

SCOTT E. ASPHAUG, United States Attorney
TODD KIM, Assistant Attorney General
S. JAY GOVINDAN, Acting Section Chief
BRIDGET K. MCNEIL, Assistant Section Chief
HANNAH O'KEEFE, Trial Attorney (IL Bar No. 6336475)
CHRISTIAN H. CARRARA, Trial Attorney (NJ Bar No. 317732020)
Wildlife & Marine Resources Section, Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0217 (Carrara)
Fax: (202) 305-0275
Email: christian.carrara@usdoj.gov

Attorneys for Federal Defendants

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**CENTRAL OREGON WILD HORSE
COALITION, GAYLE HUNT, and
MELINDA KESTLER,**

Plaintiffs,

v.

TOM VILSACK, Secretary of the U.S.
Department of Agriculture, **RANDY
MOORE**, Chief of the U.S. Forest Service,
GLENN CASAMASSA, Regional Forester,
Northwest Region of the U.S. Forest Service,
and **SHANE JEFFRIES**, Forest Supervisor
of Ochoco National Forest of the U.S. Forest
Service,

Defendants.

Case No. 2:21-cv-01443-HL

**MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Nearly 50 years ago the Forest Service developed a wild horse territory management plan for the Big Summit Territory (“Territory”) within the Ochoco National Forest. The 1975 Ochoco Wild and Free Roaming Horse Management Plan (“1975 Territory Plan”) established the Territory boundary and determined the appropriate management level (“AML”) to be within the range of 55 to 65 wild horses. This range was adjusted slightly downward in 1989, when the Forest Service issued its Ochoco National Forest Land and Resource Plan (“Ochoco Forest Plan”), directing that “wild horses within the original territory will be managed at a maximum of 60 head.” AR_11363. Over the last several decades, however, the Territory’s wild horse population has expanded from its historic level of approximately 60 horses in 1975 to 135 horses in 2018.

The Forest Service addressed the issues posed by the overpopulation of wild horses in its 2020 Ochoco Wild Horse Herd Management Plan (“2020 Territory Plan”). Based on current conditions in the Ochoco National Forest, the Forest Service used a science-based approach to establish a new AML range of 47-57 horses. The Forest Service also authorized actions to improve the genetic health of the horse population by consulting with wild horse genetics experts to manage the herd for an acceptable level of genetic variability. In order to evaluate any potential significant effects the 2020 Territory Plan may have on the environment, as required by the National Environmental Policy Act (“NEPA”), the Forest Service solicited comments from the public, engaged an interdisciplinary team of experts, and prepared an Environmental Analysis (“EA”). Based on its analysis in the EA, the Forest Service issued a Decision Notice (“DN”) explaining its decision, and a Finding of No Significant Impact (“FONSI”), determining that its decision would not have a significant environmental effect, and that no further analysis was needed under NEPA. Similarly, the agency determined that the AML range of 47-57 horses will protect the population

of wild horses in a thriving ecological balance, as required by the Wild Free-Roaming Horses and Burros Act (“WHA” or “Wild Horse Act”).

Plaintiffs now challenge the 2020 Territory Plan, alleging the Forest Service violated the WHA, Administrative Procedure Act (“APA”), and NEPA by authorizing the gather of excess wild horses in the Territory, and by approving the Decision Notice and Finding of No Significant Impact. As discussed below, Plaintiffs' arguments are without merit. Accordingly, Federal Defendants respectfully request that the Court deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Wild Free-Roaming Horses and Burros Act

Congress passed the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, to preserve such animals as “living symbols of the historic and pioneer spirit of the West,” and directed the Secretary of Agriculture to provide for their protection and management. 16 U.S.C. §§ 1331-1333. Within only a few years of the Act’s passage, however, the wild horse population had grown dramatically, “and action [was] needed to prevent a successful program from exceeding its goals and causing animal habitat destruction.” *Am. Horse Prot. Ass’n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (quoting H.R. Rep. No. 95-1122, 23 (1978)). As a result, Congress later amended the Wild Horse Act to provide both the Forest Service and the Bureau of Land Management (“BLM”) with greater authority and discretion to carry out the Wild Horse Act's statutory mandate. *Id.*

With respect to Federal public lands, Section 3 of the Wild Horse Act grants the Forest Service and BLM authority over wild horses on Federal lands according to their jurisdictions. 16

U.S.C. § 1333(a). Section 3 then directs the agencies to protect and manage wild horses “as components of the public lands” and “in a manner that is designed to achieve and maintain a thriving natural ecological balance” on those lands. *Id.* The Forest Service implements the Wild Horse Act by first establishing localized Forest Service horse territories and then setting appropriate management levels for the wild horse populations within each area. 16 U.S.C. §§ 1332(c), 1333(b)(1). The Forest Service typically defines a management range—bounded by a “low appropriate management level” and “high appropriate management level”—for each horse territory. In conjunction with a requirement that the agency maintain a current inventory of wild horses, the Wild Horse Act authorizes the Forest Service to use a variety of methods to achieve appropriate management levels, including (but not limited to) the removal of “excess animals.”¹ 16 U.S.C. § 1333(b)(1).

Once the Forest Service has determined “that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals,” the Forest Service must “immediately remove excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. § 1333(b)(2). Even if a wild horse population does not exceed high AML, when wild horse populations exceed the carrying capacity of a range, or when wild horses stray outside of a designated territory, the Forest Service is obliged to remove them. 16 U.S.C. § 1332(f).

B. The National Environmental Policy Act

NEPA is a procedural statute—it does not contain substantive environmental standards or mandate certain results, but merely requires that federal agencies “perform environmental analysis

¹ The Wild Horse Act defines “excess animals” as those “wild free-roaming horses or burros . . . which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” *Id.* § 1332(f).

before taking any ‘major Federal actions significantly affecting the quality of the human environment.’” *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094 (9th Cir. 2013) (quoting 42 U.S.C. § 4332(2)(C)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). “NEPA merely prohibits uninformed—rather than unwise—agency action.” *Robertson*, 490 U.S. at 351. To satisfy NEPA’s procedural requirements, an agency may prepare an EA to determine whether a FONSI is warranted or whether it is necessary to prepare an Environmental Impact Statement (“EIS”) that analyzes significant impacts on the environment. 40 C.F.R. §§ 1501.4, 1508.9.² An EA is a “concise public document” that serves to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” *Id.* § 1508.9(a)(1). An EA must include a “reasonably thorough discussion of the significant aspects of probable environmental consequences[,]” *Neighbors of Cuddy Mountain v. U.S. Forest Ser.*, 137 F.3d 1372, 1376 (9th Cir. 1998), and take a “‘hard look’ at the likely effects of the proposed action [. . . by] ‘considering all foreseeable direct and indirect impacts.’” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916–17 (9th Cir. 2012) (citations omitted).

II. FACTUAL BACKGROUND

A. Historic management of wild horses in the Territory

The Territory is located about 25 miles east of Prineville, Oregon, in Crook County. AR_11362. The approximately 25,434-acre area of Federal lands—of which 98 percent is National Forest System lands—is managed by the Ochoco National Forest’s Lookout Mountain and Paulina

² The Council on Environmental Quality promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, *see* 51 Fed. Reg. 15618 (Apr. 25, 1986). More recently, the Council published a new rule, effective May 20, 2022, further revising the 1978 regulations. 87 Fed. Reg. 23453. The claims in this case arise under the 1978 regulations, as amended in 1986. All citations to the Council’s regulations in this brief refer to those regulations as codified at 40 C.F.R. Part 1500 (2018).

wild horses be managed at a maximum of “60 head”—a slight decrease from the 1975 Territory Plan’s upper limit. AR_11363; AR_01834.

In 2018, the number of verified wild horses in the Territory was between 125 and 135, however, the current number is possibly higher. *See* AR_11363 (describing two censuses conducted in 2018, however, noting that the average growth of the herd appears to be 7-8 percent with high annual variation).³

B. Preparation of the 2020 Territory Plan

In June 2017, the Forest Service initiated the process of preparing a new territory plan by beginning the initial project scoping, AR_3393-3400, and issuing a Notice of Intent (“NOI”) to Prepare an EIS “to analyze the effects of revising the 1975 Ochoco Wild and Free Roaming Herd Management Plan.” AR_3403-05. However, based on information gathered from the initial scoping period, and the Forest Service’s preliminary evaluation of the issues, the Forest Service withdrew its NOI to prepare an EIS and signaled it would instead prepare an EA because it determined that “no potential significant impacts to the human environment are associated with the project.” AR_04705. The Final Environmental Analysis for the Ochoco Wild Horse Herd Management Plan and Forest Plan Amendment was published in November 2020. AR_11354-662. In the EA, the Forest Service described the purpose and need for a new herd management plan by noting, among other issues, the increased wild horse population over the 1975 AML, as well as a desire to improve the genetic variability of the wild horse herd for long-term sustainability. AR_11364. The Forest Service considered three alternatives to its proposed management plan. *See*

³ If the herd grew at a conservative 7 percent annually since the last census was conducted, it is possible that nearly 40 additional horses are on the Territory—pushing the population close to 175 horses—when the population was *already* “double the high end of the current AML established in the 1975 management plan” in 2018. AR_11363; *see* AR_11389 (showing several years where the herd grew by over 30 percent).

generally AR_11376-82. First, it considered a “No Action” alternative (“Alternative 1”). AR_11376. Second, it considered a plan, which would set the AML at a population range between 12 and 57 wild horses and allow the Forest Service to manage the herd for an acceptable level of genetic variability (“Alternative 2”). AR_11376-77. Third, the Forest Service considered a plan, which would set the AML between 150 and 200 wild horses, with no outside inputs for genetic variability (“Alternative 3”). AR_1177-78. Next, the Forest Service used data and reports prepared by an interdisciplinary team of specialists, as well as the best available science, to analyze the affected environment and environmental consequences of each alternative. AR_11383-533.

Based on the EA and the administrative record, on May 7, 2021, the Forest Service issued the DN-FONSI, selecting Alternative 2 (with modifications) for implementation, and determining that the effects of the 2020 Territory Plan are not significant. AR_12465, 12467. The DN established an AML of 47-57 horses, which is within the AML range of 12-57 horses that the Forest Service analyzed and considered under Alternative 2 in the EA. AR_11434-35; AR_12453. The DN also authorized the management of the Territory’s wild horse population through the use of consecutive gathers and contraception, authorized actions to improve and maintain genetic variability, and established guidelines for best management practices. AR_12453-55.

STANDARD OF REVIEW

Neither NEPA nor the WHA provide for a private right of action against the United States, so the Court’s assessment of Plaintiffs’ claims is governed by the APA. 5 U.S.C. § 706(2). *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1205-06 (9th Cir. 2004); *San Louis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, a court may set aside an agency action only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475

F.3d 1136, 1140 (9th Cir. 2007). Under this narrow standard of review, “[t]he court is not empowered to substitute its judgment for that of the agency.” *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016). The burden of proof remains on Plaintiffs. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

The “arbitrary and capricious standard” is necessarily deferential. A decision is arbitrary and capricious only “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Nw. Ecosystem All.*, 475 F.3d at 1140 (internal quotation and citation omitted) (this standard is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision”). In other words, there must be “a clear error of judgment.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal quotations omitted). “[A] reviewing court must generally be at its most deferential” when reviewing determinations involving agencies' technical expertise and scientific judgments. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983).

ARGUMENT

In order to meet the statutory obligation to manage the wild horses on its land in a thriving natural ecological balance, 16 U.S.C. § 1333(a), the Forest Service made necessary updates to its management plans by revising the 1975 Territory Plan and amending the Ochoco Forest Plan. As part of this effort to update out-of-date management plans, the Forest Service revised the AML

range to 47-57 horses, authorized population growth control methods, and authorized actions to improve and maintain genetic variability. In making these necessary changes, the Forest Service engaged in extensive public scoping, participated in dozens of meetings and engagements with stakeholders, and considered decades of data regarding ecological conditions, wild horse populations, and available genetic science. The Forest Service compiled its research, analysis, and decision-making in a 309-page EA, demonstrating that the agency took a “hard look” at the environmental impact of the Plan before reasonably concluding that the Plan will not significantly affect the human environment. Accordingly, Plaintiffs' claims that the Forest Service's decision violated the NEPA, WHA, and APA must fail.

I. THE FOREST SERVICE'S PLAN FOR THE TERRITORY IS CONSISTENT WITH NEPA AND SUPPORTED BY THE RECORD.

Plaintiffs appear to challenge the Forest Service's NEPA analysis in two ways: first, they argue that the Forest Service failed to take a “hard look” at the environmental impacts of the action, and second, they assert that the Forest Service should have prepared an Environmental Impact Statement.⁴ Both arguments fail.

To satisfy NEPA's procedural requirements, an EA must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI],” 40 C.F.R. § 1508.9(a)(1), and include a “reasonably thorough discussion” that takes a “hard look” at the likely

⁴ Plaintiffs' NEPA challenges are dispersed throughout their motion, and are often intertwined with their challenges under the WHA. But, unlike the WHA, NEPA is a *procedural* statute that does not mandate substantive results, but merely “requires that federal agencies perform environmental analysis before taking any ‘major Federal actions significantly affecting the quality of the human environment.’” *Ctr. for Biological Diversity*, 706 F.3d at 1094 (quoting 42 U.S.C. § 4332(2)(c)). Accordingly, Federal Defendants interpret Plaintiffs' allegations in Parts A and B of Plaintiffs' motion that the Forest Service violated NEPA as challenges to the *sufficiency* of the EA, *i.e.*, challenges that the agency did not take the requisite “hard look.” In Part C of Plaintiffs' motion, where they specifically allege that the Forest Service should have prepared an EIS, Federal Defendants address Plaintiffs' argument directly.

environmental effects of the proposed action. *Neighbors of Cuddy Mountain*, 137 F.3d at 1376; *Salazar*, 695 F.3d at 916–17. An EA includes “brief discussions of the need for the proposal, of alternatives as required by [statute], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 C.F.R. §1508.9(b). “In reviewing a challenge to the adequacy of an EA, courts apply a ‘rule of reason’ to determine whether the agency took a ‘hard look’ at a proposed action.” *Native Ecosystems Council & All. for the Wild Rockies v. U.S. Forest Serv.*, 866 F. Supp. 2d 1209, 1224 (D. Idaho 2012) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002)). Notably, the purpose of an EA is “not to amass and disclose all possible details regarding a proposal, but to create a ‘concise public document’ that serves to ‘[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].’” *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1128 (9th Cir. 2012) (citations omitted).

The EA for the 2020 Territory Plan more than satisfies NEPA’s procedural requirements. The EA outlines the purpose and need for the 2020 Territory Plan, analyzes three alternatives, and describes the Forest Service’s reasoning for selecting Alternative 2, with modifications, as the best alternative to meet the purpose and needs of the project. Supported by an extensive Administrative Record, the EA engages in a thorough analysis of the affected environment and potential environmental consequences, allowing the Forest Service to reasonably determine that the action will not significantly affect the human environment. Plaintiffs’ challenges to the sufficiency of the EA’s assessment are without merit.

A. The Forest Service Took a Hard Look by Analyzing Reliable Data and Explained its Methodology in Establishing the Winter Range.

Plaintiffs’ chief complaint with the Forest Service’s Winter Range analysis, and its effect on the AML, appears to be a challenge to the data and methodology the Forest Service used to

prepare the EA. Specifically, Plaintiffs allege that the Forest Service skewed its analysis of winter range forage availability by relying on data from years with above-average snowfall. But NEPA does not mandate that an agency employ any “particular scientific methodology” in preparing an EIS, *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1076 (E.D. Cal. 2004) (citing *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)), let alone an EA, which is not subject to the same robust analytical requirements as an EIS. *See N. Alaska Env’t Ctr. v. U.S. Dep’t of Interior*, 983 F.3d 1077, 1085 n.7 (9th Cir. 2020) (noting that an EA requires “less detail and less formality of procedure than an EIS”). Further, courts must give an agency “discretion to rely on the reasonable opinions of its own [qualified] experts, . . . and agencies are accorded particular deference with respect to scientific issues within their area of expertise.” *In Def. of Animals v. U.S. Dep’t of Interior*, 909 F. Supp. 2d 1178, 1197 (E.D. Cal. 2012), *aff’d*, 751 F.3d 1054 (9th Cir. 2014) (citations omitted). So long as an agency takes a “hard look” at the issues and reasonably responds to opposing viewpoints, it is entitled to discretion in assessing the scientific evidence. *Earth Island Inst.v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (citing 40 C.F.R. § 1502.9(a)-(b)); *see also Nw. Env’t Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006) (noting that, in reviewing decisions to ensure the agency has taken a “hard look” at the potential environmental consequences, courts should be “mindful to defer to agency expertise, particularly with respect to scientific matters.”) (citation omitted).

First, while Plaintiffs assert that the Forest Service used skewed data and “agenda-driven” decision-making to artificially manufacture a need to remove horses from the territory (Pls.’ Mot. for Summ. J. 11, ECF No. 27 (“Pls.’ Br.”)), the public has been asking the Forest Service to address the issue of limited winter forage for wild horses for years, if not decades. The scoping and public participation process, AR_11536, for the 2020 Territory Plan revealed a consistent concern that

there is not enough winter forage to support the wild horse population. The Forest Service participated in dozens of wild horse “working group” meetings, in which Plaintiffs also participated, that consistently discussed the issue of winter forage for wild horses.⁵ *See, e.g.*, AR_03006 (the working group brainstorming “feed in winter for horses”); AR_03202 (a group members asking if “The Forest Service has identified any policy regarding winter range and actions that may be taken during intense winters for the horses?”); AR_03216, AR_03220, AR_03221 (the group addressing “limited winter forage”); AR_03219 (noting the suggestion that the group “focus first on winter forage as it is the most time sensitive subject”); AR_03223 (meeting agenda item listing “Limited Access to Winter Forage”); AR_03227 (discussing “winter forage/development”); AR_03229 (discussing “the issue of winter starvation of horses and how to prevent/handle that situation”); AR_03251 (“Winter forage” was a priority topic for the Co-chair group to cover); AR_03255 (Discussions of limiting winter starvation due to limited winter forage); AR_03263 (“the underlying issue is one of winter forage”). These comments and meetings revealed an overwhelming consensus that winter forage in the Territory is insufficient for the current wild horse population, and demonstrated a clear need for Forest Service intervention.

In light of the robust history of public comments, Plaintiffs’ assertion that the Forest Service engaged in “fact-finding in reverse” makes little sense. Pls.’ Br. 13. For instance, Plaintiffs

⁵ As discussed further below (*see infra*, II(b)), many members of the working group—including Plaintiffs— have been urging the Forest Service to supplement the wild horses’ winter forage. *See, e.g.*; AR_02545 (Plaintiffs’ Vision and Objectives document) (discussing “[p]otential forage augmentation in winter, such as helicopter hay drops” as an activity worthy of listing and consideration (AR_02545)). However, providing supplemental feed for wild horses is contrary to Forest Service policy (AR_03389, AR_04686, AR_04703, AR_04718, AR_11370, AR_11638, AR_11639), as the Territory must provide winter forage for wild horses (AR_11364) *without* resultant resource or habitat degradation. AR_11406, AR_11576.

point to a March 17, 2017 document reflecting the wild horse working group's team meeting notes, which includes a draft proposed action and AML. *Id.* at 11; AR_03356. But this document was developed *after* the above-referenced comments and meetings, during which the Forest Service gathered hundreds of data points reflecting the meeting groups' questions, comments, and concerns that the Forest Service considered when developing the 2020 Territory Plan. Additionally, draft proposals are a necessary part of the scoping process, and the meeting notes specifically indicate that the draft AML range was reached "through preliminary analysis in GIS," and that "[t]here is more work to be done with [the] analysis." AR_03356. Accordingly, while Plaintiffs insist that the "[d]ecision led to the data," Pls.' Br. 11, the record reveals years of data leading to the same conclusion: the Forest Service needed to update its 1975 Territory Plan to allow for management of the wild horses at sustainable population levels in light of limited winter forage availability.

As a related challenge, Plaintiffs complain that the Forest Service "only considered select data" when defining the winter range, and "ignored the real picture of what has occurred in the [Territory]" as a way to manipulate the results of its study. Pls.' Br. 13. As before, this is essentially a critique of the data the Forest Service relied on, and the methodology it employed, which are best left to the discretion of the agency so long as the agency explains its reasoning. *Earth Island Inst.*, 351 F.3d at 1301 (citing 40 C.F.R. § 1502.9(a)-(b)). The EA includes a detailed explanation of the methodology the Forest Service used to establish the parameters of the winter range, AR_11556-11558, which reveals that the Forest Service considered five sources of data in its analysis. To map the winter range, it considered (1) the previously-established big game winter range within the Big Summit Territory; (2) the Potential Natural Vegetation communities, which would help reveal areas with more favorable thermal conditions during the winter time; (3) a 2008

winter survey showing wild horse forage use during winter with above-average snowfall, (4) a 2017 winter survey showing wild horse forage use during winter with above-average snowfall; and (5) information the Forest Service received after requesting data and feedback from members of the public. AR_11556-57. After analyzing and comparing the data, the Forest Service determined that the observed horse use during winter was most closely correlated to the 4,600-foot elevation demarcation in the territory. Based on this elevation demarcation, the Forest Service identified a winter range inside the Big Summit Territory of an estimated 4,942 acres to be used for forage calculation. AR_11392.

Moreover, Plaintiffs' claims that the agency ignored or discounted existing data are belied by the record. For instance, Plaintiffs allege that the Forest Service ignored data in the record that established sightings and tracking of wild horses outside of the proposed winter range. Pls.' Br. 13-14. But the EA never indicated that the winter range is the *only place* a wild horse will ever occupy during the winter; rather, the EA noted that "wild horses are *consistently present* in the area determined to be wild horse winter range during winter time." AR_11392. Similarly, in the Decision Notice, the Forest Service noted that, while it "acknowledge[s] the information about wild horses using areas outside the wild horse winter range during winter . . . forage use of areas outside of the estimated wild horse winter range during winters of above-average snow fall is expected to be incidental." AR_12456-57. The Forest Service did not ignore Plaintiffs' comments, or its own data—rather, it used its scientific judgment and consideration of a range of data points to establish a winter range territory that was best represented by the elevation threshold above which winter forage will not be readily available during years of above average snowfall. Thus, Plaintiffs' argument fatally mischaracterizes the EA.

Additionally, Plaintiffs allege that the Forest Service skewed its analysis by relying on data from especially harsh winters. Pls.' Br. 14. But the Forest Service's reliance on data from winters with above-average snowfall was a reasonable and logical decision for multiple reasons. First, as the Forest Service explained in the EA, winter weather with snow cover affects forage availability and creates a temporally density-dependent population. AR_11555. The more snow there is on the ground, the less forage is available for the horses and other wildlife occupying the winter range. Therefore, the Forest Service considered data from years of heavy snow in order to ensure that, *even in* years of above-average snowfall, the maximum number of wild horses allowed on the land would *still* be able to find adequate forage (while allowing the Forest Service to meet its other standards and guideline conditions in accordance with the Ochoco Forest Plan allowable use guidelines). *See* AR_11555 ("To minimize resource damage or adverse impacts to animal health, the upper limit of AML will be established in consideration of winter range forage available during winters of above-average snowfall."). Second, the record reveals that "extreme" winters are actually fairly common for the area. The Forest Service considered data showing that between 1989 and 2019—a 31-year period—the Forest had 12 winters with above-average snowfall. AR_45779. Accordingly, winters with above-average snowfall are not as "extreme" as Plaintiffs suggest. Third, the EA notes that although the Forest Service received information from the public expressing knowledge of wild horse winter use, most of the information "was not usable because it was either information outside of the Territory, information from average or below average snowfall winters, or opinions or other sources of data without actual data point information." AR_11610. In contrast, the data sets from 2008 and 2017 were *official and concerted* winter inventory surveys, and were thus the most reliable, accurate, and scientific surveys to analyze. *See Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) ("[Courts must] defer

to agency decisions so long as those conclusions are supported by studies ‘*that the agency deems reliable.*’”) (citation omitted); *see also* 40 C.F.R. § 1500.1(b) (requiring the use of “high quality” environmental information in NEPA procedures). Finally, as explained above, the Forest Service did not rely solely on data from the 2008 and 2017 surveys when considering winter forage and setting the AML; the EA indicates that usable results from the surveys “concluded the repeatable observations of horses not seen above the 4,600’ elevation.” AR_11558. Thus, the official surveys from winters with above-average snowfall corroborated observations from the Forest Service, its interdisciplinary specialists, and members of the public regarding the locations where horses are *usually* seen in winters, which aligned with setting the threshold at 4,600 feet. AR_11558.

Lastly, Plaintiffs’ claim that the horses’ very survival demonstrates sufficient winter forage is a straw man. The EA refutes this argument directly, urging that “[s]urvival is not the determinant of adequate forage, but the ability to generally meet riparian utilization standards as set in the [Ochoco Forest Plan].” AR_11610. The wild horses have continued to survive on the land because they have been *exceeding* allowable use standards—even on years when permitted livestock have not used the area—which in turn, results in habitat degradation. AR_11406; AR_11368; *see also* AR_11401 (“Currently the riparian areas inside the wild horse winter range are in unsatisfactory condition”); AR_11406 (“The current number of wild horses are contributing to the declined riparian conditions, as riparian areas have been repeatedly over-utilized). As the Forest Service noted in the “Purpose and Need” section of the EA, “[t]he Forest Service must maintain a herd size that the habitat within the Territory boundary can sustain.” AR_11364.

In sum, the Forest Service took a hard look at the environmental effects of the 2020 Territory Plan by engaging in dozens of public meetings and other scoping efforts, gathering reliable data to establish a winter range, explaining its methodological process, and incorporating

public feedback. This analysis enabled the Forest Service to set a reasonable AML of horses that can thrive in the Territory, even in the harshest winters. Accordingly, the analysis of winter range forage in the EA did exactly what it was designed to do: it provided the Forest Service sufficient evidence to reasonably determine that the 2020 Territory Plan would not have a significant effect on the environment, and preparation of an EIS was unnecessary. *Tri-Valley CAREs*, 671 F.3d at 1128.

1. The Forest Service Took a Hard Look at its Plan to Manage the Horses' Genetic Health.

Plaintiffs' argument that the Forest Service violated NEPA because it plans to remove horses from the territory before collecting "[s]ufficient [g]enetic [d]ata from the [h]erd," Pls.' Br. 28, misconstrues and misrepresents the Forest Service's stated actions, sequence, and intent. Here, part of the Forest Service's plan to manage the wild horses in accordance with the WHA includes managing the genetic variability of the population to ensure genetic health. AR_11377. Although there is already sufficient evidence to establish that the genetic variability of the herd is critically limited (AR_11394, AR_11553, AR_02769, AR_02764, AR_04572, AR_04574), the EA explains that the Forest Service will establish current genetic variability by sampling a portion of the herd during the initial gather and removal operations to achieve AML. AR_11377. This means that the Forest Service will likely have samples from 40 to 60 wild horses to complete its initial analysis, AR_12458, and sampling will continue during subsequent maintenance gather operations to monitor changes in genetic variability over time. AR_12454. The Forest Service will then submit the samples it gathers to wild horse genetics experts for evaluation. AR_12454. Based on the consultation with and advice from the genetics experts, the Forest Service will manage genetic variability by importing new, young mares from similar habitats to the Territory in order to introduce new genes to the genetic population. AR_11377. Once the territory has initially reached

AML, the Forest Service notes that it may be necessary to introduce more than one or two young mares in order to increase genetic variability in a timely manner. AR_11377.

This shows that Plaintiffs' call for the agency to "establish a baseline of the Herd's current genetic makeup" . . . "before laying plans to monitor and manage the genetic changes that the USFS proposes it will introduce" is exactly what the 2020 Territory Plan *already proposes*. The Decision Notice clearly describes how the Forest Service will determine the current genetic variability of the herd by analyzing the genetic properties of horses that it already plans to gather *before* it determines whether translocation of an additional mare is necessary. AR_12454; *see* AR_12458 (explaining that the Forest Service will use the genetic sampling from its initial gather "to determine the relativity contemporaneous genetic variability of the herd *prior to determining whether translocation is necessary*") (emphasis added). Put another way, the Forest Service has no plan to introduce outside mares to the territory until it has established a clear picture of the current genetic properties of the herd.

Additionally, Plaintiffs' claim that the genetic makeup of the herd will be "permanently altered by reduction in size" is belied by the record. For instance, there were only 49 wild horses in the Ochoco population in 2004, but the population reached approximately 135 horses by 2018. AR_11363. Yet, Plaintiffs do not argue that genetic characteristics of the horses permanently changed from 2004 to 2018 merely because of a change in population size. The herd's genetic makeup was not "permanently altered" in past periods of lower population, nor will it be "permanently altered" by gathering horses to maintain the population at an AML of 47-57 horses.

What's more, Plaintiffs' argument suggests that merely because the Forest Service's plan to protect the genetic health of the herd will involve continuous monitoring and management, it runs afoul of NEPA. This cannot be true. Indeed, it is a routine practice of Federal agencies to

create management plans, such as the 2020 Territory Plan and Ochocho Forest Plan, to establish a framework not only for immediate action, but for ongoing resource management. *See e.g.*, 353 F. Supp. 3d 991, 1017 (D. Nev.2018), *aff'd*, 820 F. App'x 513 (9th Cir. 2020) (upholding a BLM wild horse gather plan that “provides for and includes ongoing monitoring and other efforts to ensure that genetic diversity remains in the complexes”). The fact that the 2020 Territory Plan allows the Forest Service to monitor the horses’ genetic health and tailor its response accordingly does not indicate an abdication of the agency’s NEPA responsibilities; rather, it demonstrates the agency’s commitment to its statutory mandate to maintain a thriving wild horse population. Instead, the correct question for a Court to ask is whether the Forest Service took a hard look at the environmental impacts of its genetic health management plan. As shown, the Forest Service established a need to ensure genetic variability, consulted with genetics experts, and explained its decision-making in the EA. No more is required under NEPA.

2. The EA and FONSI Comply with NEPA and the Forest Service Need Not Prepare an EIS.

When an agency prepares an EA and subsequently determines that an EIS is not required, as the Forest Service did here, it must “issue a [FONSI], briefly describing why the action ‘will not have a significant effect on the human environment[.]’” *In Def. of Animals*, 751 F.3d at 1068 (quoting 40 C.F.R. § 1508.13). An EIS is only required if the EA process reveals “‘substantial questions’ about whether an agency action will have a significant effect.” *Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1007 (9th Cir. 2020) (citation omitted).

“Agencies consider two broad factors to determine whether an action may ‘significantly affect’ the environment: ‘context’ and ‘intensity.’” *In Def. of Animals*, 751 F.3d at 1068 (quoting 40 C.F.R. § 1508.27). “Context refers to the setting and circumstances of the proposed action, including ‘society as a whole (human, national), the affected region, the affected interests, and the

locality.” *Env’t Def. Ctr. V. Bureau of Ocean Energy Mgmt*, 36 F. 4th 850, 879 (9th Cir. 2022) (quoting 40 C.F.R. § 1508.27. “Intensity refers to the ‘severity of impact,’” and NEPA’s implementing regulations identify 10 factors that agencies should consider in evaluating intensity. *In Def. of Animals*, 751 F.3d at 1068 (citing 40 C.F.R. § 1508.27(b)(1)-(10)).⁶

The Court must employ the APA’s arbitrary and capricious standard “[i]n reviewing a decision not to prepare an EIS under NEPA,” just as it must in assessing the adequacy of the EA itself. *In Def. of Animals*, 751 F.3d at 1068. This requires the Court to “determine whether the agency has taken a ‘hard look’ at the consequences of its actions, based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project’s impacts are insignificant.” *Id.* (quoting *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006)). However, the Court “must not ‘substitute [its] judgment for that of the agency.’” *Id.* (quoting *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000)).

Here, based on its analysis in the EA, the Forest Service reasonably determined that its updates to the Ochoco Wild Horse Management Plan and the Forest Plan would not have a

⁶ The “intensity” factors enumerated by § 1508.27(b) include: (1) “Impacts that may be both beneficial and adverse;” (2) “The degree to which the proposed action affects public health or safety;” (3) “Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;” (4) “The degree to which the effects on the quality of the human environment are likely to be highly controversial;” (5) “The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;” (6) “The degree to which the action may establish a precedent for future actions . . . ;” (7) “Whether the action is related to other actions with individually insignificant but cumulatively significant impacts;” (8) “The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;” (9) “The degree to which the action may adversely affect an endangered or threatened species or its habitat . . . ;” and (10) “Whether the action threatens a violation of Federal, State, or local law”

significant effect on the environment. AR_12465. In the FONSI, the Forest Service considered the “context” of the project by noting that the Big Summit Territory consists of about 3 percent of the Ochoco National Forest. AR_12465. Besides managing the Ochoco wild horses in the Territory, the FONSI notes that the Forest Service also manages the area to meet the goals and objectives of five management allocations: General Forest, the General Forest Winter Range, Old Growth, Recreation Trail Visual Corridor, and the Lookout Mountain Recreation Area. AR_12465-66. Next, the Forest Service considered in detail each of the 10 “intensity factors”⁷ set forth in NEPA’s implementing regulations for determining whether a proposed action will have “significant” effects on the quality of the human environment. 40 C.F.R. § 1508.27(b); AR_12466-47. Although the Court’s review of whether the Forest Service’s findings of no significant impacts were adequate is distinct from the Court’s review of the analysis contained in the EA, the findings were necessarily and properly informed by the EA’s hard look at potential environmental effects and other analyses in the record. *E.g.*, AR_12466 (noting that the Forest Service’s determinations with regard to the intensity factors were “based on the documentation in the Revised EA and project file”).

3. The Environmental Effects are Not Highly Uncertain.

Contrary to Plaintiffs’ assertion, it is *not* “undisputed that there is a clear potential for the decimation of the Ochoco Herd,” nor does the Forest Service “agree[] that the consequences of the slated roundup will lead to ‘highly uncertain’ or ‘unique or unknown risks.’” Pls.’ Br. 29. Instead, the Forest Service explained in the FONSI that the decision “*does not* involve highly uncertain,

⁷ Of the ten intensity factors enumerated by § 1508.27(b), Plaintiffs challenge three: (1) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks (*see* Pls.’ Br. 29); (2) The degree to which the effects on the human environment are likely to be highly controversial (*see* Pls.’ Br. 29-30); and (3) The degree to which the action may establish a precedent for future actions (*see* Pls.’ Br. 30-31).

unique or unknown risks and is based on best available science and agency experience with similar types of actions.” AR_12466. The Forest Service carefully studied and documented the effects of the 2020 Territory Plan on wild horses, as well as specific effects associated with the gathers, and found no potential for the management plan to “decimate the herd.” *See* AR_11407-421 (discussion of effects to wild horses). In 1975, the herd consisted of approximately 60 horses, and in 2003, the population was again at around 60 horses. AR_11387-88. The new plan sets the initial AML at 47–57 horses (AR_12453), which approximates the previous population size of the herd. Previous management plans of the wild horse population through gathers and adoptions did not “decimate the herd,” and there is no evidence that the 2020 Territory Plan would have a negative impact on the herd. AR_11389-11390. Plaintiffs do not cite anything in the record demonstrating that the decision will have any uncertain effects, let alone that the effects are “highly uncertain,” as required by the law. *See Am. Wild Horse Campaign t*, 963 F.3d at 1008 (noting that while “[s]ome ‘quotient of uncertainty . . . is always present when making predictions about the natural world,’ . . . an EIS is only required “if the effects of the project are ‘highly’ uncertain.” (citations omitted)). Thus, the Forest Service’s reasonable analysis stands, and this factor does not trigger an EIS.

4. The Agency’s Plans for the Herd are not “Highly Controversial”.

The fact that public opposition to the 2020 Territory Plan exists does not make the action “highly controversial” for NEPA purposes. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (“A project is ‘highly controversial’ if there is a ‘substantial dispute [about] the size, nature, or effect of the major Federal action *rather than the existence of opposition to a use.*’” (emphasis added and citation omitted)); *see also Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 634 F. Supp. 2d 1045, 1057 (E.D. Cal. 2007) (“[R]eceipt of comments in

opposition to a proposal does not render that proposal controversial under NEPA.”). The Forest Service addresses this issue in the FONSI, noting that “although some aspects of wild horse management are socially controversial, there is no evidence to demonstrate a substantial dispute within the science community about the effects as described in the EA.” AR_12466. Besides noting that public groups have been placing “informed science and objections before [the Forest Service]” for “some time,” Plaintiffs have not identified any “substantial disputes” about the size, nature, or effect of the 2020 Territory Plan. Similarly, although the Forest Service and the National Research Council disagree with Plaintiffs’ claims regarding the herd’s “genetic purity,” AR_11418, disagreement between an agency and the public does not demonstrate that an action is “highly controversial” under NEPA. *Native Ecosystems Council*, 866 F. Supp. 2d at 1228 (“The fact that members of the public disagree with a project does not in itself make the project highly controversial.”). Thus, this factor does not trigger preparation of an EIS.

5. The EA Will Not Establish Precedent, and Does Not Violate Federal, State, or Local Law.

Plaintiffs’ hyperbolic claim that the Forest Service will use this decision to render “all intended protections of NEPA a thing of the past” (Pls.’ Br. 30) ignores clear Ninth Circuit precedent. Ninth Circuit law holds that “EAs are usually highly specific to the project and the locale, thus creating no binding precedent.” *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011). Here, the Forest Service’s finding in the FONSI aligns with the Ninth Circuit’s reasoning, noting that “[f]uture actions that are not addressed in this decision would be subject to additional NEPA analysis.” AR_12466. The EA is highly specific to the Wild Horse Herd Management Plan and Forest Plan Amendment for the Ochoco National Forest, and will create no binding precedent under NEPA’s implementing regulations.

Likewise, Plaintiffs' allegation that the 2020 Territory Plan violates "environmental laws or regulations" is also without merit. The 2020 Territory Plan complies with NEPA and complies with the WHA, as established below. Further, the Forest Service explains in the FONSI that the 2020 Territory Plan also complies with the National Forest Management Act, AR_12464, which is the primary statute governing the administration of National Forest System lands in the United States. Because the Forest Service reasonably concluded that the EA will not establish precedent, and the 2020 Territory Plan does not violate federal, state, or local law, neither intensity factor indicates that an EIS was required, and the Forest Service's FONSI complies with NEPA.

II. THE FOREST SERVICE'S PLAN FOR THE TERRITORY IS CONSISTENT WITH THE WHA AND SUPPORTED BY THE RECORD.

The Forest Service complied with the requirements of the WHA and its decision to revise the AML range is entitled to deference. *See Silvey*, 353 F. Supp. 3d at 1008 (providing "great deference [to the action agency] both in establishing AMLs and in reevaluating established AMLs").

An AML is an expressed wild horse population range for a designated area with both an upper and lower limit, within which the Forest Service manages wild horse populations. *See Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1178 (10th Cir. 2016). An AML range is determined after taking into account various factors of a particular area including terrain, climate, natural resources, and the ability of the area to sustain a wild horse population. "In each [herd management area], [agency] officials are afforded significant discretion to compute [AMLs] for the wild horse populations they manage." *Silvey*, 353 F. Supp. 3d at 1001 n.5 (citation omitted). The purpose of an AML is "to move towards a thriving natural ecological balance," and an AML is used as "a trigger by which the [agency] is alerted to address population imbalance." *In Def. of Animals*, 751 F.3d at 1063-64 (citation omitted).

In *American Horse Protection Association v. Watt*, the District of Columbia Circuit recognized the importance of allowing an agency to act in order to address overpopulation issues. 694 F.2d at 1318. There, the court explained that, agencies should consider “(i) the inventory of federal public land, (ii) land use plans, (iii) information from environmental impact statements, [and] (iv) the inventory of wild horses,” however, “[they are] explicitly authorized to proceed with the removal of horses ‘in the absence of the information contained in (i-iv).’” *Watt*, 694 F.2d at 1318 (citing 16 U.S.C. § 1333(b)(2)). As the administrative record demonstrates that (1) the wild horse population of the Territory exceeds its AML; (2) natural ecological damage is occurring on the Territory due to this, and there is a likelihood of insufficient forage to sustain the Territory; and (3) the Forest Service considered the genetic health of the herd in setting the AML, the Forest Service properly revised the AML range in the 2020 Territory Plan. *In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior*, 751 F.3d 1054, 1062-1063 (9th Cir. 2014) (upholding the agency’s action to restore AMLs based on the overpopulation of horses and burros, deterioration of riparian areas, and insufficient forage to sustain the herd).

A. The Forest Service Thoroughly Considered the Population Inventory on the Territory.

The WHA requires that the Forest Service make a determination that an overpopulation of wild horses threatens the natural ecological balance of an area and whether removal is needed to restore that balance. 16 U.S.C. § 1333(b)(2); *see id.* § 1333(b)(1) (“the purpose of such inventory shall be to[] make determinations as to whether and where an overpopulation exists. . . .”). Here, the Forest Service considered the population inventory of wild horses and decades of data and observation on resources and utilization in revising the AML range of wild horses. The record demonstrates that, since 1975, the wild horse population in the Territory has more than doubled. AR_11363; *see also* AR_12456 (stating in 1975 there were about 60 wild horses in the Territory);

AR_07993 (“The latest number of wild horses around the [Territory] is 135 horses.”). At the same time, resource conditions in the Territory have continued to diminish. *See* AR_11406 (“The current number of wild horses are contributing to the declined riparian conditions, as riparian areas have been repeatedly over-utilized.”); AR_11407 (“While permitted livestock numbers have remained the same since 1975, wildlife and wild horse numbers have increased resulting in an available forage shortfall.”).

The WHA also requires that the Forest Service determine the appropriate management level on the basis of information contained in any land use plan. 16 U.S.C. § 1333(b)(2)(ii). In reviewing the Ochoco Forest Plan, which set the forage objectives and Desired Future Condition for the Territory, the Forest Service noted that these objectives focus on moving the territory towards good or excellent range conditions. AR_11397; *see* AR_00180-00196 (discussing desired future conditions throughout the Territory). Yet, based on data available on upland forage conditions, neither the pine nor elk sedge upland communities have met the forage objective of good condition, and they are currently in fair condition with an apparent downward trend. AR_11397. Because they are not in a stable trend, the Forest Service noted that the uplands inside the Territory are classified as being in an unsatisfactory condition under the Ochoco Forest Plan standards. AR_11397; *see id.* (explaining the difference between satisfactory and unsatisfactory conditions). Similarly, using the objectives and standards set by the Ochoco Forest Plan for riparian areas, the Forest Service concluded that none of the riparian areas assessed in the Territory are in good or excellent condition. AR_11401. In particular, the Forest Service explained that, “[a]t current wild horse numbers, riparian areas within the wild horse winter range (and elsewhere) are showing consistent exceedance of the [Ochoco Forest Plan] utilization rate standards and guidelines.” AR_11402. The Forest Service further explained that “[c]ompetition for riparian

forage between livestock, horses, and wildlife is limiting the regeneration of hardwoods within the [Territory],” which is confirmed by documentation of horses “frequently in riparian areas” and studies demonstrating that horses “consume or otherwise impact riparian shrubs decreasing the shrubs’ height or impacting shrub presence.” *See* AR_11403-11404 (citing numerous studies and providing riparian study data results from 2005 to 2015 for the Territory). Thus, the inventory shows that the wild horse population is well over the 1975 Territory Plan’s established AML range and that there is an observable ecological imbalance in the Territory. This is sufficient to support the Forest Service’s determination that there is an excess of horses in the Territory. *In Def. of Animals*, 751 F.3d at 1066 (finding that agency expertise deserves deference when an overpopulation exists and action is warranted); *see also Am. Horse Protection Ass’n*, 694 F.2d at 1318 (noting the WHA conveys Congress’s intent to provide agencies with latitude in how to manage and achieve the goals of the WHA).

Dissatisfied with this conclusion, Plaintiffs offer a scattershot of arguments, hoping one will find the target. First, Plaintiffs argue that because there are no active signs of suffering or decline of the herd, it has stabilized and should be left to manage itself. *See* Pls.’ Brief at 22-23 (seemingly arguing that since the herd “has survived for decades,” “it is likely the best evidence of actual attainment of that exact thriving natural ecological balance”). This argument mischaracterizes the record and the science. The Forest Service considered annual censuses since the last wild horse gather in 2010, which revealed an initial rapid increase in horse numbers followed by an apparent plateau in the number of horses. AR_11424. The Forest Service explained that this plateau could suggest that the herd is self-limiting its size through increased competition for forage at higher densities. AR_11425. This increased competition results in smaller quantities of forage per animal, poorer body condition and decreased natality and survival rates. AR_11425;

see also AR_11403 (discussing increased competition and its effect on hardwoods as well as horses). This competition requires the Forest Service to closely monitor the horses in poor body condition and, if necessary, remove them from the Territory. AR_11425. Moreover, Plaintiffs' argument is further undercut by the fact that there are visible signs of the horses being affected by smaller quantities of forage per animal, *see id.* (Figure 27: Horse during winter in poor body condition). Thus, Plaintiffs' first contention is unfounded.

Plaintiffs next contend that the Forest Service "only examines wild horse behavior critically, and fails to consider the contributing conduct of other wildlife and livestock" when analyzing the reduced forage in the Territory. Pls.' Br. at 21. This argument also misses the mark. The Forest Service specifically noted that the Ochoco Forest Plan "provides guidelines for allowable use of forage for the multiple resources managed in the [Territory]." AR_11404. The Ochoco Forest Plan's standard and guideline allows for different allowable use levels depending on community type, range resource management level, and forage condition of the communities. *Id.*; *see* AR_11405 (providing tables that show livestock management of forage pursuant to the Ochoco Forest Plan). Thus, applying this guidance, the Forest Service stated that "[w]hen considering the AML for the [Territory], other multiple-uses in the area must be considered ... [and] [f]orage available under the cumulative allowable use rate ... must be divided amongst wild horses, wildlife and permitted livestock." AR_11405. And the EA noted that, "[w]hile permitted livestock numbers have stayed the same since the 1975 plan was written, both wildlife and wild horse numbers have increased causing a current shortfall of available forage based on resource conditions and periodic exceedance of allowable use rates as shown in the winter range utilization monitoring." AR_11405; AR_12456. Thus, Plaintiffs' argument that the Forest Service only critically examined wild horse behavior is disconnected from the record. Rather, because there is

an increase in winter forage usage and an increase in horse numbers, while livestock numbers have stayed the same, the Forest Service reasonably determined this factor supported a reduced AML.

B. The Forest Service Thoroughly Considered Limited Winter Forage Available to the Herd.

Next, the Forest Service thoroughly considered the natural ecological damage that is occurring due to the overpopulation of the herd and the likelihood of insufficient winter forage in the Territory. Plaintiffs attempt to distort the record by focusing on the Forest Service's definition of "winter range," contending that it is arbitrary and capricious and improperly defined, and lacks any scientific basis. Pls.' Br. at 12; *see also id.* at 14 ("USFS' entire premise of insufficient forage availability and poor conditions is based on limited evidence collected during just two oddly spaced, USFS-selected winters (2008 and 2016/2017) with above-average snowfall."). These arguments fail, however, as the record supports the agency's careful consideration of the issue.

In its 2020 EA and DN-FONSI, the Forest Service explained that a "primary concern among many scoping respondents is the desire to see supplemental feeding of wild horses" due to harsh winter conditions making it difficult for them to find food. AR_11370. The Forest Service considered this concern along with a 2013 study by the National Research Council, which concluded that winter weather conditions can have effects on horse population dynamics, and specifically, that winter weather can directly affect horses through thermal stress, but more indirectly with snow cover that affects forage availability. AR_11555. The Forest Service further noted the NRC Study's conclusion that herbivore populations—such as wild horse herds—in climatic variations, including severe winters and droughts, "should not be expected to reach a steady state in which population density is in stable equilibrium with forage production." AR_11555.

In rejecting requests that the Forest Service provide supplemental feeding to wild horses during harsh winter conditions, the Forest Service explained that the need for supplemental feedings may be an indication that the wild horse population is too high, and not in a thriving ecological balance, contrary to the WHA. AR_11370. That is because supplemental feeding may facilitate population growth above the AML, leading to negative resource impacts resulting in ecological *imbalance* in addition to habituating horses to people and disrupting the movement of horses across the territory. AR_11370. Thus, the Forest Service concluded that, in order to “minimize resource damage or adverse impacts to animal health,” the upper limit of the AML should be 57 horses in consideration of the limited winter range forage available during winters of above-average snowfall. AR_11555; AR_12456. The low end of the AML range—47 horses—is “based on anticipated population growth rates and the capacity to gather 10-18 head once every two to three years.” AR_12456. Thus, Plaintiffs’ contentions that there is no scientific basis for the Forest Service’s evaluation of winter conditions and that it “rests on flawed reasoning” lack substance. The Forest Service thoroughly considered natural ecological damage due to herd overpopulation and the likelihood of insufficient winter forage in the Territory consistent with the WHA. *See In Def. of Animals*, 751 F.3d at 1062-1063 (upholding the agency’s consideration of ecological damage and insufficient forage in setting an AML range); *id.* at 1063-64 (the purpose of an AML is “to move towards a thriving natural ecological balance”).

C. The Forest Service Thoroughly Considered the Genetic Variability of the Herd.

The Forest Service also thoroughly explained its consideration of the genetic variability of the Ochoco herd in revising the AML. Nonetheless, Plaintiffs challenge the reasonableness of the Forest Service’s determination. First, Plaintiffs argue that the 2020 Territory Plan is “antithetical to the very core of the Wild Horse Act” in that “the entrance of new genes will destroy a distinct,

rare genetic pattern that has been intact for a century.” Pls.’ Br. at 26. Along these lines, Plaintiffs argue that the Plan is “destroying anyone’s ability to evaluate herd health without further inquiry.” *Id.* at 28. Both arguments are quickly dismantled.

First, the WHA does not require the Forest Service to consider “genetic uniqueness;” it requires the Forest Service maintain a thriving ecological balance. In explaining how genetic *variability* relates to the WHA’s requirement that the Forest Service maintain such a balance, the Forest Service quoted the NRC study, which provides “[i]solation and small population size in combination with the effects of genetic drift, may reduce genetic diversity to the point where herds suffer from the reduced fitness often associated with inbreeding.” AR_08002; AR_11394. The Forest Service noted that while “[i]t was originally thought that an effective population size of at least 50 was necessary to avoid short-term inbreeding depression,” empirical studies suggest that larger population sizes are necessary, and so, no single territory could be considered to have a minimum viable population size for the long term. AR_08002; AR_11394. Thus, since genetic health is tied to maintaining an “ecological balance,” the Forest Service’s consideration of this issue is consistent with the WHA.

Turning to data specific to the Territory, the Forest Service examined two genetic studies conducted on the Territory’s wild horses in 2010 and 2011 that indicated low genetic variability. AR_11394. The 2010 study showed “many of the captured horses were closely related,” which the Forest Service noted “could be indicative of a small herd that is inbred.” *Id.* The 2011 report supported this finding, indicating that the mean heterozygosity values for the bands of horses studied—or, put simply, the measure of how much diversity is found, on average, within individual horses—is at a critical risk level. *Id.* In response to these reports, the 2020 Territory Plan requires that the Forest Service take steps to document the herd’s genetic variability in coordination with

experts, including “establish[ing] current genetic variability by sampling a portion of the herd during initial gather and removal operations” and continuing sampling during subsequent gather operations to monitor genetic variability over time. AR_12454. Based on the results of this sampling, and in consultation with experts in the field, the Forest Service would introduce new mares from herds with complementary genetics, as needed to sustain the Territory’s wild horse population. *Id.* This consideration of genetic variability falls well within line with what the WHA requires and the scope of the agency’s discretion to manage herds to meet the statutory goals. *See Friends of Animals v. Culver*, No. CV 19-3506 (CKK), 2022 WL 2315537, at *6 (D.D.C. June 28, 2022) (deferring to the agency’s genetic variability finding and noting that the record shows substantial, scientific consideration was given to horse health generally).

Second, Plaintiffs fail to undermine the Forest Service’s determination that the herd is not genetically unique. *See* Pls.’ Br. 24-26. Plaintiffs simply cite to research showing opposing viewpoints, however, they have failed to show why the Forest Service’s research and conclusions on the issue should be disregarded. *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (deferring to an agency’s determination in an area in which the agency has a “high level of technical expertise”). For example, the record demonstrates that the Forest Service considered data from the NRC study, Suppl. AR_0435-0526, which “suggest[s] that the Big Summit herd[] has little genetic differentiation, compared to a number of other federally-managed wild horse herds in California, Oregon, Nevada, and Wyoming. These support the interpretation that the [Territory] wild horses are components in a highly connected metapopulation that includes many wild horse herds.” AR_12355. Reinforcing this finding, the NRC Study concluded that “[m]anagement of equids as a metapopulation is necessary for the long-term genetic health of horses and burros at the HMA or HMA-complex level.” Suppl. AR_0099. Thus, because the Forest Service determined

that the genetics of the Territory's horses should be managed at the metapopulation level to ensure the health of the horses, Plaintiffs' claim concerning the territory's genetic uniqueness fails. On this record, Plaintiffs have failed to show that the Forest Service's genetic findings were either "so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise" or a "fail[ure] to consider an important aspect of the problem." *See Friends of the Earth v. Haaland*, — F. Supp. 3d —, 2022 WL 254526, at *5 (D.D.C. Jan. 27, 2022) (quoting *Motor Vehicle Ass'n*, 463 U.S. at 43).

Third, contrary to Plaintiffs' contention that the decision is "destroying anyone's ability to evaluate herd health without further inquiry," Pls.' Br. at 28, the 2020 Territory Plan requires that the agency take steps to document the herd's genetic variability prior to taking actions to influence that variability. The 2020 Territory Plan "would establish current genetic variability by sampling a portion of the herd during initial gather and removal operations" and would continue sampling during subsequent gather operations to monitor genetic variability over time. AR_12454. The Forest Service would thus monitor variability in consultation with genetics experts, and would introduce new mares from herds with complementary genetics, as needed. *Id.* Because the record demonstrates that the Forest Service will monitor the herd for genetic variability and consult with experts prior to making any decision to introduce new mares, Plaintiffs' contention that the 2020 Territory Plan would "destroy anyone's ability to evaluate herd health" is unfounded.

In sum, the Forest Service's decision to revise the AML to 47-57 horses complied with the WHA. The agency thoroughly based this decision on data demonstrating that there is an overpopulation of wild horses on the Territory; that the overpopulation is causing damage to the environment, and that genetic variability of the herd is at critical risk to herd health. Consistent with the WHA, these factors warrant a revised AML to ensure a thriving natural ecological balance

in the Territory. *See In Def. of Animals*, 751 F.3d at 1062-1063 (“upholding the agency’s action to restore AMLs based on the overpopulation of horses and burros, deterioration of riparian areas, and insufficient forage to sustain the herd”); *Culver*, 2022 WL 2315537, at *6 (deferring to the agency’s genetic variability finding and noting that the record shows “substantial, scientific consideration given to the state of riparian resources, cultural resources, upland vegetation and soil, wildlife, and horse health generally”).

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant their motion for summary judgment and deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

TODD KIM, Assistant Attorney General
S. JAY GOVINDAN, Acting Section Chief
BRIDGET K. MCNEIL, Assistant Section Chief

/s/ Hannah O’Keefe
HANNAH O’KEEFE, Trial Attorney
IL Bar No. 6336475
Natural Resources Section

/s/ Chris Carrara
CHRISTIAN H. CARRARA, Trial Attorney
NJ Bar No. 317732020
Wildlife & Marine Resources Section
Environment and Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 598-9736 (Carrara)
Fax: (202) 305-0275
Email: hannah.okeefe@usdoj.gov
Email: christian.carrara@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,927 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Chris Carrara

Christian H. Carrara

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2022, I electronically filed the foregoing Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment with the Clerk of the Court using CM/ECF. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF.

Geordie L. Duckler
geordied@animallawpractice.com

Bruce A. Wagman
bwagman@rshc-law.com

/s/ Chris Carrara

Christian H. Carrara