2013 Territory Plan”) for the Devil’s Garden Plateau Wild Horse Territory (the “Territory”) and adopting an amendment to the 1991 Forest Plan for the Modoc National Forest (the “Forest Plan” or “Plan”) to correct that Plan’s description of the

Territory. The decision reaffirms that the Territory consists of two non-contiguous units totaling 232,520 acres. The issues on appeal are:

I. Whether the Forest Service's decision complied with the Wild Free-Roaming Horses and Burros Act and the National Forest Management Act, where the agency determined that references to a larger contiguous Territory in a 1980s Map and the Forest Plan were the result of administrative error.

II. Whether the Forest Service's decision complied with National Environmental Policy Act, where the agency took a "hard look" at the environmental impacts of its proposed action and concluded that they would not be significant because they would not significantly alter the agency's longstanding management of the area's wild horses.

## STATEMENT OF THE CASE

### A. Legal Framework

#### 1. The Organic Act, the Multiple-Use Sustained-Yield Act, and the National Forest Management Act

As this Court has noted, two "venerable statutes" set forth the Forest Service's general responsibilities for management of the national forests: the Organic Administration Act of 1897, 16 U.S.C. § 475, and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528 *et seq.* *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 226 (D.C. Cir. 2009). The

Organic Administration Act directs that the national forests be administered to secure favorable conditions of water flows and to furnish the country with a continuous supply of timber. 16 U.S.C. § 475. The Multiple-Use Sustained-Yield Act adds “outdoor recreation, range, timber, watershed, and wildlife and fish purposes” to the list of management objectives, *id.* § 528, and requires the Forest Service to develop and administer the national forests’ renewable surface resources “for multiple use and sustained yield of the several products and services obtained therefrom.” *Id.* § 529.

A third statute, the National Forest Management Act of 1976, 16 U.S.C. §§ 1600 *et seq.*, establishes a two-stage management process by which the agency is to pursue these multiple-use management goals. At the initial stage, the Forest Service develops a Land and Resource Management Plan, also called a forest plan, for each national forest. *Id.* § 1604(a). Like a zoning ordinance, a forest plan establishes management goals and broad standards and guidelines. At the second stage, the Forest Service analyzes and authorizes project-level decisions, such as wild horse territory management plans, which must be consistent with the governing forest plan. 16 U.S.C. § 1604(i); *see also Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 729 (1998).

The Forest Service may amend its forest plans “in any manner whatsoever after final adoption,” provided that changes deemed “significant” meet certain substantive and procedural requirements. 16 U.S.C. § 1604(f)(4); *Montanans For Multiple Use*, 568 F.3d at 227.

## 2. The Wild Free-Roaming Horses and Burros Act

The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (the “Wild Horses Act” or “Act”) governs the Forest Service’s protection and management of “wild free-roaming horses and burros” (collectively “wild horses” or “horses”) on public lands under the agency’s jurisdiction. *Kleppe v. New Mexico*, 426 U.S. 529, 531-32 (1976). Congress enacted the Wild Horses Act in 1971 to address concerns that wild horses were vanishing from the West, and to preserve them as “living symbols of the historic and pioneer spirit of the West.” 16 U.S.C. § 1331. Congress amended the Act in 1978 because, within a few years of the Act’s passage, the situation had reversed itself “and action [was] needed to prevent a successful program from exceeding its goals and causing animal habitat destruction.” *American Horse Prot. Ass’n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (quoting H.R. Rep. No. 95-1122, at 23 (1978)); see also *In Defense of Animals v. U.S. Dep’t of the Interior*, 751 F.3d 1054, 1058 (9th Cir. 2014); U.S. Government Accountability Office, *Bureau of Land*

*Management: Effective Long-Term Options Needed to Manage Unadoptable Wild Horses*, GAO-09-77 (Washington DC 2009), <http://www.gao.gov/products/GAO-09-77>.

As amended, the Act grants the Secretaries of Agriculture and the Interior authority over wild horses on certain public lands and directs them to protect and manage those animals “in the area where presently found” and “in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. §§ 1331, 1332, 1333(a); *see generally Fund for Animals v. BLM*, 460 F.3d 13, 15 (D.C. Cir. 2006).

By regulation, the Secretary of Agriculture has delegated his management responsibilities under the Wild Horses Act to the Forest Service. 36 C.F.R. § 222.60(a). Under the regulations the Forest Service (among other things) establishes wild horse territories on public lands under Forest Service administrative jurisdiction that were territorial habitat of wild horses at the time of the passage of the Act, develops territory management plans, and establishes appropriate management levels. 36 C.F.R. § 222.61 (3), (4), (6). The Forest Service is not authorized to establish wild horse territory on private land or on land that was not “territorial habitat” of wild horses in 1971. *Id.* § 222.60(15) (“Wild horse

and burro territory means 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 and/or burros at the time of the passage of the Act.”); *see also* Forest Service Manual § 2260.3(1) (“Confine wild free-roaming horses and burros to managed Horse and Burro Territories as established in 1971, to the extent possible.”).

### 3. The National Environmental Policy Act (“NEPA”)

Congress enacted NEPA, 42 U.S.C. § 4321 *et seq.*, to establish a consistent process for federal agencies to consider the environmental consequences of proposed major federal actions. *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 558 (1978). That goal is “realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The statute imposes procedural, rather than substantive requirements. So long as “the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.* at 350.

Under NEPA, agencies must prepare a detailed, comprehensive environmental impact statement (“EIS”) if a proposal is a “major Federal

action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Under NEPA regulations promulgated by the Council on Environmental Quality, agencies may prepare an environmental assessment, defined as a “brief” and “concise” document, to determine whether the proposed action will have significant environmental effects. If the environmental assessment shows that the proposed action would not have a such effects, the agency and may decline to prepare an EIS and may instead issue a finding of no significant impact (known as a “FONSI”). 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13. A FONSI is also appropriate where an action may produce significant impacts but mitigation measures render such impacts insignificant. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682-83 (D.C. Cir. 1982).

## **B. Factual and Procedural Background**

### **1. The Establishment of the Territory**

Feral horses, most likely the descendants of local ranch horses, have been present on the Devil’s Garden Plateau in northeastern California since the late 1800s. AR 252, 2969, 2975 (JA0353, 0649, 0655). In 1975, four years after enactment of the Wild Horses Act, the Forest Service established the Devil’s Garden Plateau Wild Horse Territory by adopting a wild horse territory management plan (the “1975 Territory Plan”). AR 2965-2987

(JA0645-67). In accordance with the Act, the 1975 Territory Plan designated as wild horse territory those areas of the Plateau's public lands where wild horses were found at the time of the Act's passage – that is, 1971. AR 2970-71, 2976 (JA 0650-51, 0656); 16 U.S.C. § 1331; 36 C.F.R. § 222.60(b)(15). Most of the Territory is within the Modoc National Forest; about 7,632 acres are public lands managed by the Bureau of Land Management.<sup>1</sup> AR 156 (JA0261).

The Territory designated by the 1975 Territory Plan consists of two large non-contiguous home ranges (East and West) encompassing an estimated 236,000 acres.<sup>2</sup> AR 2970-71 (JA0650-51); AR 2986 (JA0666) (map). The East home range included two herd units – Emigrant and Pine Spring – and the West home range included three herd units – Surveyors, Pothole, and Dalton. AR 2979 (JA0659) (population numbers by unit for 1971); AR 4087 (JA0807) (1974 map of herd units).

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<sup>1</sup> The Forest Service and the Bureau of Land Management have cooperated in the management of wild horses on the Territory since the mid-1970s, with the Forest Service taking lead management responsibility. AR 3810 (JA0730).

<sup>2</sup> As described below, in developing the 2013 Territory Plan, the Forest Service conducted a more accurate acreage computation than was available in 1975 and determined that the Territory encompasses 232,520 acres, not 236,000 as estimated in the 1975 and subsequent Territory Plans. AR 155 (JA0260). This revised acreage calculation does not reflect a change in the Territory's boundaries.

The Territory fully encompasses the seasonal migration routes of the wild horses within these herd units. During the winter months, the herds migrate in search of forage. AR 4087 (JA0807) (identifying migration routes within each herd unit); AR 2978 (JA0658) (designating “a gross territory of approximately 236,000 acres and summer habitat of about 86,000 acres” within those home ranges).

Based on these territorial boundaries, the 1975 Territory Plan identified a total appropriate management level or “AML” of 300 or 305 horses. AR 2978-79 (JA0658-59). Separate appropriate management levels were designated for each of the five herd units based on the amount of available forage and other uses. AR 2980 (JA0660). No appropriate management level for horses was designated for any other public lands within the Forest.

The 1975 Territory Plan did not identify any wild horse herds using the “disputed area” – that is, the area between the two home ranges.<sup>3</sup> Nor did it identify any migration routes between the two home ranges. The absence of wild horses in this area was likely due to the extensive livestock

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<sup>3</sup> The district court refers to the land between the two home ranges as the “disputed territory;” the Campaign uses the conclusory label “Middle Section.” In the interest of clarity – albeit at the risk of further complicating matters – we refer to it as the “disputed area.”

operations and many miles of fences in the area at the time. AR 373 (JA0409); *see also* AR 4087 (JA0807) (map of migration routes); AR 2971 (JA0651) (identifying 105 miles of fences); AR 3995 (JA0802) (map of existing fences as of 1976 around Boles Meadow, which is located on the Triangle Exchange Lands, discussed below).

## **2. The Triangle Exchange Lands**

In 1976, the Forest Service acquired 17,846 acres of land, including some within the disputed area, as part of the Triangle land exchange. AR 3968 (JA0799). As explained in the 1979 environmental assessment analyzing the effects of the agency's proposed management plan for these newly-acquired lands, "[n]one of the Triangle Lands Management Unit are included within a horse management unit." As of 1979 there were "no resident bands" of wild horses on the Triangle lands, "but up to 20 head can be seen feeding in Boles Meadows sporadically throughout the summer." AR 4033 (JA0805). The management plan for the Triangle lands expressly provides that "feral horse colonization" will be considered "an incompatible resource use." AR 3998 (JA0804).

## **3. Management under the 1980, 1981, and 1982 Territory Plans**

In 1980, the Forest Service updated its 1975 Territory Plan. AR 2949 (JA0620). The 1980 Territory Plan reaffirmed the prior plan's description

of the Territory as consisting of “two large units which encompasses a gross acreage estimated at 236,000 acres,” and its appropriate management level of approximately 300 horses. AR 2953, 2959 (JA0633, 0639). The 1980 Territory Plan announced a new goal of distributing the population “proportionately around the territory,” *id.*, while reaffirming the 1975 Plan’s commitment to removing horses found outside the Territory. AR 2961 (JA0641) (1980 Territory Plan, providing that “[h]orses determined to be outside the designated territory will be considered as expanding their range and will be removed by the most practical means available”); AR 2977 (JA0657) (identical provision in 1975 Territory Plan).

The Forest Service updated the Territory Plan again in 1981 and 1982. Like the 1975 and 1980 plans, the 1981<sup>4</sup> and 1982 plans describe a Territory of approximately 236,000 acres broken into two units, with an appropriate management level of about 300 horses.<sup>5</sup> AR 2946 (JA0626)

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<sup>4</sup> The Forest Service was unable to locate the entire 1981 Territory Plan in its files. However, the pages it did locate describe the Territory as “two units,” consistent with the 1975, 1980, and 1982 plans. *Compare* AR 2946 (JA0626) *with* AR 2956 (JA0636).

<sup>5</sup> Beginning in the 1980s, the Forest Service began expressing appropriate management levels as a range of values rather than a single number; this allows for periodic removal of excess animals (to the low range), and subsequent population growth (to the high range) between removals. *See* AR 547 (JA0481). Thus, the Forest’s 1987 monitoring report

(1981 Territory Plan); AR 2843, 2849 (JA0612, 0618) (1982 Territory Plan). Under these plans, the Forest Service continued to gather and remove horses found outside the Territory's boundaries. AR 2948 (JA0628) (1981 Plan); AR 2860 (JA0640) (1982 Plan).

The Forest Service conducted aerial surveys almost every year from 1979 to 1990. AR 3932-53 (JA0773-94). These surveys sometimes spotted wild horses outside the Territory, particularly when the population level exceeded the appropriate management level. For example, between 1979 and 1981, when the population reached 1,000 animals, the Forest Service identified a few wild horses outside the Territory along the boundary fence separating the Carr allotment from the Avanzino allotment. AR 3931 (JA0772). Between 1985 and 1987, the Forest Service identified wild horses further to the east on the private lands within the Avanzino allotment and redoubled its efforts to bring the population down to the appropriate management level. AR 3929 (JA0770) (map with Avanzino observations in 1987); AR 3943 (JA0784) (emphasizing need for funding to gather 120 excess horses in 1987). In 1990, when the population exceeded the

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states that “[o]ur management level for the horses is 305 plus or minus 10%.” AR 3943 (JA0784).

appropriate management level by 160 horses, the Forest Service identified wild horses roaming outside the Territory along the north side of Boles Meadow. AR 3934 (JA0775). The horses were recommended for capture. AR 3933 (JA0774).

Sometime in the mid-1980s the Forest Service created a map (the “1980s Map”) depicting the Territory as a contiguous unit of 258,000 acres. See AR 158 (JA0263). The territory depicted in the 1980s Map includes 7,265 acres of private lands and approximately 15,000 acres of public lands that are outside the boundaries established in the 1975 Territory Plan and reaffirmed in each of the subsequent Territory Plans. AR 156, 158 (JA0261, 0263). The 1980s Map was apparently prepared for administrative convenience to assist in keeping track of horses both inside and outside the actual Territory.<sup>6</sup> AR 156 (JA0261). In any event, the 1982 Territory Plan –

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<sup>6</sup> The administrative record includes a July, 2014 email from the now-retired Forest Service employee who created the 1980s Map. The email explains that the map “lumping the territory into one” was “never intended to change the [Wild Horse Territory] Plan, only for ease of managing the existing situation within the WHT.” AR 3925 (JA0767). While this document is post-decisional, the Court may consider it because it provides background information that will facilitate judicial review by explaining the factual basis for the agency’s decision. See *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (administrative record may be supplemented if background information is needed to determine whether the agency considered all the relevant factors or if the “agency

which was the governing plan until it was superseded by the challenged 2013 Territory Plan – was never revised to reflect the boundaries depicted in the 1980s Map.

#### 4. The Forest Plan

In 1991, the Forest Service adopted a revised Forest Plan for the Modoc National Forest. This planning effort covered the entire forest, but made changes to the existing management direction only where necessary to address issues of “significant management or public concern.” AR 2838 at 2-1 (JA0580). The 1991 Forest Plan does not identify any issues involving wild horses as issues of significant management or public concern. *Id.* at 2-1 to 2-4 (JA0580-83). To the contrary, the Forest Plan states that its management goal for wild horses is to “continue managing wild horses.” *Id.* at 4-11 (JA0587).

The Forest Plan further explains that, to develop the Plan, the Forest Service convened an interdisciplinary team, which reviewed the Forest’s existing resource management plans and divided them into three categories: (1) plans that would be amended to make them consistent with the new Forest Plan; (2) plans that would be superseded; and (3) plans

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failed to explain administrative action so as to frustrate judicial review”) (internal quotation marks and brackets omitted).

deemed “consist with, and still appropriate for, the Forest Plan,” which would be incorporated into the Forest Plan by reference. *Id.* at 1-1, 1-2 JA0578-79). The Forest Plan assigned the “Wild Horse Management Plan” – that is, the 1982 Territory Plan<sup>7</sup> – to this third category of consistent plans. *Id.* at A-1 (JA0588). Likewise, the Forest Plan retained and incorporated the existing Triangle Lands management plan, which as described above (p. 10) designates use by wild horses as an “incompatible use” of those lands. *Id.*

The Forest Plan also formalized the Forest Service’s existing practice of expressing the appropriate management level as a range of values rather than a single number to allow for periodic removal of excess animals and population growth between removals. *Compare* AR 2838 at 3-19 (JA0586) (Forest Plan describing wild horse population objective as “275-335 animals”) *with* AR 3943 (JA0784) (1987 monitoring report describing wild horse population objective as “305 plus or minus 10%”).

Despite these multiple provisions of the 1991 Forest Plan indicating that it was not intended to change the status quo with respect to the

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<sup>7</sup> The Forest Plan includes a single reference to a “1985” Territory Plan, AR 2838 at 3-17 – 3-18 (JA0584-85), but this was plainly a typographical error. Other than this single reference, there is no evidence in the record of a 1985 plan. *See* D.E. 32 at 6 n.4 and 19 n.7 (JA0101 n.4 and 0114 n.7).

management of wild horses, the Forest Plan also includes, in two places, statements describing the Territory as encompassing about “258,000 acres.” AR 2838 at 3-18; 3-17 (JA0585, 0584). This figure is inconsistent with all of the prior territory plans, which state that the Territory consists of an estimated 236,000 acres and is broken into two large units. AR 2970-71 (JA0650-51) (1975 Territory Plan); AR 2953 (JA0633) (1980 Territory Plan); AR 2956 (JA0636) (1981 Territory Plan)<sup>8</sup>; AR 2843 (JA0612) (1982 Territory Plan). The Forest Plan does not explain the basis for this 258,000-acre figure. There are no maps attached to the Forest Plan depicting such a territory, and other than the acreage figure, there is no indication in the Forest Plan – or in the Record of Decision adopting the Forest Plan – that the Forest Service intended to expand the boundaries of the existing Territory when it adopted the Forest Plan. Indeed, the Record of Decision makes no mention at all of wild horses or wild horse territory. AR 2838 (JA0591-607) (Record of Decision).

Since 1991, the Forest Service has continued managing the Territory according to the 1982 Territory Plan and the 1991 Forest Plan, gathering and removing horses from the Territory and the disputed area. AR 255

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<sup>8</sup> As noted above (n. 4), the available pages of the 1981 Plan include a reference to “two units,” but do not include a reference to the acreage.

(JA0356) (documenting gathers since 2003); AR 256-57 (JA0357-58) (table showing that the appropriate management levels for the grazing allotments in the disputed area are zero); *see also* AR 159, 161-63, 178-80 (JA0264, 0266-68, 0279-81).

## 5. The Expanding Herd

Because they have few natural predators, unmanaged feral horse populations can grow very rapidly, doubling every four or five years. AR 2974 (JA0654). After the passage of the Wild Horses Act, the Devil's Garden began to grow. By 1974, the population had already grown from 305 to an estimated 500 horses. AR 2973 (JA0653). In the years immediately following the designation of the Territory, the Forest Service and the Bureau of Land Management conducted annual gathers in an effort to keep the herd within the appropriate management level, but the herd outpaced these efforts. AR 4364 (JA0873) (documenting gathers from 1975-79). The population climbed from 305 in 1971 to 708 in 1976, 924 in 1978, and over 1,000 in 1979. AR 4361 (JA0872); AR 4447 (JA0875) (population survey data from 1973-78). Under the 1980, 1981, and 1982 Territory Plans, the Forest Service and the Bureau of Land Management continued their efforts to reduce the population to the appropriate

management level, removing 430 horses in 1980, 184 in 1981, and 203 in 1982. AR 2848 (JA0617).

More recently, between 2003 and 2012, the population grew from 469 to 1,124 horses, a figure which exceeds the appropriate management level by 340 percent. AR 254 (JA0355). The current overpopulation adversely impacts numerous resources and has resulted in accelerated emigration of wild horses outside of the Territory. AR 252-53, 274, 281, 560, 573, 589, 612 (JA0353-54, 0375, 0382, 0494, 0507, 0523, 0546).

Livestock are only permitted on the range when conditions are appropriate.

*E.g.* AR 1314-15, 1321 (JA0572-74) (Emigrant Springs Allotment

Management Plan); AR 1339 (JA0575) (Carr Allotment Management Plan).

In contrast, wild horses remain on the range year-round, including over the winter and in early spring. Year-round grazing by wild horses has resulted in allotments that exhibit bare soils, denuded vegetation, and the presence of undesirable plants. AR 244, 165, 502-04 (JA0345, 0269, 0436-38).

Trampling by wild horses sets up conditions for weeds to develop and has been particularly detrimental in the spring when soils are saturated (a time when cattle are excluded from the range to protect resources). AR 167, 504-5 (JA0272, 0438-39). Wild horses have also excavated large holes in search of salt or other minerals. AR 504, 559 (JA0272, 0493).

The overpopulation of horses has caused deteriorating conditions in several allotments within the Territory. The horses routinely denude riparian areas, leaving little to no forage. AR 165-66 (JA0270-71). Certain allotments have been particularly hard hit, including some of the pastures that border the disputed area. AR 165 (JA0270) (discussing over-browsing on Timbered Pasture of the Carr Allotment and the Black Rock Pasture of the Timbered Mountain Allotment); AR 566 (JA0500) (map showing overutilization in Timbered Pasture); AR 617 (JA0551) (overutilization in Black Rock Pasture). Once the vegetation within the Territory has been consumed, the horses roam outside the Territory into the disputed area and beyond. AR 159 (JA0264) (estimating 269 animals outside of the Territory in 2013); AR 610 (JA0544) (noting horses breaking through fences onto Avanzino lands); AR 633 (JA0559) (80 horses on Avanzino and 10 horses on Triangle); AR 281 (JA0382) (wild horses on private subdivisions far outside of the Territory). The competitive pressures on the herds are so extreme that the population, if left unchecked, will face starvation. AR 360 (JA0407).

## **6. Development and Analysis of the Proposed Action and Alternatives**

In June, 2011, the Forest Service assembled an interdisciplinary team of experts to begin the process of updating the wild horse territory

management plan. AR 3072-73 (JA0677-78). The next month the Forest Service issued a scoping notice describing the proposed action, announcing the agency's intent to prepare an environmental assessment, and inviting public comment.<sup>9</sup> AR 3911-20 (JA0757-66). The scoping notice explained that one of the purposes of the proposed action was to determine if the current appropriate management level remained appropriate, and if not, to determine the optimum number of animals the Territory could support. AR 3912 (JA0758). The District Ranger's memorandum establishing the interdisciplinary team set an anticipated completion date for the new territory plan of May 2012. AR 3073 (JA0678).

Due to retirements and staffing shortages – at the time, the Modoc National Forest did not have a wild horse expert on staff – the interdisciplinary team fell behind schedule. AR 4700, 4748, 3073 (JA0878, 0905, 0678). In August, 2012, the Forest Service entered into a cost-sharing agreement with the Modoc County Farm Bureau (“Farm Bureau”) to hire a wild horse specialist and other personnel to compile data, prepare draft reports, and support the Forest Service through the NEPA process. AR

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<sup>9</sup> The 2011 scoping notice erroneously described the Territory as encompassing “approximately 268,750 acres” plus an addition 8,500 acres of BLM-administered land and included the 1980s Map depicting the Territory as a single contiguous unit. AR 3911, 3919-20 (JA0757, 0765-66).

4727, 4713-14 (JA0902, 0891-92). The agreement provided for the Forest Service to supervise the work, review all of the analysis prepared by the Farm Bureau and its contractors, and make its own decision regarding the Project. AR 4714 (JA08920). The Farm Bureau hired retired Modoc National Forest wild horse specialist Rob Jeffers, among others, to perform this work. See AR 489, 542 (JA0423, 0476).

In October, 2012, after reviewing the comments on the scoping notice, the interdisciplinary team identified additional information it needed to further assess the proposed action, including a “map showing the original [Wild Horse Territory] boundary” and additional monitoring data. AR 3048 (JA0675). With this data, and upon closer inspection, the interdisciplinary team discovered the discrepancy between the description of the Territory in the Forest Plan and the Territory established in the 1975 Territory Plan and reaffirmed in the 1980, 1981, and 1982 Territory Plans. AR 172, 3042 (JA0276, 0669).

In light of that discrepancy, the Forest Service promptly issued a new scoping notice. AR 3810 (JA0730); *see also* AR 3045 (JA0672). That notice and the accompanying description of the proposed action explained that the Territory consists of two separate units totaling 232,520 acres, that the Forest Plan’s references to a 258,000-acre territory were the result of

administrative error, and that the agency proposed to correct its error through a non-significant amendment to the Forest Plan. AR 3811-12 (JA0731-32); *see* AR 161 (JA0266). The new scoping notice further explained that the proposed action included adoption of a new territory plan and re-evaluation of the appropriate management level. AR 3817 (JA0737).

The Forest Service then prepared a draft environmental assessment, which was made available for public comment in May, 2013. AR 3451, 106 (JA0704, 0217). The agency also held a public meeting to present information relating to the project, answer questions, and solicit public comment, and consulted with the Pit River Tribe, the United States Fish and Wildlife Service, and the California Department of Fish and Wildlife. AR 106 (JA0217).

#### **7. The Environmental Assessment, Decision Notice, and Finding of No Significant Impact**

After reviewing and responding to the public comments, the Forest Service issued the final Environmental Assessment on August 26, 2013. The Environmental Assessment analyzes the potential environmental effects of current management direction, the proposed action, and two other alternatives. The Environmental Assessment is based on 17 specialist reports on impacts to particular resources, including wild horses and range

resources. *E.g.* AR 489 (JA0 423) (Wild Horse Specialist report); AR 542 (JA0476) (Devil's Garden Plateau Wild Horse Territory: Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level); AR 622 (JA0556) (Devil's Garden Wild Horse Territory: Resource Monitoring Report).<sup>10</sup>

The Environmental Assessment forthrightly discloses the errors in the 1980s Map and Forest Plan. It explains that the Forest “appears to have adjusted” the Territory boundary for “administrative convenience,” thereby incorporating about 23,631 acres, including the Triangle lands and Avanzino Ranch. AR 156 (JA0261). This change increased the Territory to “approximately 258,000 acres,” but “an AML was not established for the added lands and few, if any, wild horses were found there.” *Id.*

The Environmental Assessment goes on to explain that this was an “administrative error” because it expanded the Territory “beyond the herd’s known territorial limits” – that is, the territory designated by the 1975 Territory Plan – and included some private lands – specifically, the Triangle lands, which were not acquired by the Forest Service until 1976,

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<sup>10</sup> The specialist reports also included reports on Botany (AR 387-406), Heritage Resources (AR 410-34), Hydrology (AR 435-59), Noxious Weeds (AR 460-69), Range-Livestock (AR 470-79, JA0413-44), Soils (AR 712-727), and Wildlife (AR 728-829).

nearly five years after enactment of the Wild Horses Act, and the Avanzino Ranch lands, some of which remain privately owned. AR 159, 373-74 (JA0264, 0409-10). To correct this error and comply with the Act, the Forest Service proposed to return to the management of wild horses “within the territorial limits established in” the 1975 Territory Plan. AR 162 (JA0267).

The Environmental Assessment also analyzes whether the proposed amendment to the Forest Plan correcting the acreage of the Territory is a significant amendment for purposes of the National Forest Management Act. AR 161-63 (JA0266-68). Applying the factors enumerated in the Forest Service Manual, the Environmental Assessment explains that the amendment is not significant because it would not alter the multiple-use goals and objectives of the Forest Plan and would make the Plan consistent with the Wild Horses Act. AR 162 (JA0267).

The Environmental Assessment further explains that the proposed Forest Plan amendment correcting the error in the 1991 Forest Plan would not have a significant impact on the environment because the Forest Service had been managing the Territory according to the 1982 Territory Plan, had not established appropriate management levels for horses on the disputed area, and had consistently been removing horses from the

disputed area. AR 156-59 (JA0261-64); AR 255 (JA0356) (documenting gathers since 2003). Thus, correction of the error would have no practical consequences for the agency's ongoing management of the horses or their habitat. AR 159, 178-80, 269-71 (JA0264, 0279-81, 0370-72).

The Environmental Assessment also analyzes the impacts of the proposed broadening of the appropriate management level range for wild horses to 206-402 adults.<sup>11</sup> AR 180-97 (JA0281-98). This change from the range of 275-335 horses, (which the agency had employed since at least 1987, *see* AR 3943, JA0784), would allow the herd to grow to the upper limit over a longer period of time, reduce the frequency of gathers to once every four or more years (as compared to once a year under the current appropriate management level range), and result in a higher median population level than the current appropriate management level range. AR 265, 268, 270 (JA0366, 0369, 0371); *see* AR 547 (JA0481).

The Forest Service then issued its Decision Notice and Finding of No Significant Impact. AR 100 (JA0211). The agency concluded, on the basis of the Environmental Assessment and the "significance factors" described in the NEPA regulations (40 C.F.R. § 1508.27), that the proposed alternative –

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<sup>11</sup> The Campaign challenged this aspect of the Forest Service decision in the district court, but is not pursuing the issue on appeal.

adoption of the 2013 Territory Plan and the amendments to the 1991 Forest Plan – would have no significant impact on the environment and that an environmental impact statement was not required. AR 107-10 (JA0218-21).

The Campaign filed an administrative appeal, *see* 36 C.F.R. § 215, and on January 2, 2014, the Appeal Deciding Officer affirmed the decision on all the issues involved in this lawsuit. AR 1, 4-65 (JA0146, 0149-210).<sup>12</sup>

#### 8. Proceedings Below

The Campaign then brought suit in the district court, alleging that both the boundary clarification and the adjustment to the appropriate management level range violated the Wild Horses Act, the National Forest Management Act, and NEPA. D.E. 1 (JA0013). On cross motions for summary judgment, the court upheld the Forest Service's decision. D.E. 32 (JA0096). The court reasoned that the Campaign's claims were founded on the faulty premise that the Forest Service had in fact incorporated the disputed area into the Territory sometime in the 1980s or in the 1991 Forest Plan, and that the 2013 Decision "eliminated" or "removed" the disputed area from the Territory. The court squarely rejected that premise, holding

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<sup>12</sup> The Appeal Deciding Officer instructed the Forest Service to prepare an additional analysis of the economic costs associated with a gather and postponed any gathers until that analysis had been completed. AR 2-3 (JA0147-48). This point is not at issue in the instant case.

that the record supported the Forest Service's determination that the references in the 1980s Map and the 1991 Forest Plan to a contiguous wild horse territory including the disputed area were the result of administrative error and did not affect the actual management of the Territory, and the agency's decision to rectify its mistake was reasonable. D.E. 32 at 12-13 (JA0107-08). The court also rejected the Campaign's challenges to the agency's decision to broaden the appropriate management level range from 275-335 to 206-402 adult horses. *Id.* at 33-46 (JA0128-41).

This appeal followed. On appeal, the Campaign has abandoned its challenges with respect to the changes in the appropriate management level range. *See New York Rehab. Care Mgmt., LLC v. N.L.R.B.*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issues not raised until the reply brief generally are waived).

### SUMMARY OF ARGUMENT

The Campaign's challenges to the 2013 Territory Plan and the related amendments to the Forest Plan are premised on a mischaracterization of the agency's decision and the district court's rationale for upholding it. The Campaign contends that the Forest Service formally incorporated the disputed area into the Territory in 1991 when it adopted the revised Forest Plan, and that the Forest Service, in approving the 2013 Territory Plan and

Forest Plan amendments, decided to “eliminate” or “remove” the disputed area from the Territory. But as the district court recognized, the Forest Service made no such decision. Rather, the agency concluded that the disputed area was never formally incorporated into the Territory in the first place, and the court upheld that conclusion. While the agency’s explanation of its rationale is of less than ideal clarity, the agency’s path may reasonably be discerned and the record provides ample support for its decision.

Multiple considerations support the Forest Service’s conclusion that the disputed area was never formally incorporated into the Territory. There is no evidence that the Forest Service intended to alter, or thought that it was altering, the existing Territory boundaries when it adopted the Forest Plan. To the contrary, the Record of Decision adopting the Forest Plan makes no mention of wild horses, and the Forest Plan’s references to a 258,000-acre territory are inconsistent with the Plan’s other provisions on wild horses, which indicate that the agency intended to maintain the status quo, not expand the Territory. In particular, the Forest Plan incorporates the 1982 Territory Plan (which provides for a non-contiguous two-unit Territory of 236,000 acres), and the Triangle Lands management plan (which designates wild horses as an incompatible use on the Triangle Lands). Further, in the years following adoption of the Forest Plan, the

Forest Service continued removing horses from the disputed area. And in any event, the disputed area could not lawfully have been incorporated into the Territory because it included private land and land that was not territorial habitat of wild horses in 1971.

The Forest Service reasonably determined that correction of the Forest Plan's erroneous acreage statement was not significant for purposes of the National Forest Management Act. The Forest Service considered the factors set out in the Forest Service Manual and found that the proposed amendment would not alter the multiple-use goals and objectives of the Forest Plan, would manage wild horses within the territorial limits established in the 1975 Territory Plan, and would bring the Forest Plan into alignment with the Wild Horses Act. Given the agency's finding that the disputed area was never formally incorporated into the Territory, this conclusion was is entirely reasonable.

Likewise, there is no merit to the Campaign's NEPA claims. The record demonstrates that the Forest Service took the requisite "hard look" at the effects of its proposed action, considered the "significance factors" set out in the NEPA regulations, and determined that the effects would not be significant. The record supports that determination and confirms that the 2013 Territory Plan does not substantially alter the prior management

direction for the disputed area. The Campaign's contentions that the outcome of the Forest Service's NEPA analysis was predetermined and that the agency conducted it in bad faith are unfounded.

### STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011).

The Campaign's claims under the Wild Horses Act, the National Forest Management Act, and NEPA are reviewed under the Administrative Procedure Act, which authorizes the Court to set aside decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under that standard, the court examines whether the agency has examined all the relevant factors and articulated a reasonable explanation for its decisions. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Reviewing courts are to be at their "most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 93, 96, 103, 105-106 (1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (*en banc*). The court will "defer to the wisdom of the agency,

provided its decision is reasoned and rational, and even uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (internal quotation marks omitted); *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974).

This Court's role in reviewing an agency's decision not to prepare an environmental impact statement is a "limited" one, designed primarily to ensure "that no arguably significant consequences have been ignored." *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 267 (D.C. Cir. 1988). As relevant here, the reviewing court's task is to determine whether the agency (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its environmental assessment, and (3) is able to make a convincing case for its finding of no significant impact. *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir 2012).

## ARGUMENT

### I. The Forest Service complied with the Wild Horses Act and the National Forest Management Act.

#### A. The Campaign mischaracterizes the Forest Service's decision and the district court's rationale for upholding it.

The Campaign contends that the district court erred by (purportedly) “finding that the Forest Service properly *removed* the Middle Section from the WHT.” Br. 39 (emphasis added); *see also* Br. 2 (describing issue presented as whether the Forest Service's decision to “*eliminate* the Middle Section from the WHT” was unlawful) (emphasis added); Br. 34 (“The district court ruled for Defendants, finding 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”) (emphasis added). This mischaracterizes both the challenged Forest Service decision and the district court's rationale for upholding it. As the district court recognized, the agency's decision adopting the 2013 Territory Plan and the Forest Plan amendments does not purport to “remove” or “eliminate” the disputed area from the Territory. Rather, the agency determined that the disputed area was never properly incorporated into the Territory in the first place. Doc. 32 at 12-13 (JA0107-08); AR 156-60 (JA0261-65); AR 12-14 (JA0157-59). The Campaign's

rhetorical gambit – reframing the issues in a way that presumes the truth of a disputed premise that is key to its other arguments – should be rejected out of hand.

**B. The Forest Service reasonably concluded that the disputed area was never formally incorporated into the Territory.**

In adopting the 2013 Territory Management Plan and the related Forest Plan amendments, the Forest Service reasonably determined that the disputed area was not – and could not have been – properly incorporated into the Territory. AR 12-14, 102, 104, 156-60, 162, 171, 373-74 (JA0157-59, 0213, 0215, 0261-65, 0267, 0275, 0409-10). While the agency’s explanation of its rationale is “of less than ideal clarity,” *see Bowman*, 419 U.S. at 286, the agency’s path may reasonably be discerned and the record provides ample support for the agency’s decision.

First, the record establishes that the Forest Service originally designated the Territory in 1975 when it adopted the 1975 Territory Plan. As the Campaign concedes (Br. 9), this original Territory consisted of two non-contiguous units totaling an estimated 236,000 acres. AR 2970-71, 2986 (JA0650-51, 0666). The Campaign also concedes (Br. 9-10) that the agency’s subsequent revised Territory plans, adopted in 1980, 1981, and 1982, reaffirmed that original designation – that is, two non-contiguous units totaling about 236,000 acres. AR 2953, 2946, 2843 (JA0633, 0629,

0612). The 1982 Territory Plan remained in effect until it was superseded by the 2013 Territory Plan. AR 159, 178 (JA0264, 0279).

Second, the environmental assessment for the Forest Service's 1979 management plan for the then-newly-acquired Triangle lands – some of which are located in the disputed area – unambiguously provides that the Triangle lands were *not* within the Territory and that the lands would *not* be managed for wild horses. AR 3997 (JA0803) (“None of the Triangle Lands Management Unit are included within a horse management unit”); AR 3998 (JA0804) (“Triangle Lands management will consider feral horse colonization as an incompatible resource use”). The Triangle Lands Management Plan is still in effect. AR 2838 at 1-2 (JA0579).

Third, in the years since the acquisition of the Triangle lands, the Forest Service has continued to apply an appropriate management level of zero for wild horses on the grazing allotments within the disputed area. AR 256 (JA0357). And the Forest Service'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. AR 255 (JA0356) (documenting gathers since 2003); AR 159, 161-63, 178-80 (JA0264, 0266-68, 0279-81); AR 3934-39 (JA0775-80) (1990 map documenting wild horse inventory); AR

4127 (JA0836) (2012 map). Thus, there is ample evidence in the record supporting the Forest Service's determination that the disputed area was never formally incorporated into the Territory.

To be sure, some documents in the record reflect confusion about the status of the disputed area. In particular, the 1980s Map depicts a single contiguous Territory that includes the disputed area, and the 1991 Forest Plan twice states that the Territory is 258,000 acres – a number that apparently counts the disputed area as part of the Territory. But multiple considerations support the Forest Service's conclusion that the 1980s Map and the acreage statements in the Forest Plan reflect administrative error rather than a formal decision to incorporate the disputed area into the Territory.

There is no evidence that, in creating the 1980s Map and adopting the 1991 Forest Plan, the Forest Service intended to alter, or thought that it was altering, the existing Territory boundaries. As the Campaign itself points out in support of its arguments that the Forest Service has unlawfully “eliminated” the disputed area from the Territory (Br. 48, 53), the Forest Service could not lawfully make a significant change to the boundaries of a wild horse territory without undertaking a formal decisionmaking process, including public notice and environmental review. *See* D.E. 32 at 16-17

(JA0111-12). Yet there is no evidence that the 1980s Map was the product of any formal decisionmaking process or was ever subject to public notice or environmental review. Rather, the record supports the Forest Service's determination that the 1980s Map was drawn solely for administrative convenience. AR 156-59 (JA0261-64); *see also* AR 3925 (JA0767) and p.13 n.6, *supra*.

The same analysis applies to the 2002 and 2004 "Wildhorse Inventory" forms cited by the Campaign. Br. 14, 17, 30 (citing AR 4324-25, JA0849-50). As the Campaign points out, the forms include entries for "designated mgt herd min. size" on the Boles and Big Sage allotments, which are within the disputed area.<sup>13</sup> But the forms are monitoring reports, not decision documents. And as with the 1980s Map, there is no evidence that the Forest Service ever undertook a formal decisionmaking process (with the requisite public notice and environmental review) to modify the 1982 Territory Plan and the Triangle Lands Management Plan by establishing appropriate management levels for horses in the disputed area. Rather, the management levels in the monitoring reports were included

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<sup>13</sup> The Campaign also notes the inventory forms' references to Timbered Mountain (Br. 17, 30), but those references do not support the Campaign's argument. Most of the Timbered Mountain allotment is within the Territory, not the disputed area. AR 256, 609 (JA0357, 0543).

solely for administrative convenience. AR 3925 (JA0767) (1980s Map and “Administrative AMLs” were “never intended to change the WHT Plan, only for ease of managing the existing situation within the WHT.”).

On the other hand, as the Campaign points out, the Forest Plan *was* the subject of a lengthy NFMA and NEPA decisionmaking process. The Campaign makes much of the formality and importance of that process. Br. 39-42. But except for the two anomalous references to a territory of 258,000 acres, the Campaign has failed to identify *any* evidence that, as part of that formal process, the Forest Service even *considered* modifying the existing Territory boundaries, let alone that it actually decided to do so. To the contrary, the Record of Decision adopting the 1991 Forest Plan contains not a single mention of wild horses or wild horse territory. AR 2838 (JA0591-607) (ROD). And the Plan itself does not identify management of wild horses as an issue of “significant management or public concern,” and simply states that the agency’s management goal is to “continue managing wild horses.” AR 2838 at 2-1, 4-11 (JA0580, 0587). Moreover – and contrary to the Campaign’s assertion (Br. 42) – the Forest Plan expressly incorporates both the 1982 Territory Plan, which provides for a non-contiguous two-unit Territory of 236,000 acres, and the Triangle Lands management plan, which designates wild horses as an incompatible

use on those lands. AR 2843 (JA0612) (1982 Territory Plan); AR 3998 (JA0804) (Triangle management plan); AR 2838 at A-1 (JA0588) (1991 Forest Plan, incorporating 1982 Territory Plan and Triangle management plan). Thus, as the district court recognized (D.E 32 at 18-21, JA0113-16), the 1991 Forest Plan's references to a 258,000-acre territory are manifestly inconsistent with the Plan's other provisions on wild horses.<sup>14</sup>

Further, it would be unreasonable to interpret the 1980s Map or the 1991 Forest Plan as incorporating the disputed area into the Territory, because incorporating the disputed area would violate the Wild Horses Act and Forest Service regulations. AR 102, 104, 156, 159 (JA0213, 0215, 2061, 0264). To qualify as wild horse territory under the Act and regulations, the disputed area would have to be (1) National Forest System land and (2) territorial habitat for wild horses in 1971 when the Act was passed. 16 U.S.C. §§ 1331, 1332 (Act applies to certain horses "presently found" on certain

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<sup>14</sup> As the Campaign points out (Br. 13, 30, 40), the Environmental Assessment itself states that in the Forest 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." AR 159 (JA0264). But this inartful language must be read in context with the Environmental Assessment's repeated statements that this was "administrative error" and contrary to the Wild Horses Act, and that no appropriate management level allocations were ever assigned to these acquired lands. *Id.*

“public lands”); 36 C.F.R. § 222.60(b)(15) (“Wild horse and burro territory means 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 and/or burros at the time of the passage of the Act.”).

Neither of those requirements is satisfied here. As the district court found (D.E. 32 at 22, JA0117), the disputed area includes non-federal lands. Approximately 5,923 acres of the disputed area were privately owned in 1971 (when the Wild Horses Act was passed), and 2,375 acres remain privately owned today. AR 3968, 3960, 3969, 373, 156 (JA0799, 0798, 0808, 0409, 0261). In addition, the disputed area was not territorial habitat of wild horses in 1971, as demonstrated by the 1975 Territory Plan, which excluded the disputed area from the Territory. AR 2986 (JA0666); *see also* AR 4078 (JA0806) (1974 map). The Campaign’s expert speculated that the disputed area *was* territorial habitat for wild horses in 1971, but her opinion, based on two visits she made to portions of Devil’s Garden over three decades later, *see* AR 4131-32, 4136-37 (JA0837-38, 0842-43), ¶¶ 1, 4, 16, 19, is not a sufficient basis to set aside the 1975 Territory Plan’s decision not to include the disputed area. The Forest Service is entitled to rely on its own experts to determine the appropriate boundaries of its wild horse territory. *See U.S. Air Tour Ass’n v. FAA*, 298 F.3d 997, 1009 (D.C.

Cir. 2002) (citing *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 378 (1989) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.”)).

Thus, the Forest Service reasonably concluded in its Decision Notice and in the Environmental Assessment that including the disputed area within the Territory would violate the Wild Horses Act. AR 104 (JA0215) (Decision Notice); AR 159, 162 (JA0264, 0267) (Environmental Assessment).

The Campaign argues (Br. 43-48) that the district court erred in concluding that the Forest Service lacked the authority to incorporate the disputed area into the Territory. According to the Campaign, the district court’s finding that “significant portions of the disputed territory were privately held and would not have qualified for inclusion in the [Territory],” D.E. 32 at 22 (JA0117), is a “*post hoc* rationale.” Br. 46. Not so. The Environmental Assessment explains that “[i]nclusion of the Triangle Ranch lands (which were not acquired by the Forest Service until 1976 . . . ) was clearly in error.” AR 159 (JA0264); *see also* AR 373-74 (JA0409-10) (“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”).

Nor is there merit to the Campaign’s contention that the district 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.*” Br. 46 (emphasis in original). The Wild Horses Act does not authorize the Forest Service to designate private land as wild horse territory. 16 U.S.C. §§ 1332, 1333(a); 36 C.F.R. § 222.60(a), (b)(15). Contrary to the Campaign’s suggestion, that limitation doesn’t turn on whether a “majority” of a given area is privately owned: the statute makes *all* privately-owned land ineligible. Thus, the Forest Service’s “admission” that the “majority”<sup>15</sup> of the disputed area was not privately owned does not undermine the agency’s conclusion that incorporation of the disputed area into the Territory would violate the Act. While a “majority” of the disputed area was not privately owned, a

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<sup>15</sup> The Campaign repeatedly suggests – without record support – that the Forest Service’s decision is arbitrary because the agency “disavowed” its (purported) prior assertion that a “majority” of the disputed area was private land. Br. 2, 4, 31, 46. To the best of our knowledge, the Forest Service has never claimed that a “majority” of the disputed area was privately owned. In any event, as discussed above, the Campaign’s attempt to make an issue of the distinction between a “majority” and “significant portions” is unavailing.

“significant portion” was (and is). D.E. 32 at 22 (JA0117). Again, the record shows that approximately 5,923 acres were privately owned in the 1971, and 2,375 acres remain privately owned today. AR 373, 156, 3968-69 (JA0409, 0261, 0799-80). Accordingly, the court’s finding that “significant portions” of the disputed territory would not have qualified for inclusion in the Territory is correct, and the Forest Services’ consideration of that private ownership as a factor in its decision was reasonable.

**C. The Forest Service reasonably determined that its amendment to the 1991 Forest Plan was not significant under the National Forest Management Act.**

Under the National Forest Management Act, the Forest Service is permitted to make non-significant amendments to its Forest Plans “in any manner whatsoever after final adoption after public notice[.]”<sup>16</sup> U.S.C. § 1604(f)(4); *Montanans For Multiple Use*, 568 F.3d at 227.

Significance for purposes of the National Forest Management Act is distinct from significance for purposes of NEPA.<sup>16</sup> The Forest Service Manual<sup>17</sup> provides guidance on the assessment of significance under the

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<sup>16</sup> As discussed below, the Council on Environmental Quality’s NEPA regulations set out a list of factors for determining whether an action is significant for purposes of NEPA. 40 C.F.R. § 1508.27.

<sup>17</sup> The Forest Service Manual is a compendium of “legal authorities, responsibilities, delegations, and general instruction and direction” for

National Forest Management Act and gives several examples of types of amendments that are not significant. Non-significant amendments include “[a]ctions that do not significantly alter the multiple-use goals and objectives for long-term land and resource management,” and “[a]djustments of management area boundaries” that “do not cause significant changes in the multiple-use goals and objectives for long-term land and resource management.” Forest Service Manual § 1926.51(1), (2).

As part of its decision to adopt the 2013 Territory Plan, the Forest Service amended the 1991 Forest Plan to correct the Plan’s erroneous statements regarding the Territory’s acreage. AR 101-02 (JA0212-13). The Forest Service determined that that amendment was not significant, AR 161-63 (JA0266-68), and the district court upheld that determination. D.E. 32 at 25-27 (JA0120-22). The record confirms the reasonableness of the agency’s finding.

Consistent with 16 U.S.C. § 1604(f)(4), the Forest Service gave public notice of the proposed amendment and considered (as part of its NEPA analysis) the significance factors set out in the Forest Service Manual. The Forest Service found that that the proposed amendment is not significant

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Forest Services officers. 36 C.F.R. § 216.2(a). It is a guidance document. *Western Radio Services Co. v. Espy*, 79 F.3d 896 (9th Cir. 1996).

because it would not alter the multiple-use goals and objectives of the Forest Plan, would manage wild horses within the territorial limits established in the 1975 Territory Plan, and would “bring the Forest Plan into alignment with” the Wild Horses Act. AR 161-62 (JA0266-67).

The Campaign’s challenge to that conclusion rests on the same false premise as its challenge to the agency’s determination that the disputed area was never formally incorporated into the Territory. The Campaign characterizes the amendment as a decision to “abolish the Middle Section,” causing “the loss of more than 23,000 acres of public lands that for more than two decades have been legally authorized for wild horse use through the binding 1991 Forest Plan.” Br. 48; *see also* Br. 52. But as demonstrated above, that characterization is contradicted by the record and is contrary to the Forest Service’s interpretation of its Forest Plan. Moreover, the erroneous acreage figure in the 1991 Forest Plan has been of no practical consequence for the management of the disputed area 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. AR 255-56 (JA0356-57); *see also* AR 4301 (JA0845) (2012 preliminary monitoring report, showing zero AML for

Avanzino, Triangle, and Big Sage within the disputed area); AR 4303-04 (JA0846-47) (photos showing contrasting conditions in “the Big Sage allotment (outside the WHT) and the Emigrant Springs allotment (inside the WHT)”). Accordingly, the Campaign’s National Forest Management Act challenge fails.

## **II. The Forest Service complied with NEPA.**

The district court correctly found (D.E. 32 at 28-29, JA0123-24) that the Forest Service fulfilled its NEPA responsibilities by (1) identifying the relevant environmental concerns, including in particular the effects of continuing to manage the wild horses within the territorial limits first established in the 1975 Territory Plan; (2) taking the requisite “hard look” at those effects; and (3) reasonably concluding that the effects would not be significant. AR 252-83, 171, 101-02, 106 (JA0353-84, 0372, 0212-13, 0217). The Campaign challenges the Forest Service’s NEPA compliance on several grounds, none of which has merit.

### **A. The Forest Service reasonably determined that the proposed action will not have a significant impact on the environment.**

First, the Campaign contends that an environmental impact statement was required because the “elimination” of the disputed area from the Territory was “undoubtedly a ‘significant amendment’ to the 1991 Forest Plan for purposes of” the National Forest Management Act, and thus

significant for purposes of NEPA. Br. 54. This argument is merely a repackaging of the Campaign's prior arguments, which we have addressed above. It fails because, like the prior arguments, it rests on the false premises that (1) the Forest Service "eliminated" the disputed area from the Territory, and (2) that purported elimination was significant for purpose of the National Forest Management Act. See pp. 31-43, *supra*.

Second, the Campaign argues that the Forest Service failed to identify, and take a hard look at, the relevant environmental concern, which it frames as "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[.]" Br 56. Here again, the Campaign's argument fails because it rests on the false premise that Forest Service's decision "eliminates" the "Middle Section" from the Territory.

Moreover, even if the agency's action is characterized as "eliminating the Middle Section" rather than as correcting an erroneous description, the record documents that the Forest Service took the requisite "hard look" at the effects of its proposed action, including effects on wild horses and the

horse-viewing public.<sup>18</sup> AR 252-83 (JA0353-84) (Environmental Assessment discussing effects on wild horses); AR 231 (JA0332) (effects on recreation); AR 234 (JA0335) (socio-economic impacts); *see also* AR 489 (JA0423) (Wild Horse Specialist Report); AR 542 (JA0476) (AML Report); AR 622 (JA0556) (Devil's Garden Wild Horse Territory Resource Monitoring Report).

Based on that hard look, the agency reasonably determined that the environmental effects of its proposed action would not be significant. The Environmental Assessment explains that, under the 2013 Territory Plan and associated Forest Plan amendments, the appropriate management levels for wild horses in the disputed area will be zero and the Forest Service will target horses found in the disputed area for removal. AR 256 (JA0357) (table showing appropriate management levels, with appropriate management levels of zero for allotments in the disputed area); AR 275 (JA0376). Similarly, in the absence of the challenged agency action (called the “No Action Alternative” in NEPA parlance), “[w]ild horse management would be guided by the goals and objectives established in the 1982

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<sup>18</sup> In addition to wild horses, recreation, and socio-economics, the Environmental Assessment describes the effects of the proposed action and three alternatives on vegetation, heritage resources, livestock grazing, watershed resources, wildlife, and fisheries. AR 198-305 (JA0299-406).

[Territory Plan] and the 1991 Forest Plan.” AR 178 (JA0279). The agency would “[c]onduct consecutive gathers as needed to remove excess wild horses to attain AML,” and “[t]he highest priority would be to gather and remove wild horses residing outside the [Territory] and in areas where resource damage is occurring due to overpopulation.” AR 179 (JA0280) (emphasis added); AR 273 (JA0374); AR 255 (JA0356) (documenting gathers since 2003). Thus, whether the Forest Service’s action is characterized as “eliminating the Middle Section” or as correcting an erroneous description, 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 or the Territory.

The record also contradicts the Campaign’s contention (Br. 54) that the agency’s action is significant under NEPA because the disputed area “served as a key corridor connecting the two isolated units” of the Territory and “therefore facilitated genetic interchange and provided access to meadows and water sources[.]” The Campaign provides no support for its assertion that the disputed area is a key corridor and no support for its suggestion that the Forest Service’s adoption of the 2013 Territory Plan will affect this (purported) genetic interchange differently than the prior – and

essentially unchanged – management regime. To the contrary, the Environmental Assessment explains that “[t]here have been no observed problems with seasonal migrations” of wild horses, AR 364 (JA0408), and the Territory’s two non-contiguous parcels include migration routes and allow for genetic interchange between the herds within those parcels. AR 260, 274, 4087 (JA0361, 0373, 0807). Further, the 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. AR 169, 172, 194, 274 (JA0273, 0276, 0295, 0375). Moreover, the 2013 Territory Plan, like the prior management regime, provides for gates in pasture and allotment fences to remain open from late fall through early spring when livestock are absent, to facilitate the seasonal migration of wild horses. AR 364 (JA0408). And the 2013 Territory Plan provides for the widening of gates in horse concentration areas to further facilitate seasonal movements. AR 130 (JA0241); *see* AR 153, 181, 364, 373 (JA0258, 0282, 0408, 0416).

In any event, as the Environmental Assessment explains, no genetic problems have been detected in the Devil’s Garden horses, and the 2013 Territory Plan includes provisions for monitoring genetic diversity. AR 260 (JA0361). During the first gather following plan approval, hair samples are

to be collected from the herd to establish baseline genetic diversity. AR 170 (JA0274). Thereafter, samples would be collected at every other gather (at a minimum) to detect any change from the baseline. AR 176 (JA0277). If genetic diversity should fall below the minimum acceptable level, specified management actions would be taken to address the problem. AR 176, 183 (JA0277, 0284).

Also without merit is the Campaign's assertion (Br. 56) that the Forest Service failed to adequately consider impacts to members of the public who – according to the Campaign – “have long observed federally protected horses” in the disputed area. The Environmental Assessment explains that, due to limited access and heavy tree cover, opportunities to view wild horses on the Devil's Garden are “extremely poor” compared to Bureau of Land Management herd management areas in the vicinity. AR 234 (JA0335). As a result, “public interest in wild horse viewing in the Devil's Garden WHT has been extremely low.” *Id.*; *see also* AR 196, 231, 385-86, 701 (JA0297, 0332, 0411-12, 0561). Given this limited interest – and the lack of any significant change in the management of wild horses in the disputed area – the Forest Service's analysis of this issue satisfies NEPA. As the NEPA regulations make clear, “[i]mpacts shall be discussed in proportion to their significance,” and “[t]here shall be only brief

discussion of other than significant issues.” 40 C.F.R. § 1502.2(b); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) (“Detailed analysis is required only where impacts are likely. Where adverse environmental impacts are not likely, expensive and time-consuming studies are not necessary.”).

The Campaign also contends that the Forest Service “admits” that it 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.” Br. 60 (emphasis in original). In support of this remarkable contention, the Campaign quotes the Environmental Assessment, which states that “[w]ild horse populations outside the [new, two-unit] wild horse territory *were not considered* as it is assumed they would be removed.” Br. 60 (quoting AR 264) (alterations and emphasis provided by Campaign). But the Campaign blithely ignores the context of the statement, which makes clear that the statement merely describes one of the assumptions used in the computer modeling the Forest Service performed to predict the population outcomes of the different management alternatives. AR 264 (JA0365). Read in proper context, the statement provides no support for the Campaign’s argument. And as

described above, the Environmental Assessment discusses the presence and impacts of horses on the disputed area. *E.g.*, AR 166, 169-71, 214, 221-23, 231, 253, 255, 257, 274, 277-82, 294, 297-98 (JA0271, 0273-75, 0315, 0322-24, 0332, 0354, 0356, 0358, 0375, 0378-83, 0395, 0398-99).

The Campaign also briefly argues (Br. 58 n.11) that the “elimination of the Middle Section (and access to its meadows and water sources), in combination with the loss of genetic interchange,” implicates several of the “significance factors” identified in the NEPA regulations. The regulations explain that “Significantly as used in NEPA requires considerations of both context and intensity,” and list ten factors that “*should be considered in evaluating intensity.*” 40 C.F.R. § 1508.27 (emphasis added). The factors cited by the Campaign are “[t]he degree to which the effects . . . are likely to be highly controversial,” “[t]he degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks,” and “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(4), (5), (6). As used in the regulations, the term “controversial” refers to cases where “a substantial dispute exists as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use.” *Town of Cave Creek*,

*Arizona v. F.A.A.*, 325 F.3d 320, 331 (D.C. Cir. 2003) (emphasis in original; citation omitted).

None of these factors is implicated here. The effects of the Forest Service's action are neither "highly controversial" nor "highly uncertain," because the action will not have a substantial effect on the horses' access to the disputed area and will not result or result in "the loss of genetic interchange." As demonstrated above, the record provides ample evidence supporting the agency's conclusions on these issues, and the mere fact that the Campaign disagrees is insufficient. AR 108 (JA0219) (Decision Notice); *see Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 93, 96, 103, 105-106 (1983) (reviewing courts are to be at their "most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science"); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993) (if disagreement among experts were all that was necessary to mandate an EIS, "the environmental assessment process would be meaningless."). Likewise, the action does not establish create a precedent for future actions. Rather, it is a project-specific decision addressing the unique facts of this case, and future adjustments in management of the Territory would be based on the

evaluation of new monitoring data. AR 108 (JA0219). Accordingly, the Campaign's arguments based on the NEPA significance factors fail.

- B. The Campaign's allegations that the outcome of the NEPA analysis was predetermined and the product of bad faith are unfounded.**

The Campaign contends that the outcome of the Forest Service's NEPA analysis was predetermined and that the agency conducted it in bad faith. According to the Campaign, the NEPA process 'was nothing more than a *post hoc* attempt to justify the removal of the Middle Section at the behest of the Farm Bureau[.]' Br. 57 n.10; *see also* Br. 61 (asserting that "the Service's underlying motivation for abolishing the Middle Section and for failing to conduct even a cursory review of its environmental effects" was "to accede to the desires of the Farm Bureau"). The district court considered these assertions at length and correctly determined that they are unfounded. D.E. 32 at 29-33 (JA0124-28).

The standard for proving that the outcome of an agency's NEPA analysis was predetermined is high. "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action" that depends on a particular result before completing its analysis. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original). Further, "[a]n agency can have a preferred

alternative in mind when it conducts a NEPA analysis,” *id.* at 712, and bias towards a preferred outcome does not violate NEPA so long as it does not prevent full and frank consideration of environmental concerns. *NRDC v. Nuclear Regulatory Comm’n*, 547 F.2d 633, 659 n. 5 (D.C. Cir. 1976) (Tamm, J., concurring), *rev’d on other grounds sub nom. Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

The Campaign falls far short of demonstrating either predetermination or bad faith. The record documents that the Forest Service entered into the Cooperative Agreement with the Modoc County Farm Bureau to obtain the staff and information needed to undertake a thorough inter-disciplinary analysis of the proposed action, as envisioned by NEPA. AR 4700-01, 4748 (JA0878-79, 0905); 40 C.F.R. § 1502.6. The Farm Bureau was responsible for collecting and analyzing data and drafting various reports and NEPA documents, but no outcome was specified. AR 4713 (JA0891). The Forest Service reviewed and independently evaluated the work of the Farm Bureau and the contractors, and took responsibility for its scope and contents. AR 4714, 305 (JA0892, 0406). The contracting process was transparent and lawful, and the ultimate decisions were made by the Forest Service, not the Farm Bureau or the specialists the Farm Bureau hired. AR 112 (JA0312). Thus, the Campaign’s suggestion (Br. 20-

21) that the Farm Bureau was responsible for the decision to “change the WHT boundaries” is unfounded. *See Associations Working for Aurora’s Residential Env’t v. Colorado Dep’t of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (transportation agency’s oversight was sufficient to cure any defect arising from NEPA contractor’s alleged conflict of interest).

Ultimately, the Campaign’s unfounded speculation about Forest Service’s allegedly improper motives is insufficient to demonstrate that the Forest Service’s cooperative agreement with the Farm Bureau compromised the “objectivity and integrity of the NEPA process.” *Citizens Against Burlington v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991) (quoting 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981)). Accordingly, the Campaign’s claims of predetermination and bias must be rejected.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,895 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Mark R. Haag

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users who will be served by the appellate CM/ECF system.

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