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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

LAURA LEIGH, *et al.*,

Plaintiffs,

v.

JON RABY, *et al.*,

Defendants.

Case No. 3:22-cv-00034-MMD-CLB

ORDER

**I. SUMMARY**

Animal rights plaintiffs<sup>1</sup> have filed suit against the U.S. Bureau of Land Management (“BLM”), U.S. Department of the Interior, and Nevada BLM Director Jon Raby on the grounds that a recent roundup of wild horses in eastern Nevada violated the Wild Free-Roaming Horses and Burros Act (“WHA”) and the National Environmental Policy Act of 1969 (“NEPA”). Before the Court are the parties’ cross-motions for summary judgment (ECF Nos. 64, 70 (“Motions”)) and Plaintiffs’ request for judicial notice of several documents (ECF No. 65 (“Request”)).<sup>2</sup> As explained in further detail below, the Court finds that BLM must be compelled to prepare a herd management area plan (“HMAP”) and must reanalyze the foreseeable effects of the Gather Plan alternatives on wildfire risks in the Pancake Complex and reach a conclusion as to their significance. Accordingly, the Court will grant in part and deny in part both Motions and

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<sup>1</sup>Plaintiffs are Laura Leigh, Wild Horse Education, Animal Wellness Action, CANA Foundation, and the Center for a Humane Economy.

<sup>2</sup>The Court has reviewed the parties’ responses and replies. (ECF Nos. 68, 69, 71, 73, 78, 79.) The Court also considered the parties’ arguments on the Motions after directing supplemental briefing. (ECF No. 80.)

1 Plaintiffs' Request.

2 **II. BACKGROUND**

3 The following facts are undisputed and primarily derived from the administrative  
4 record ("AR").

5 The Pancake Complex is a 1.2 million-acre area in eastern Nevada comprised of  
6 two herd management areas ("HMAs"), one herd area, and one wild horse territory.  
7 (ECF Nos. 64 at 10; 70 at 4-5.) The two HMAs in the Pancake Complex are the  
8 Pancake HMA and the Sand Springs West Wild Horse HMA. (ECF No. 70 at 4.) BLM  
9 created the Pancake HMA in 2008 by combining two pre-existing HMAs, the Monte  
10 Christo HMA and the Sand Springs East HMA. (Pancake Complex Wild Horse Gather  
11 Final Environmental Assessment ("Final EA") at AR 3501.) The Sand Springs West  
12 HMA was established in the late 1980s. (*Id.* at AR 3554.)

13 BLM set the appropriate management level<sup>3</sup> ("AML") for the Pancake Complex at  
14 a range of 361 to 638 wild horses. (*Id.* at AR 3502.) This AML is the sum of the AMLs  
15 for its component management areas, which were most recently set in the Ely District  
16 Record of Decision ("ROD") and Resource Management Plan ("RMP"), the Tonopah  
17 RMP, and the Humboldt National Forest Land and Resource Management Plan  
18 ("Humboldt RMP"). (*Id.* at AR 3502, 3553-54.)

19 In 2020, BLM conducted flight surveys and estimated that the population of wild  
20 horses in the Pancake Complex was at least 2,300 above the low AML. (*Id.* at AR  
21 3503.) The agency therefore determined that removing excess horses was necessary to

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23 <sup>3</sup>BLM defines the AML as "the number of wild horses that can be sustained within  
24 a designated HMA which achieves and maintains a thriving natural ecological balance  
25 in keeping with the multiple-use management concept for the area." (Pancake Complex  
26 Preliminary Environmental Assessment ("Preliminary EA") at AR 1928.) *See also Dahl*  
27 *v. Clark*, 600 F. Supp. 585, 595 (D. Nev. 1984) ("[T]he test as to appropriate wild horse  
28 population levels is whether such levels will achieve and maintain a thriving, ecological  
balance on the public lands."). Wild horse and burro management should seek to  
balance wild horse and burro populations, wildlife, livestock, and vegetation, and to  
"protect the range from the deterioration associated with overpopulation of wild horses  
and burros." (Preliminary EA at AR 1928 (quoting *Animal Prot. Inst. of Am.*, 109 IBLA  
112, 115 (1989).)

1 achieve a thriving natural ecological balance and protect rangeland resources. (*Id.*)

2 BLM then conducted a preliminary environmental assessment (“EA”) of its gather  
3 plan. (Preliminary EA at AR 1924-2079.) Thousands of comments on the Preliminary  
4 EA were submitted during its 30-day public comment period. (ECF No. 70 at 6; Public  
5 Comments on Pancake Complex Wild Horse Gather EA (“Public Comments”) at AR  
6 2080-3392.) These public comments notified BLM of concerns about population growth  
7 rates, wildfire risks, gelding, livestock grazing levels, and AMLs. (*Id.*) BLM responded to  
8 the comments, edited the gather plan, then released the Final EA. (ECF No. 70 at 6.)

9 The Final EA considered five alternatives: (1) the no-action alternative; (2) the  
10 proposed action or Alternative A, which included phased gathers, fertility control, sex  
11 ratio adjustments, and releasing geldings; (3) Alternative B, which was the same as  
12 Alternative A but without geldings; (4) Alternative C, which would only use gathers; and  
13 (5) Alternative D, which would focus only on the Jakes Wash HA. (Final EA at AR 3506-  
14 07.) BLM signed its finding of no significant impact (“FONSI”) and issued a Decision  
15 Record on May 4, 2021, adopting Alternatives A and D. (FONSI for Pancake Complex  
16 Wild Horse Gather at AR 3694-96; Decision Record at AR 3491-95.)

17 During the initial gather in early 2022, approximately 2,030 horses were removed  
18 from the Pancake Complex. (ECF No. 64 at 10.)

19 Plaintiffs brought this suit in January 2022 (ECF No. 1) and filed an amended  
20 complaint three months later (ECF No. 31 (“Complaint”).). Now that discovery is  
21 complete, the parties have both moved for summary judgment. (ECF Nos. 64, 70  
22 (“Motions”).) Plaintiffs also seek to supplement the AR. (ECF No. 65.)

23 **III. MOTIONS FOR SUMMARY JUDGMENT**

24 The Motions seek summary judgment on Plaintiffs’ claims that BLM violated the  
25 WHA and NEPA.<sup>4</sup> (ECF Nos. 64, 70.) “Because neither NEPA nor the [WHA] contain[s]

26 \_\_\_\_\_  
27 <sup>4</sup>Plaintiffs make other arguments in their Motion that the Court does not address  
28 in detail here. First, Plaintiffs affirmatively argue they have standing to prosecute this  
case. (ECF No. 64 at 16-22.) Defendants do not dispute Plaintiffs’ standing, and the

1 an internal standard of judicial review, the Administrative Procedure Act [(“APA”)]  
2 governs this court’s review of the BLM’s actions.” *In Def. of Animals, Dreamcatcher Wild*  
3 *Horse & Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1061 (9th Cir. 2014);  
4 *see also* 5 U.S.C. § 702. The APA requires courts to compel “unlawfully withheld or  
5 unreasonably delayed” agency action and to set aside agency actions that are  
6 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5  
7 U.S.C. § 706. The Court will first determine whether BLM must be compelled to prepare  
8 HMAPs, then assess whether the gather plan or its EA were arbitrary, capricious, or  
9 otherwise not in accordance with the law.

#### 10 **A. Compelling Action Under the WHA and Implementing Regulations**

11 Plaintiffs allege that BLM has unlawfully withheld, or alternatively unreasonably  
12 delayed, preparing HMAPs for the Pancake Complex. *See* 5 U.S.C. § 706(1). Under the  
13 APA, courts may compel withheld or delayed agency action only if that action is both  
14 discrete and legally required. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-64  
15 (2004). Preparing an HMAP is indisputably a discrete action. *See Vietnam Veterans of*  
16 *Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1079 (9th Cir. 2016) (noting that an action  
17 can still be discrete when the agency retains discretion over the way its duty may be  
18 carried out); *cf. Norton*, 542 U.S. at 64 (describing the discreteness requirement as  
19 precluding a “broad programmatic attack”). At issue here are the circumstances under  
20 which developing an HMAP is also mandatory. The Court’s analysis accordingly turns  
21 on whether the deadline for preparing an HMAP is firm or discretionary—that is,

22 \_\_\_\_\_  
23 Court finds that Plaintiffs have met the Article III threshold requirements. It is undisputed  
24 that BLM gathered horses from the Pancake Complex, which caused the injury and  
25 deaths of wild horses. Plaintiffs, who are wild horse enthusiasts and animal rights  
26 groups, were harmed or have members whose aesthetic interests and interests in the  
wellbeing of horses were harmed as a result. Plaintiffs’ requested relief could remedy  
those harms moving forward.

27 Defendants also do not dispute Plaintiffs’ assertion that they have exhausted  
28 their administrative remedies. (ECF No. 64 at 22.) Accordingly, the Court’s analysis will  
focus on whether Defendants violated the WHA and NEPA.

1 whether the HMAP is being unlawfully withheld or unreasonably delayed, respectively.  
2 See *Biodiversity Legal Found. v. Badgely*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002).

3 The Court will employ traditional tools of construction to determine whether the  
4 WHA and its implementing regulations are “genuinely ambiguous” as to the deadline for  
5 preparing an HMAP. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). If there is genuine  
6 ambiguity, then *Auer* deference might apply to BLM’s interpretation; however, if  
7 “uncertainty does not exist . . . [t]he regulation then just means what it means.” *Id.*

### 8 **1. Unlawfully Withheld HMAP**

9 Plaintiffs argue that the interplay between two BLM regulations sets a firm  
10 deadline for preparing HMAPs: BLM must have an approved HMAP *before* performing  
11 management activities on an HMA. (ECF No. 64 at 31.) See *also* 43 C.F.R. §§ 4710.3-  
12 1, 4710.4. Otherwise, they argue, the mandate to manage wild horses and burros “at  
13 the minimum level necessary to attain the objectives identified in approved land use  
14 plans and [HMAPs]” would be rendered superfluous. 43 C.F.R. § 4710.4.

15 Viewed in isolation, the regulation requiring BLM to prepare HMAPs is silent as to  
16 the deadline for doing so. See *id.* at § 4710.3-1. Regulatory language, however, “cannot  
17 be construed in a vacuum.” *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)  
18 (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989)); see *also Kisor*,  
19 139 S.Ct. at 2415 (holding that to “exhaust all the traditional tools of construction” courts  
20 must “carefully consider the text, structure, history, and purpose of a regulation”  
21 (cleaned up)). “It is a fundamental canon of [] construction” that regulations “must be  
22 read in their context” and with a view to their place in the overall regulatory scheme.  
23 *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)  
24 (quotation marks and citation omitted); *accord King v. Burwell*, 576 U.S. 473, 492  
25 (2015).<sup>5</sup> Courts must interpret a statute’s implementing regulations “as a symmetrical

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27 <sup>5</sup>Though these cases discuss statutory interpretation, the Supreme Court  
28 indicated in *Kisor v. Wilkie* that the same rules of interpretation apply to regulations. See  
139 S.Ct. at 2414-15.

1 and coherent regulatory scheme and fit, if possible, all parts into a[] harmonious whole.”  
2 *Brown & Williamson*, 529 U.S. at 133 (quotation marks and citation omitted).

3 The requirement to prepare HMAPs should thus be read in the context of other  
4 implementing regulations of the WHA, as well as the WHA’s controlling statutory  
5 language. The WHA requires that the Secretary of the Interior manage wild horses in a  
6 manner that will “achieve and maintain a thriving natural ecological balance” on public  
7 land. 16 U.S.C. § 1333(a). If the Secretary determines an area is overpopulated, she  
8 must fulfill her duty to maintain ecological balance by “*immediately* remov[ing] excess  
9 animals from the range.” *Id.* at § 1333(b)(2) (emphasis added). Though Plaintiffs assert  
10 that the directive to manage wild horses at “the minimal feasible level” is operative here,  
11 *id.* at § 1333(a), “Congress could not have intended that the ‘minimal’ management  
12 requirement would force the BLM to ignore these other statutory mandates,” *In Def. of*  
13 *Animals*, 751 F.3d at 1066. Reading the regulations as Plaintiffs request would force  
14 BLM to put gathers on hold for months, years, or perhaps even decades until an HMAP  
15 is approved, instead of conducting immediate removals. As the WHA implementing  
16 regulations must comport with the WHA itself, they have “only one reasonable  
17 construction.” *Kisor*, 139 S. Ct. at 2415. BLM may conduct management activities on  
18 HMAs which do not yet have an approved HMAP.

19 As Plaintiffs have not identified any firm deadlines for developing an HMAP, the  
20 Pancake Complex HMAPs have not been unlawfully withheld.

21 **2. Unreasonable Delay in Preparing an HMAP**

22 In the absence of a firm deadline for preparing HMAPs, the Court will assess  
23 whether BLM has unreasonably delayed creating an HMAP for the Pancake Complex  
24 HMAs. The Court finds that BLM has unreasonably delayed its performance of this  
25 mandatory duty and must be compelled to prepare an HMAP.

26 **a. Notice Pleading Standard**

27 As a threshold matter, Defendants object that Plaintiffs’ unreasonable delay claim  
28 was not adequately raised in the Complaint. (ECF Nos. 70 at 19; 73 at 13-14.) The

1 Federal Rules of Civil Procedure require only that a complaint include “a short and plain  
2 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIVIL PROC.  
3 8(a)(2). Though plaintiffs must state a demand for the relief they seek, that demand  
4 “may include relief in the alternative.” *Id.* at (a)(3). “This simplified notice pleading  
5 standard relies on liberal discovery rules and summary judgment motions to define  
6 disputed facts and issues,” rather than requiring plaintiffs to define all their claims  
7 perfectly before further proceedings are conducted. *Swierkiewicz v. Sorema N. A.*, 534  
8 U.S. 506, 512 (2002).

9 The Complaint satisfies these notice pleading requirements because Defendants  
10 have received fair notice of Plaintiffs’ claims and the grounds upon which they rest. See  
11 *id.* at 514; *Updike v. Multnomah Cnty.*, 870 F.3d 939, 952 (9th Cir. 2017). The second  
12 cause of action begins with a focus on BLM’s duty to prepare HMAPs before gathering  
13 horses. (ECF No. 31 at 22.) It then more broadly states,

14 Defendants have unlawfully withheld *or unreasonably delayed* their mandatory  
15 duty to prepare an HMAP for the Pancake Complex of Herd Management Areas  
16 or for the individual herd management areas that make up the Complex . . .  
17 Defendants’ failure to adopt a Herd Management Area Plan for the Pancake  
18 Complex of Herd Management Areas has injured Plaintiffs in the manner  
19 described in this Complaint.

20 (*Id.* (emphasis added).) Plaintiffs may set out multiple statements of a claim in a single  
21 count, and “the pleading is sufficient if any one of them is sufficient.” FED. R. CIVIL PROC.  
22 8(d). Thus, Plaintiffs’ general request that the Court compel BLM to prepare an HMAP is  
23 not defeated by their more specific request that the Court compel BLM to prepare an  
24 HMAP before engaging in management actions. Nor is this claim defeated by Plaintiffs’  
25 failure to expressly request preparation of an HMAP as a form of relief, as Plaintiffs  
26 included a blanket request that the Court grant “additional and further relief to which  
27 plaintiffs may be entitled.” (ECF No. 31 at 26.) The liberal notice pleading standard has  
28 been met. The Court will proceed with reviewing the claim on its merits.

**b. Legally Required**

Section 4710.3-1 of BLM’s WHA implementing regulations provides that HMAs

1 “shall be established for the maintenance of wild horse and burro herds” and that BLM  
2 “shall prepare a [HMAP], which may cover one or more [HMAs].” 43 C.F.R. § 4710.3-1.  
3 These are mandatory duties with which BLM must comply. (ECF No. 70 at 14  
4 (Defendants’ admission that Section 4710.3-1 includes a “general mandate that BLM  
5 create HMAPs”); BLM Wild Free-Roaming Horses and Burros Management Policy  
6 Manual (“Manual”) at AR 1433 (noting BLM district or field office managers must  
7 prepare “HMAPs for all HMAs in their offices”).) *See also Animal Prot. Inst. of Am.*, 109  
8 IBLA at 127 (“43 CFR 4710.3-1 requires preparation of an HMAP.”); *Me. Cmty. Health*  
9 *Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (“The first sign that the statute  
10 imposed an obligation is its mandatory language: ‘shall.’”). Therefore, regardless of the  
11 discretion the agency was originally granted under the WHA, BLM “has chosen to  
12 constrain its own discretion via regulations that carry the force of law.” *Trout Unlimited v.*  
13 *Pirzadeh*, 1 F.4th 738, 751 (9th Cir. 2021); *accord Flores v. Bowen*, 790 F.2d 740, 742  
14 (9th Cir. 1986). BLM must comply with Section 4710.3-1 and develop one or more  
15 HMAPs for the Pancake Complex HMAs. *See Flores*, 790 F.3d at 742; *Vietnam*  
16 *Veterans of Am.*, 811 F.3d at 1079; *Erie Boulevard Hydropower, LP v. Fed. Energy*  
17 *Regul. Comm’n*, 878 F.3d 258, 269 (D.C. Cir. 2017) (“It is axiomatic that an agency is  
18 bound by its own regulations.”).

19 **c. Substantial Compliance with HMAP Mandate**

20 Defendants concede that they have not prepared HMAPs for the Pancake or  
21 Sand Springs West HMAs (ECF Nos. 78 at 11; Final EA at AR 3553-54; ECF No. 80  
22 (oral argument on the Motions)); however, they argue that BLM has substantially  
23 complied with its duty to develop an HMAP through its land use plans (“LUPs”),  
24 including the Humboldt, Tonopah, and Ely District RMPs.<sup>6</sup> This interpretation of Section  
25 4710.3-1 is unreasonable, as LUPs and HMAPs are not equivalent documents. BLM  
26 must adhere to its own regulations and develop an HMAP for the Pancake Complex.

27 \_\_\_\_\_  
28 <sup>6</sup>RMPs are a type of LUP. (H-4700-1 Wild Horses and Burros Management Handbook (“Handbook”) at AR 1356.)



1           Only two regulations discuss HMAPs: Section 4710.3-1 and Section 4710.4. See  
2 43 C.F.R. §§ 4710.3-1, 4710.4. Neither lays out what comprises an HMAP, leaving that  
3 largely up to the agency to decide. See *Kisor*, 139 S. Ct. at 2415. The regulations,  
4 however, are clear on what HMAPs are *not*, as they explicitly distinguish HMAPs from  
5 LUPs. See *id.* at 2415-16; 43 C.F.R. § 4710.4. BLM recognizes this distinction  
6 throughout its guidance documents, and other courts have recognized that the  
7 documents are not equivalent as well. (Manual at AR 1431, 1435; BLM Wild Horses and  
8 Burros Management Handbook (“Handbook”) at AR 1359-60, 1395.) See, e.g., *Friends*  
9 *of Animals v. BLM*, 548 F. Supp. 3d 39, 47 (D.D.C. 2021).

10           BLM counters that issuing RMPs which included all the substantive requirements  
11 of HMAPs fulfilled its duty under Section 4710.3-1. Even if an RMP engaged in all the  
12 herd-focused management planning of an HMAP, the differences between HMAPs and  
13 RMPs go beyond their substance. Parties aggrieved by an HMAP have different  
14 procedural rights and administrative review processes than parties who wish to protest  
15 RMPs.<sup>7</sup> Compare 43 C.F.R. §§ 4.21, 4.410 (administrative review procedures for wild  
16 horse and burro implementation decisions, including HMAPs), with 43 C.F.R. §§  
17 1610.5-1, 1610.5-2 (protest procedures for RMPs); *High Desert Multiple-Use Coal., Inc.,*  
18 *et al. Keith Collins*, 142 IBLA 285, 289 (1998). To the extent that BLM argues that any  
19 wild horse management decisions would be implementation decisions subject to the  
20 same administrative review procedures as an HMAP, the agency failed to recognize this  
21 in its RMPs. (Ely District RMP at AR 880-81 (recognizing other actions as  
22 implementation decisions).) Engaging in the decision-making of an HMAP without  
23 actually preparing an HMAP could therefore deprive interested parties of the  
24 administrative review processes to which they are entitled.

25           Moreover, BLM engages in environmental review under NEPA at each stage of

26 \_\_\_\_\_  
27 <sup>7</sup>The same is true for HMAPs and gather plans. (Handbook at AR 1394-95  
28 (distinguishing the appeals timing and processes for HMAPs and gather decisions).) Compare 43 C.F.R. §§ 4.21, 4.410, with *id.* at § 4770.3(c) (gather and removal decision appeals procedures).

1 its wild horse management planning process, from establishing broad LUPs to narrower  
2 HMAPs and specific gather plans. (Handbook at AR 1385-90, 1397-99.) See also 43  
3 C.F.R. § 1601.0-6 (requiring NEPA review for RMPs). Skipping the HMAP stage evades  
4 that middle level of environmental review. Such additional review might well be  
5 redundant if an RMP includes the same information that an HMAP would cover;  
6 however, it is not the Court's role to question that policy choice. BLM has committed  
7 itself to engaging in a tiered, iterative process for managing wild horses on public lands.  
8 The agency must uphold that commitment, even if it appears formalistic.

9 BLM's reading of Section 4710.3-1 is therefore outside "the bounds of  
10 reasonable interpretation." *Kisor*, 138 S. Ct. at 2416 (quoting *City of Arlington v. FCC*,  
11 569 U.S. 290, 296 (2013)). RMPs cannot fulfill the Section 4710.3-1 HMAP preparation  
12 mandate.

#### 13 d. TRAC Factors

14 The issue then is whether BLM's delay in preparing HMAPs has been  
15 unreasonable. To answer that question, the Ninth Circuit uses the six-factor balancing  
16 test announced by the D.C. Circuit in *Telecommunications Research & Action Center v.*  
17 *FCC* ("TRAC"). See *Vaz v. Neal*, 33 F.4th 1131, 1137 (9th Cir. 2022) (quoting *TRAC*,  
18 750 F.2d 70, 80 (D.C. Cir. 1984)).

19 The first factor considers "whether the time for agency action has been  
20 reasonable." *Id.* at 1138 (quoting *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139  
21 (9th Cir. 2020) ("*In re NRDC*"). Though not determinative, it is "the most important  
22 factor." *Id.* (quotation marks omitted). "Repeatedly, courts in this and other circuits have  
23 concluded that a reasonable time for agency action is typically counted in weeks or  
24 months, not years." *Id.* (quoting *In re NRDC*, 956 F.3d at 1139) (quotation marks  
25 omitted).

26 By these standards, BLM has taken more than a reasonable amount of time to  
27 prepare HMAPs for the Pancake and Sand Springs West HMAs. The duty to prepare an  
28 HMAP arose as soon as BLM created the HMAs—or, if the HMAs predate Section

1 4710.3-1, that duty arose when BLM promulgated the regulation 38 years ago in 1986.  
2 (ECF No. 71 at 13.) See also Revision of Existing Regulations on Protection,  
3 Management, and Control of Wild Free-Roaming Horses and Burros, 51 Fed. Reg.  
4 7410, 7416 (Mar. 3, 1986) (to be codified at 43 C.F.R. pt. 4710.3-1). BLM's decades-  
5 long delays in developing and approving HMAPs have therefore been "nothing short of  
6 egregious" and clearly violate the rule of reason. (Final EA at AR 3501, 3553-54 (noting  
7 that BLM created the Pancake HMA in 2008 and the Sand Springs West HMA in the  
8 late 1980s.) *In re NRDC*, 956 F.3d at 1142; see also *In re Pesticide Action Network N.*  
9 *Am.*, 798 F.3d 809, 814 (9th Cir. 2015) (eight-year delay with no concrete timeline to  
10 reach a final ruling was a "roadmap for further delay" that "stretched the 'rule of reason'  
11 beyond its limits"); *All. for Wild Rockies v. Cooley*, 661 F. Supp. 3d 1025, 1039 (D.  
12 Mont. 2023) (20-year delay in grizzly bear management was "clearly" unreasonable).  
13 The first TRAC factor strongly favors Plaintiffs.

14 The second factor is not applicable because Congress has not supplied a  
15 timeframe in which HMAPs should be prepared. See *In re NRDC*, 956 F.3d at 1140-41.

16 The third factor indicates that delay is less likely to be reasonable when the  
17 regulation at issue affects human health and welfare than when it is an economic  
18 regulation, and the fifth factor looks more broadly at the nature and extent of the  
19 interests that have been prejudiced by the agency's delay. See *Vaz*, 33 F.4th at 1137.  
20 The Court will analyze these factors together, as they often overlap. See *Indep. Mining*  
21 *Co., Inc. v. Babbitt*, 105 F.3d 502, 509 (9th Cir. 1997). The consequences of BLM's  
22 failure to prepare an HMAP "fall neither into the economic realm nor specifically into the  
23 realm of human health and welfare." *Or. Nat. Desert Ass'n v. Bushue*, 644 F. Supp. 3d  
24 813, 842 (D. Or. 2022), *appeal dismissed sub nom. Or. Nat. Desert Ass'n v. BLM*, No.  
25 23-35101, 2023 WL 5012123 (9th Cir. June 5, 2023). The third factor is thus neutral.

26 But "the public can still have a significant interest in agency management that  
27 promotes such important values as wildlife, scenery, cultural resources, and  
28 recreational opportunities." *Id.* (quotation marks omitted). Congress enacted the WHA to

1 protect wild horses and burros—which are “an integral part of the natural system of the  
2 public lands” and symbols of American history and culture—and the ecology of the  
3 public lands they inhabit. 16 U.S.C. §§ 1331, 1333(a). Defendants contend that,  
4 because the RMPs are functionally HMAPs, none of these interests were prejudiced by  
5 BLM’s delay in developing an HMAP. (ECF No. 80.) The Court will assume, without  
6 deciding, that this is true<sup>8</sup> and that the fifth factor weighs in Defendants’ favor.

7 The fourth factor looks to “whether compelling the agency to act would detract  
8 from its higher or competing priorities.” *Vaz*, 33 F.4th at 1138. Preparing the Pancake  
9 Complex HMAP may take personnel and funding away from other BLM activities, like  
10 gathering excess horses. (ECF No. 78 at 13-14.) The Court is sympathetic to the fact  
11 that BLM, like most public agencies, has multiple resource-intensive mandates and  
12 limited resources with which to fulfill them. See *Vaz*, 33 F.4th at 1138. But it would be  
13 overly generous to say that BLM gets a free pass on the fourth factor because all of its  
14 activities to some extent touch on the important values of wildlife, recreation, and the  
15 multiple use of public lands. See *In re NRDC*, 956 F.3d at 1141. Preparing an HMAP  
16 should have only limited impact on BLM’s other priorities. The agency can conduct  
17 gathers in the meantime, and the HMAP should require minimal work since BLM claims  
18 to have already substantially prepared one. (ECF No. 80.) This factor favors Plaintiffs.

19 Finally, the sixth factor is irrelevant because there is no evidence that BLM has  
20 behaved improperly. (ECF Nos. 64 at 32; 78 at 14.) See *also Vaz*, 33 F.4th at 1138 n.6.

21 Only the fifth factor has weighed in Defendants’ favor, leaving little question that  
22 BLM’s delay in preparing HMAPs for the Pancake and Sand Springs West HMAs has  
23 been unreasonable. BLM must develop and approve one or more HMAPs for the  
24

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25 <sup>8</sup>Before the gather, a massive overpopulation of wild horses was harming the  
26 ecology of the Pancake Complex, its rangeland resources, and the horses themselves.  
27 (Final EA at AR 3503-04.) These are the types of issues that HMAPs are meant to  
28 address, leaving the Court not entirely convinced that no interests have been prejudiced  
by the decades-long delays in preparing HMAPs. (Handbook at AR 1386, 1401.)  
Regardless, this factor is not dispositive, and the Court still finds that BLM’s delay is  
unreasonable, as explained below.

1 Pancake Complex HMAs within the next year.<sup>9</sup> See 43 C.F.R. § 4710.3-1 (noting that  
2 HMAPs may cover one or multiple HMAs). Plaintiffs' Motion is granted, and Defendants'  
3 Motion is denied, as to Plaintiffs' second cause of action.

#### 4 **B. Timing of Gather Plan Arbitrary and Capricious**

5 Plaintiffs further argue that BLM's decision to adopt the gather plan and proceed  
6 with the gather was arbitrary and capricious, an abuse of discretion, and contrary to the  
7 law in light of BLM's mandatory duty to prepare an HMAP prior to conducting herd  
8 management activities. (ECF Nos. 31 at 23; 64 at 33-35.) See also 5 U.S.C. §  
9 706(2)(A). The Court has already found that BLM may gather excess horses without  
10 first preparing and approving an HMAP. BLM's interpretation of its duties therefore does  
11 not conflict with binding law, nor does it lack a reasonable basis. Plaintiffs' Motion is  
12 denied, and Defendants' Motion is granted, as to Plaintiffs' third cause of action.

#### 13 **C. Timing of Gather Plan in Excess of BLM's Authority**

14 BLM likewise did not act in excess of statutory jurisdiction, authority, or limitations  
15 by gathering horses before preparing an HMAP for the Pancake Complex. (ECF Nos.  
16 31 at 24; 64 at 36.) See also 5 U.S.C. § 706(2)(C). Again, the gather was congruent  
17 with the WHA and its implementing regulations, and thus conducting a gather for an  
18 area which did not yet have an HMAP was within BLM's authority. Plaintiffs' Motion is  
19 denied, and Defendants' Motion is granted, as to Plaintiffs' fourth cause of action.

#### 20 **D. Compliance with NEPA and its Implementing Regulations**

21 The Court will now turn to whether the Gather Plan EA complies with NEPA.  
22 Although NEPA lacks a substantive mandate, its "action-forcing" procedural  
23 requirements help carry out a "national commitment to protecting and promoting  
24 environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348  
25 (1989); accord 42 U.S.C. § 4331. One such means by which NEPA forces action is its

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26  
27 <sup>9</sup>The parties agreed at the March 19, 2024, hearing that one year was a  
28 reasonable period in which BLM could complete an HMAP for the Pancake Complex  
HMAs. (ECF No. 80.)

1 requirement that agencies take a “hard look” at the environmental consequences of  
2 their proposed actions. See *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir. 2002). This  
3 ‘hard look’ includes conducting an environmental assessment (“EA”) in certain  
4 circumstances to inform whether the agency prepares an environmental impact  
5 statement (“EIS”) or instead issues a finding of no significant impact (“FONSI”). See 40  
6 C.F.R. §§ 1501.5(c)(1), 1501.6(a).

7 Courts examine an EA “with two purposes in mind: to determine whether it has  
8 adequately considered and elaborated the possible consequences of the proposed  
9 agency action when concluding that it will have no significant impact on the  
10 environment, and whether its determination that no EIS is required is a reasonable  
11 conclusion.” *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) (quoting *Ctr.*  
12 *for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th  
13 Cir. 2008)). Here, Plaintiffs challenge both whether BLM took the requisite “hard look” at  
14 its Gather Plan and whether BLM’s decision not to conduct an EIS was reasonable.  
15 They specifically allege that BLM did not adequately consider the environmental  
16 impacts of the Gather Plan, appropriate alternative courses of action, its AML  
17 calculation formula, or the effects of incomplete information.

### 18 **1. Hard Look at Environmental Impacts**

19 To satisfy NEPA’s ‘hard look’ requirement, agencies preparing an EA must  
20 provide “a reasonably thorough discussion of the significant aspects of the probable  
21 environmental consequences.” *350 Montana*, 50 F.4th at 1265 (quoting *Nat’l Highway*  
22 *Traffic Safety Admin.*, 538 F.3d at 1194). Compiling an “exhaustive examination of each  
23 and every tangential event that potentially could impact the local environment,”  
24 however, would be an “impossible, and never-ending,” task. *Tri-Valley CAREs v. U.S.*  
25 *Dep’t of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012). As a result, EAs are designed  
26 “not to amass and disclose all possible details regarding a proposal but to . . . briefly  
27 provide sufficient evidence and analysis for determining whether to prepare an [EIS] or  
28 a [FONSI].” *Id.* at 1128 (cleaned up); accord 40 C.F.R. § 1508.1(h) (defining EAs as

1 “concise” documents). The agency’s analysis must include a “satisfactory explanation”  
2 for its action so that the Court may assess “whether the process employed by the  
3 agency to reach its decision took into consideration all the relevant factors.” *Asarco, Inc.*  
4 *v. U.S. Env’t Prot. Agency*, 616 F.2d 1153, 1159 (1980).

5 Plaintiffs argue that the EA did not sufficiently assess the Gather Plan’s impacts  
6 on the population growth rate of wild horse populations, herd social dynamics, or wildfire  
7 risks in the Pancake Complex. The Court will conduct “a searching and careful inquiry  
8 into the facts” in reviewing these claims. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
9 18 F.3d 1468, 1471 (9th Cir. 1994).

10 **a. Impacts to Population Growth Rate**

11 Commenters raised concerns that removals may increase wild horse herd  
12 population growth rates by lowering population levels below food-limited carrying  
13 capacity and consequently decreasing competition for forage. (Public Comments on EA  
14 at AR 2118, 2151-52.) Plaintiffs now allege that BLM did not respond to these  
15 comments and thus failed to take a ‘hard look’ at how a gather may keep population  
16 growth rates high, despite the Gather Plan’s stated purpose to “reduce the wild horse  
17 population growth rates to achieve and maintain established AML ranges.”<sup>10</sup> (Final EA  
18 at AR 3504.)

19 Both the Preliminary and Final EAs include significant discussion of the issue,  
20 which the Court will summarize here. (Preliminary EA at AR 1962-65; Final EA at AR  
21 3506-37.) Wild horses are a non-self-regulating species, meaning without human  
22 intervention their population will steadily increase beyond the range’s carrying capacity.  
23 (Final EA at AR 3529.) Allowing the range to naturally limit populations would therefore

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24 <sup>10</sup>As part of this claim, Plaintiffs allege that BLM did not examine  
25 recommendations from a 2013 study published by the National Academy of Sciences  
26 (“NAS”). (ECF No. 64 at 40.) The Final EA cites the study several times, including when  
27 examining the impacts of a no-action alternative on wild horse population growth. (Final  
28 EA at AR 3521, 3529 (“The NAS report (NRC 2013) concluded that the primary way that  
equid populations self-limit is through increased competition for forage at higher  
densities.”).) BLM also examined the substance of the NAS recommendation at issue.  
The Court thus finds this argument unpersuasive.

1 not only be inhumane but would also violate the WHA's mandates to immediately  
2 remove excess horses, protect the range from the deterioration associated with  
3 overpopulation, and preserve and maintain a thriving natural ecological balance. (*Id.* at  
4 AR 3521, 3529.) See also 16 U.S.C. §§ 1333(a), 1333(b)(2). Moreover, BLM ran  
5 population models which estimated that the no-action alternative would actually lead to  
6 higher average annual growth rates over a ten-year period than Alternatives A, B, or  
7 C—all of which included a gather.<sup>11</sup> (Final EA at AR 3596-605.) BLM thus gave a hard  
8 look to impacts on population growth rates, concluded a gather would not raise growth  
9 rates, and properly eliminated the no-action alternative from further consideration. (*Id.* at  
10 AR 3520-21.) See *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067,  
11 1075 (9th Cir. 2011) (holding that, to be afforded deference, an agency must support its  
12 conclusions with studies that the agency deems reliable).

13 Plaintiffs' argument also ignores the totality of BLM's purpose in reducing  
14 population growth rates, which was to achieve and maintain established AMLs. (Final  
15 EA at AR 3504.) As the herd population in the Pancake Complex was about seven  
16 times greater than its low AML, BLM concluded that removing a significant portion of the  
17 wild horses on the Pancake Complex was necessary to reach AMLs and restore a  
18 thriving natural ecological balance. (FONSI at AR 3694; Decision Record at 3493.) BLM  
19 recognized that removing horses from the range, without more, would cause "reduced  
20 competition for scarce resources within the HMA," and thus removals alone "would not  
21 address population control on the range by reducing population growth." (Final EA at  
22 AR 3537.) Alternatives which combined gathers with means of curbing the herd's fertility  
23 were therefore also assessed. These alternatives were the best at controlling population  
24 growth rates and maintaining AMLs, so BLM adopted an approach that used both  
25 gathers and fertility controls. (*Id.* at AR 3594-605; Decision Record at AR 3492.)

26 The EA adequately considered how gathers might keep herd population growth  
27

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28 <sup>11</sup>This conclusion references the estimated median ten-year growth rates.



1 rates high and even implemented additional corrective measures to ensure that the  
2 Plan's population control purposes were met. (*Id.* at AR 3504.) BLM gave the Gather  
3 Plan's impact on population growth a sufficiently hard look and adopted an alternative in  
4 line with the evidence before the agency. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*  
5 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiffs' Motion is denied, and  
6 Defendants' Motion is granted, as to whether BLM adequately considered the impacts  
7 to population growth rates.

8 **b. Impacts to Horses and Herds from Returning Geldings**

9 In support of their challenge to BLM's analysis of how re-introducing hundreds of  
10 geldings into the Pancake Complex might impact horses or herds, Plaintiffs reference  
11 the lack of complete information on these effects, as well as expert opinions that  
12 contradict the studies upon which BLM relied. (ECF No. 64 at 44-45.)

13 Incomplete information about the effects of gelding does not itself render the EA  
14 arbitrary and capricious, so long as BLM considered and addressed the relevant  
15 unknown factors, explained why additional information was not available, and did not  
16 otherwise engage in a clear error of judgment. See *Am. Wild Horse Campaign v.*  
17 *Bernhardt*, 963 F.3d 1001, 1012 (9th Cir. 2020); *Marsh v. Or. Nat. Res. Council*, 490  
18 U.S. 360, 378 (1989). BLM did just that in the Gather Plan EA. (Final EA at AR 3531,  
19 3626-31.) The agency looked at existing studies on geldings and their interactions with  
20 other horses, recognizing that it was unclear exactly how a wild horse's behavior would  
21 change post-gelding or how releasing geldings would affect the behavior of other wild  
22 horses. (*Id.* at AR 3627-29.) Based on this literature, BLM concluded that the proposed  
23 level of gelding in the Pancake Complex would not significantly change herd social  
24 structures or demographics. (*Id.* at AR 3630.) Such analysis is sufficient, even with gaps  
25 in scientific knowledge. See *Friends of Animals v. Silvey*, 353 F. Supp. 3d 991, 1016-17  
26 (D. Nev. 2018), *aff'd*, 820 F. App'x 513 (9th Cir. 2020); *Bernhardt*, 963 F.3d at 1012-13.

27 BLM also adequately responded to comments which raised concerns about the  
28 studies BLM cited. (Final EA at AR 3663-65, 3670-73, 3675-76.) One commenter

1 referenced two experts who stated that gelding a wild stallion would materially change  
2 his behavior. (*Id.* at AR 3675-76.) BLM directly addressed these expert opinions,  
3 “ultimately determining them to be ‘speculative’ because neither of them had actually  
4 conducted a study on the issue.” *Am. Wild Horse Campaign v. Zinke*, 353 F. Supp. 3d  
5 971, 985 (D. Nev. 2018), *aff’d sub nom. Bernhardt*, 963 F.3d 1001. The agency likewise  
6 noted that other concerns were unfounded. (Final EA at AR 3664-65, 3671-72.)  
7 Determinations like these are the types of “scientific judgments and technical analyses  
8 within the agency’s expertise” that require the Court to be “at its most deferential.” *N.*  
9 *Plains Res. Council*, 668 F.3d at 1075; *accord Marsh*, 490 U.S. at 378; *Ctr. for*  
10 *Biological Diversity v. Ilano*, 928 F.3d 774, 782-3 (9th Cir. 2019).

11 BLM has fairly considered the available evidence and the issues before it with  
12 regard to gelding. *See Zinke*, 353 F. Supp. 3d at 985-86. Plaintiffs’ Motion is denied,  
13 and Defendants’ Motion is granted, as to whether BLM adequately considered the  
14 effects of gelding stallions.

### 15 c. Increased Wildfire Risks

16 Plaintiffs next maintain that BLM did not sufficiently respond to concerns about  
17 increased wildfire risk post-gather. (ECF No. 64 at 40-41.)

18 To start, the record indicates that the impacts from altered wildfire risk are not  
19 “tangential event[s]” which the agency can ignore. *Tri-Valley CAREs*, 671 F.3d at 1129;  
20 *accord Salmon River Concerned Citizens v. Robertson*, 798 F. Supp. 1434, 1442 (E.D.  
21 Cal. 1992), *aff’d*, 32 F.3d 1346 (9th Cir. 1994) (holding environmental reviews need not  
22 discuss all speculative impacts). Throughout the EA, BLM references how wildfires, and  
23 the lack thereof, have affected riparian areas, wetlands, surface water quality, soils,  
24 watersheds, and rangeland habitat health in the Pancake Complex. (Final EA at AR  
25 3540, 3552, 3607, 3610-11.) Impacts to wildfire risk were also reasonably foreseeable  
26 and had a reasonably close causal connection to the gather, as BLM noted in the EA.  
27 (*Id.* at 3614 (discussing how considered alternatives would affect the spread of invasive  
28 plants, which could change the fire regime).) *See also* 40 C.F.R. §§ 1508.1(g), (aa).

1 BLM could have still properly determined that the Gather Plan’s effects on  
2 wildfire risks were minimal, but the record does not allow the Court to find that the  
3 agency took a hard look at wildfire risks. If the effects of the proposed action on wildfire  
4 risks were insignificant, the EA needed to say that and explain why it reached that  
5 conclusion. See 40 C.F.R. § 1502.2 (noting that a FONSI should include enough  
6 discussion of insignificant issues to show why further study is not needed); *350*  
7 *Montana*, 50 F.4th at 1266 (holding that an agency’s failure to cite scientific evidence or  
8 identify science-based criteria used to support its decision was fatal to its determination  
9 a project’s impacts would be minor); *Tri-Valley CAREs*, 671 F.3d at 1124 (“[A]n agency  
10 must support its conclusions with studies that the agency deems reliable.”). Here, BLM  
11 responded to concerns about how reductions in wild horse grazing might alter fire risks  
12 by stating that grazing was just one of many factors that influence wildfire risk and thus  
13 “it is an oversimplification and inaccurate to state that grazing—in and of itself—will  
14 reduce wildfire risk.” (*Id.* at AR 3671 (emphasis added).) The Court will defer to these  
15 expert opinions. See *N. Plains Res. Council*, 668 F.3d at 1075. But grazing was not the  
16 only wildfire risk factor that the gather would affect. BLM itself recognized in the Final  
17 EA that, under every considered alternative, wild horses would spread an invasive weed  
18 called cheatgrass, which could alter the fire regime by increasing wildfire risks.<sup>12</sup> (*Id.* at  
19 AR 3526-27, 3614, 3671.) No effort was made to evaluate how greatly the spread of  
20 invasive plants would alter risks or how the combined effects of changes in wild horse  
21 grazing and the spread of cheatgrass would shift risk levels. The reader is instead left to  
22 guess how these factors will interact. See *350 Montana*, 50 F.4th at 1266.

23 Consideration of how all affected wildfire risk factors might alter the Pancake  
24 Complex fire regime was essential to ensuring that BLM made an informed decision on  
25 whether it should prepare an EIS. See *Found. for N. Am. Wild Sheep v. U.S. Dep’t of*

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26  
27 <sup>12</sup>The no-action alternative would lead to the greatest spread in invasive plants  
28 and therefore, impliedly, the greatest increase in fire risk, though BLM did not explicitly  
reach this conclusion. (*Id.* at AR 3614.)

1 *Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982). BLM therefore did not provide “a  
2 reasonably thorough discussion of the significant aspects of the probable environmental  
3 consequences.” *350 Montana*, 50 F.4th at 1265 (quoting *Nat’l Highway Traffic Safety*  
4 *Admin.*, 538 F.3d at 1194). As such, Defendants acted in an arbitrary and capricious  
5 manner and failed to take the required ‘hard look’ at the foreseeable direct and indirect  
6 effects on fire risk from the proposed gather alternatives. Therefore, vacatur of the EA,  
7 ROD, and FONSI is necessary. BLM must reanalyze the foreseeable effects of the  
8 Gather Plan alternatives on wildfire risks in the Pancake Complex and reach a  
9 conclusion as to their significance. Plaintiffs’ Motion is granted, and Defendants’ Motion  
10 is denied, as to BLM’s consideration of effects on wildfire risk.

11       Once the agency has addressed the identified problems, BLM may decide to  
12 make different choices. *See Oregon Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1124  
13 (9th Cir. 2010). “NEPA is not a paper exercise, and new analyses may point in new  
14 directions.” *Id.* But the Court is not necessarily directing BLM to reach a different  
15 outcome. *See Norton*, 542 U.S. at 65. The issue identified today is only with the  
16 processes by which BLM reached its final result, not the final result itself.

## 17       **2. Consideration of Range of Alternatives**

18       In addition to thoroughly assessing the Gather Plan’s environmental impacts,  
19 BLM must have also considered a reasonable range of alternatives. Agencies  
20 developing an EA for a proposal involving unresolved conflicts over how to use  
21 available resources must consider “appropriate” alternatives to the proposed action,  
22 including a ‘no action’ alternative. 42 U.S.C. §§ 4332(2)(C)(iii), (H); *see also* 40 C.F.R. §  
23 1501.5(c)(2).<sup>13</sup> Of course, not every possible alternative is appropriate or reasonable.

24  
25 \_\_\_\_\_  
26 <sup>13</sup>Congress has amended NEPA since BLM prepared the EA in 2021. *See* Fiscal  
27 Responsibility Act of 2023, Pub. L. 118-5, 137 Stat. 38. These amendments did not  
28 meaningfully change the aforementioned substantive requirements of NEPA Section  
102 but merely renumbered them. *See id.* at § 321 (redesignating Section 102  
subparagraphs (D) through (I) as (G) through (L)). The Court cites Section 102 as it  
is currently codified and notes that, because updates to the NEPA regulations following

1 Agencies need not consider alternatives that do not advance the purpose of a project or  
2 are otherwise infeasible or impractical. See *Native Ecosystems Council v. U.S. Forest*  
3 *Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005); *Env't Def. Ctr. v. Bureau of Ocean Energy*  
4 *Mgmt.*, 36 F.4th 850, 877 (9th Cir. 2022); 40 C.F.R. § 1508.1(z).<sup>14</sup> Nor must agencies  
5 engage in duplicative work by considering alternatives that are “substantially similar” to  
6 other alternatives. *Native Ecosystems Council*, 428 F.3d at 1249. However, the  
7 “existence of a viable but unexamined alternative renders the environmental review  
8 conducted under NEPA inadequate.” *Env't Def. Ctr.*, 36 F.4th at 877 (quotation marks  
9 omitted).

10 This examination need not be extensive. Agencies’ “obligation to consider  
11 alternatives under an EA is a lesser one than under an EIS,” and they may reject an  
12 alternative without detailed discussion if they considered the alternative and provided  
13 “an appropriate explanation as to why [it] was eliminated.” *Native Ecosystems*, 428 F.3d  
14 at 1246. The Court will now determine whether BLM insufficiently considered three  
15 alternatives that would have increased the number of wild horses remaining on the  
16 Pancake Complex.

17 **a. Reductions in Livestock Grazing**

18 According to Plaintiffs, BLM improperly eliminated from further consideration a  
19 suggestion to reduce livestock grazing so that Pancake Complex could support more  
20 wild horses. (ECF No. 64 at 41-42.) But BLM provided an “appropriate explanation as to  
21 why it rejected the livestock reduction alternative: it simply could not reduce livestock  
22 grazing allotments through the gather process.” *Cloud Found. v. BLM*, 802 F. Supp. 2d

23 \_\_\_\_\_  
24 the 2023 NEPA amendments have not yet been finalized, 40 C.F.R. § 1501.5(c)(2)'s  
reference to Section 102(2)(E) now refers to Section 102(2)(H).

25 <sup>14</sup>Though this provision of the NEPA implementing regulations has recently been  
26 amended, it still defined “reasonable alternatives” as a “range of alternatives that . . .  
27 meet the purpose and need for the proposed action” when the EAs were prepared. See  
28 Update to the Regulations Implementing the Procedural Provisions of the National  
Environmental Policy Act, 85 Fed. Reg. 43304-01, 43376 (July 16, 2020) (to be codified  
at 40 C.F.R. pt. 1508(z)).

1 1192, 1206 (D. Nev. 2011); accord *Silvey*, 353 F. Supp. 3d at 1016. As the agency  
2 noted in its response to this suggestion, livestock allotments may only be changed  
3 through the official amendment of an RMP, which requires public involvement,  
4 preparation of an EA or EIS, interagency coordination, and other analysis. (Final EA at  
5 AR 3520.) See *Cloud Found.*, 802 F. Supp. 2d at 1206-07 (citing 43 C.F.R. § 1610.5-5).  
6 Lowering livestock grazing allotments was therefore outside the scope of the Final EA.  
7 (Final EA at AR 3519.)

8 Moreover, reducing livestock grazing to increase wild horse AMLs was not a  
9 reasonable alternative because it would have undermined the Gather Plan's stated  
10 purpose to "prevent undue or unnecessary degradation of . . . and to restore a thriving  
11 natural ecological balance and multiple-use relationship on public lands." (*Id.* at AR  
12 3504.) See also *Native Ecosystems Council*, 428 F.3d at 1247. Due to the unique  
13 negative impacts wild horses had upon native vegetation and riparian buffers in the  
14 Pancake Complex, BLM concluded that "simply re-allocating livestock Animal Unit  
15 Months (AUMs) to increase the wild horse AMLs would not achieve a thriving natural  
16 ecological balance." (Final EA at AR 3520.) "It is not our role to question that informed  
17 scientific judgment." *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 991 (9th Cir.  
18 2022). BLM had no obligation to consider this alternative that conflicted with the  
19 purpose of the Final EA. See *Native Ecosystems Council*, 428 F.3d at 1247-48.

20 The livestock reduction alternative was properly considered and eliminated.

#### 21 **b. Rewilding**

22 Plaintiffs also claim that BLM ignored a commenter's suggestions to consider  
23 "rewilding," which they define as returning the land to its natural state by reducing  
24 livestock grazing and "other conflicting monopolizers" like mining or off-highway vehicle  
25 use. (ECF No. 64 at 42; Public Comments at AR 3028.) However, BLM need not  
26 undertake a separate analysis of why it eliminated this alternative because it would  
27 have "substantially similar consequences" to reducing livestock grazing. *Westlands*  
28 *Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004); accord *Native*

1 *Ecosystems Council*, 428 F.3d at 1249. Reallocating other uses of the Pancake  
2 Complex to support more wild horses would still undermine the thriving ecological  
3 balance of the area, as the additional horses are an ecological concern regardless of  
4 what land use they replace. (Final EA at AR 3520.) There was no need for BLM to  
5 engage in a redundant analysis of why it would not further consider decreasing other  
6 uses of the Pancake Complex to increase the horse population. *See Native Ecosystems*  
7 *Council*, 428 F.3d at 1248-49. The rewilding alternative was properly ignored.

8 **c. Raising AMLs**

9 Plaintiffs finally assert that BLM did not adequately support its decision not to  
10 raise the AML range for the Pancake Complex. (ECF No. 64 at 42-43.) Their primary  
11 concerns are that BLM did not rely upon sufficient monitoring data and acted before an  
12 evaluation of the Sand Springs West HMA rangelands could be completed. (*Id.*)

13 To start, BLM had no statutory or self-imposed requirements to assess the AML.  
14 The WHA does not require BLM to determine new AMLs based on current conditions  
15 each time the agency decides to restore an already-established AML. *See In Def. of*  
16 *Animals*, 751 F.3d at 1064 n.13. Nor must BLM show that an AML range remains valid  
17 before relying upon it. *See Friends of Animals v. BLM*, 2018 WL 1612836, at \*18 (D. Or.  
18 Apr. 2, 2018). Existing management plans likewise do not commit BLM to recalculating  
19 the AML in any particular timeframe. (Monte Cristo HMAP at AR 18-20; Humboldt  
20 National Forest RMP at AR 54-55; Tonopah RMP and ROD at AR 532-724; Ely RMP  
21 and ROD at AR 871-1349.) *See also Friends of Animals v. Sparks*, 200 F. Supp. 3d  
22 1114, 1125 (D. Mont. 2016).

23 BLM also properly considered and rejected suggestions to increase the AML for  
24 the Pancake Complex. (Final EA at AR 3519.) The agency found that monitoring and  
25 other historical data did not indicate that AMLs should be increased but instead  
26 “confirm[ed] the need to remove excess wild horses.” (Final EA at AR 3519; Handbook  
27 at AR 1367 (recommending BLM evaluate AMLs when “resource monitoring and  
28 population inventory data indicates the AML may no longer be appropriate”).) Plaintiffs

1 have presented no evidence to the contrary, beyond unsupported assertions that the  
2 AMLs seem too low. (Public Comments at AR 2089-91 (stating that the square miles of  
3 habitat per horse are low)<sup>15</sup>; *id.* at AR 2126 (noting that horses receive limited AUMs  
4 compared to livestock).) As Plaintiffs have “failed to provide any support to show how a  
5 reevaluation and adjustment in AMLs would reduce . . . or in any way promote the  
6 health of existing wild horse populations,” BLM reasonably eliminated this alternative  
7 from analysis as contrary to the principles of the WHA. *Silvey*, 353 F. Supp. 3d at 1015.

8 The unfinished rangeland health evaluation does not alter that conclusion. In  
9 determining whether a gather is necessary, BLM “must act immediately, even if more  
10 relevant information could become available at a later date.” *Am. Wild Horse Campaign*  
11 *v. Bernhardt*, 442 F. Supp. 3d 127, 155 (D.D.C. 2020), *aff’d sub nom. W. Watersheds*  
12 *Project v. Haaland*, 850 F. App’x 14 (D.C. Cir. 2021); *accord* 16 U.S.C. § 1333(b)(2).  
13 Therefore, BLM did not need to wait to conduct a gather until it had completed the  
14 rangeland evaluation.

15 BLM has fulfilled its duty to prepare appropriate alternatives for the EA and gave  
16 those alternatives due consideration, even though they were outside the purpose and  
17 need of the Gather Plan.

### 18 **3. Arbitrary and Capricious Means of Calculating Total AMLs**

19 Plaintiffs also suggest that it was arbitrary and capricious for BLM to calculate the  
20 AML for the entire Pancake Complex by adding up the AMLs of its component  
21 management areas, instead of calculating a cumulative AML. (ECF No. 64 at 42-43.)

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22 <sup>15</sup>This commenter also noted that studies have shown many AMLs are well below  
23 ecological carrying capacity. (Public Comments at AR 2091.) But, as BLM explained,  
24 the ecological carrying capacity is not equivalent to a thriving natural ecological balance.  
25 (Final EA at 3520-21 (finding that controlling wild horse populations by natural means  
26 would result in the “catastrophic mortality of wild horses,” “reduce herbaceous  
27 vegetative cover, damage springs[,] and increase erosion, and could result in  
28 irreversible damage to the range”); Handbook at AR 1395 (“AML decisions determine  
the maximum number of WH&B to be managed in the HMA that results in a TNEB and  
avoids a deterioration of the range.”).) See also *Cent. Or. Wild Horse Coal. v. Vilsak*,  
No. 2:21-CV-01443-HL, 2023 WL 4456855, at \*7 (D. Or. May 12, 2023), *report and*  
*recommendation adopted sub nom. Cent. Or. Wild Horse Coal. v. Vilsack*, No. 2:21-CV-  
1443-HL, 2023 WL 7545514 (D. Or. Nov. 14, 2023).



1 While several commenters requested that BLM raise AMLs, no commenters questioned  
2 the methodology of using an aggregate AML. (Public Comments at AR 2081, 2089-91,  
3 2109, 2126.) Thus, BLM was not notified of this concern during the public comment  
4 process with sufficient particularity for the agency to give the issue “meaningful  
5 consideration.” *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 489 (9th Cir. 2023)  
6 (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004)).

7 No exceptional circumstances exist here that might excuse the belated raising of  
8 this issue. See *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1033 (9th Cir.  
9 2018). Plaintiffs had the full information needed to make these concerns known during  
10 the public comment period. (Preliminary EA at AR 1927-29.) *Cf. id.* at 1034 (holding that  
11 an exceptional circumstance existed where an agency’s failure to disclose information  
12 prevented the plaintiff from raising a concern during the comment period). There is also  
13 no evidence that BLM had independent knowledge of this issue. *Cf. ‘Ilio’ulaokalani Coal.*  
14 *v. Rumsfeld*, 464 F.3d 1083, 1092-93 (9th Cir. 2006).

15 As BLM did not receive a prior opportunity to consider whether aggregating  
16 AMLs was appropriate and no exceptional circumstances are present, this claim has  
17 been waived. See *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1063-65 (9th  
18 Cir. 2023).

#### 19 **4. Decision Not to Prepare an EIS**

20 Plaintiffs finally argue that the unknown effects of gelding and the unsupported  
21 Pancake Complex AML require an EIS. (ECF No. 64 at 43, 45.) The Court disagrees.

##### 22 **a. Uncertainty Regarding Gelding**

23 NEPA requires federal agencies to prepare an EIS for “major Federal actions  
24 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). This  
25 mandate extends to situations where an EA left “substantial questions” as to whether  
26 the proposed action will have a significant effect. See *Bernhardt*, 963 F.3d at 1007.  
27 Although NEPA does not require an EIS “anytime there is some uncertainty,” substantial  
28 questions exist if the effects of the project are “highly uncertain.” *Ctr. for Cmty. Action &*

1 *Env't Just. v. Fed. Aviation Admin.*, 61 F.4th 633, 649 (9th Cir. 2023) (quoting *Bernhart*,  
2 963 F.3d at 1008).

3 BLM's proposal to geld and release male horses to the range does not meet the  
4 'highly uncertain effects' threshold. Gelding horses is an established practice with well  
5 understood consequences. (Final EA at AR 3531.) *See also Bernhardt*, 963 F.3d at  
6 1008. The Final EA thoroughly reviewed the known impacts of gelding on domestic  
7 horses and other species, then used these studies to find that gelding would have  
8 minimal effects on the wild horses in the Pancake Complex. (Final EA at AR 3626-31.)  
9 This was a "reasonable prediction[] on the basis of prior data" which left "only that  
10 quotient of uncertainty which is always present when making predictions about the  
11 natural world." *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir.  
12 2009); *accord Bernhardt*, 963 F.3d at 1008-09.

13 The inclusion of gelding did not raise substantial questions regarding whether the  
14 Gather Plan would significantly affect the environment.

15 **b. Unsupported AMLs**

16 The Court has already discussed each component of this claim but will briefly  
17 reiterate those findings here. The EA properly identified the basis for BLM's decision not  
18 to recalculate AMLs for the Pancake Complex. (Final EA at AR 3503, 3519.) Monitoring  
19 data did not show any need to do so. (*Id.*; Ely RMP at AR 1106.) Nor was the calculated  
20 total AML for the Complex arbitrary. BLM simply added up the controlling, previously  
21 evaluated AMLs of its component parts to obtain the total numbers—a methodology  
22 which Plaintiffs failed to challenge before filing their Motion. *See Earth Island Inst.*, 87  
23 F.4th at 1063-65 (finding claim waived under similar circumstances). Incomplete  
24 rangeland studies also did not render the AMLs invalid, as the WHA mandates that BLM  
25 "immediately" remove excess horses even if all relevant information on a gather is not  
26 yet available. 16 U.S.C. § 1333(b)(2). Plaintiffs fail to identify a basis upon which the  
27 Final EA or FONSI were inadequate with regard to the Pancake Complex AML.

28 Apart from its inadequate assessment of impacts on wildfire risks, BLM took the

1 appropriate hard look at the environmental impacts of and considered reasonable  
2 alternatives to its plan to achieve established AMLs in the Pancake Complex. The Court  
3 denies Plaintiffs' Motion and grants Defendants' Motion as to all NEPA claims except  
4 the claim regarding wildfire risk assessment.

#### 5 **IV. REQUEST FOR JUDICIAL NOTICE**

6 Plaintiffs have requested that the Court take judicial notice of six additional  
7 documents to supplement the AR: (1) the Fifteenmile HMAP from Wyoming; (2) notes  
8 for 43 C.F.R. Part 4700; (3) a 1986 Federal Register notice for the final rulemaking of 43  
9 C.F.R. Part 4700; (4) a 1991 Federal Register notice of an interim final rulemaking for  
10 43 C.F.R. Part 4700; (5) 43 C.F.R. Part 4700; and (6) a 1984 Federal Register notice of  
11 proposed rulemaking for 43 C.F.R. Part 4700. (ECF No. 65.) Defendants oppose only  
12 judicial notice of the Fifteenmile HMAP. (ECF No. 68 at 2 & n.1.)

##### 13 **A. Fifteenmile HMAP**

14 "Judicial review of agency actions should generally be confined to the original  
15 record upon which the actions were based." *Rybachek v. U.S. Env't Prot. Agency*, 904  
16 F.2d 1276, 1296 n.25 (9th Cir. 1990). "The reviewing court may consider information  
17 supplemental to the record only exceptionally: for instance, if the information is  
18 necessary as background to explain the basis of the agency's action and the factors the  
19 agency considered." *Id.* (quotation marks omitted).

20 Plaintiffs argue that the Fifteenmile HMAP provides necessary background  
21 information on the differences between HMAPs and other planning documents. (ECF  
22 No. 65 at 3-4.) The Court disagrees. BLM did not rely on any information in the  
23 Fifteenmile HMAP, the HMAP does not address any issues not already present in the  
24 record, and it would not provide any explanation as to the basis of BLM's failure to  
25 prepare an HMAP for the Pancake Complex. *See Rybachek*, 904 F.2d at 1296 n.25.  
26 Whether RMPs can act as substitute HMAPs for the purposes of Section 4710.3-1 is a  
27 legal question upon which other HMAPs have no bearing. There is accordingly no need  
28 for the Court to reference the Fifteenmile HMAP, and Plaintiffs' Request is denied as to

1 this document.

2 **B. Other Documents**

3 Defendants submitted a notice of their non-opposition to judicial notice of the  
4 documents from the Code of Federal Regulations or Federal Register. (ECF No. 68 at 2  
5 n.1.) Defendants have therefore consented to the Court granting Plaintiffs' Request as  
6 to these filings. See *R.S. Coppola Tr. - Oct. 19, 1995 v. Nat'l Default Servs.*, No. 3:21-  
7 CV-00281-MMD-CSD, 2022 WL 2753512, at \*1 (D. Nev. July 13, 2022), *aff'd sub nom.*  
8 *Coppola v. Nat'l Default Servs.*, No. 22-16212, 2023 WL 6566493 (9th Cir. Oct. 10,  
9 2023). Alternatively, the Court grants the Request as to these documents because they  
10 are properly subject to judicial review as part of "the original record upon which the  
11 actions were based." *Rybachek*, 904 F.2d at 1296 n.25.

12 **V. CONCLUSION**

13 The Court notes that the parties made several arguments and cited several  
14 cases not discussed above. The Court has reviewed these arguments and cases and  
15 determines that they do not warrant discussion because they do not affect the outcome  
16 of the Motions.

17 It is therefore ordered that Plaintiffs' motion for summary judgment (ECF No. 64)  
18 and Defendants' motion for summary judgment (ECF No. 70) are granted in part and  
19 denied in part as discussed herein.

20 The Court grants Plaintiff's Motion and denies Defendants' Motion as to the claim  
21 under the Wild Free-Roaming Horses and Burros Act that BLM unreasonably delayed  
22 preparing an HMAP but otherwise denied. Under 5 U.S.C. § 706(1), the Court remands  
23 to compel Defendants to prepare and approve HMAP(s) covering the Pancake Complex  
24 HMAs within one year of the date of this order.


25 The Court grants Plaintiff's Motion and denies Defendants' Motion as to the  
26 National Environmental Policy Act claim involving BLM's consideration of wildfire risks in  
27 the Final EA. The Court vacates and remands the Environmental Assessment, Record  
28 of Decision, and Finding of No Significant Impact for the agency to reanalyze the

1 foreseeable effects of the Gather Plan alternatives on wildfire risks in the Pancake  
2 Complex and reach a conclusion as to their significance. The Court otherwise denies  
3 Plaintiff's Motion and grants Defendants' Motions as to the remaining claims.

4 It is further ordered that Plaintiffs' request for judicial notice (ECF No. 65) is  
5 denied as to the Fifteenmile HMAP (ECF No. 65-2) but granted as to the other exhibits  
6 (ECF Nos. 65-3–65-7).

7 It is further ordered that the Clerk of Court enter judgment in accordance with this  
8 order and close this case.

9 DATED THIS 28<sup>th</sup> Day of March 2024.

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13 MIRANDA M. DU  
14 CHIEF UNITED STATES DISTRICT JUDGE  
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