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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER WILD HORSE MANAGEMENT GROUP, INC., a non-profit organization; SIMONE NETHERLANDS, an individual, **Plaintiffs** **UNITED STATES GOVERNMENT, DEPARTMENT OF INTERIOR, Tom Vilsack, as acting SECRETARY OF AGRICULTURE; U.S. FOREST SERVICE, and Neil Bosworth, as the acting U.S. Forest Supervisor,** **Defendants.**	**Case No.** **PLAINTIFF'S APPLICATION FOR TEMPRARY RESTRAINING ORDER (EX PARTE) and WRIT OF MANDAMUS**

Pursuant to Fed. R. Civ. P. 65(b), Plaintiffs, Salt River Wild Horse Management Group, Inc. ("SRWH"), a non-profit organization, Simone Netherlands, an individual (collectively "Plaintiffs"), move for an ex parte temporary restraining order, to be followed by preliminary and permanent injunctive relief, to prevent Defendants from unlawfully rounding up and removing all (approximately 100) wild horses from the Tonto National Forest and surrounding public lands. Absent the requested injunctive relief, Defendants plan to immediately allow private parties to remove the horses or move forward with the removal of horses any time after August 7, 2015.

These horses are located in the Tonto National Forest and have roamed freely along the Lower Salt River for decades (at least as far back as the 1930's by the U.S. Forest Service's own admission. Defendants purportedly contend (without any support)

that these horses constitute domesticated, unbranded and unauthorized livestock that have somehow migrated onto the Tonto National Forest from the surrounding areas. Plaintiff SRWH, non-profit organization formed for the purpose of monitoring and scientifically studying the wild horse population commonly referred to as the Salt River Wild Horses, has kept records and can establish bloodlines for many of these horses dating back at least twenty years.

The Wild Free-Roaming Horses and Burros Act of 1971 (the "Wild Horse Act") protects wild horses within the Tonto National Forest from capture, branding, harassment, and death. See 16 U.S.C. §1331, 1333. Defendants have neglected and violated their obligations under the Wild Horse Act to manage and protect the wild horses inhabiting public lands within the Tonto National Forest. Moreover, Defendants decision to capture, relocate, and eventually sell unclaimed horses located within the Tonto National Forest violates the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA").

Therefore, Plaintiffs request that this Court restrain Defendants, its officers, agents, servants, employees, and those in active concert or participation with Defendants from:

(A) Rounding up and/or removing any horses from the Tonto National Forest or allowing the removal of any horses until Defendants have complied with the requirements of the Wild Horses and Burros Act of 1971, NEPA, and the APA, including, but not limited to:

(1) Preparing an Environmental Impact Statement to determine the impact of the proposed removal on the human and natural environment;

(2) Determining the number of wild horses located in the Tonto National Forest including means such as observation for branding or domestic markings, use of genetic testing and/or other means or study;

(3) Determining the number of branded horses (if any) in the Tonto National Forest that may qualify for protection under the Wild Horses and Burros Act through intermingling under 36 CFR Section 222.23; and

(4) Providing the public with notice of any proposed action with regard to horses within the Tonto National Forest and allowing for public comment on that proposed action and then take into consideration those comments prior to any future action.

Absent the requested relief, Plaintiffs will suffer immediate and irreparable injury.

Furthermore, pursuant to 28 U.S.C. Section 1361, Plaintiffs seek a writ of mandamus compelling Defendants to comply with the requirements of the Wild Horse Act in protecting and managing horses within the Tonto National Forest, including:

(A) Conducting and inventory or accounting of the horses located within the Tonto National Forest to determine their status as wild or domestic trespass, branded versus unbranded. See 16 U.S.C. Section 1333(b).

(B) Presenting reliable data or investigative reports to support the assertion, if supportable, that horses in the Tonto National Forest are "unauthorized livestock," as opposed to protected "wild free-roaming horses" or offspring of those horses. Id.;

(C) Protecting any and all wild free-roaming horses in the Tonto National Forest, including but not limited to foals born there and/or branded horses that have intermingled with the wild horses from capture, branding, harassment and death. See 16 U.S.C. Section 1331;

(D) Managing the wild horses in the Tonto National Forest and surrounding public lands. See 16 U.S.C. Section 1333;

(E) Conducting an inventory or census of the number, type, age, and condition of the wild free-roaming horses in the Tonto National Forest and surrounding

public lands. See 16 U.S.C. Section 1338(a);

(F) Conducting a scientific and independent study to determine the interaction with and relationship of the horses to other wildlife and foliage in the Tonto National Forest.

This Application is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTORITIES

Factual Background

Sometime prior to July 31, 2015, the U.S. Forest Service arbitrarily and without adequate investigation, determined that approximately one hundred horses living and grazing in the Tonto National Forest near and along the Lower Salt River, were "trespass" or stray horses and that all "unauthorized horses" must be removed from the forest. Records confirm that wild horses have roamed along the Lower Salt River near and along a grazing allotment known as the Sunflower grazing allotment since at least the 1930's. By the Forest Service's own admission, "Range records indicate that there has been a population of trespass horses along the Lower Salt River (river), southwest of the allotment, since the 1930s." (Final Environmental Assessment for Sunflower Allotment Grazing Analysis, Forest Service Southwestern Region, Tonto National Forest, July 2015 attached hereto as Exhibit A at p. 61). Historical articles document the presence of these animals in the area since the late 1800's, and SRWH has kept records and can establish bloodlines for many of these horses dating back at least twenty years.

The U.S. Forest Service, upon information and belief, has not conducted a census, inventory, or any other type of survey to determine how many of these approximate one hundred horses are branded or unbranded. Nor has the U.S. Forest Service made any attempt to determine if any of these horses are "wild free-roaming" horses and thus

entitled to protection under the Wild Horses and Burros Act of 1971. The U.S. Forest Service has an obligation to manage and protect wild horses residing on any public lands such as Tonto National Forest.

The U.S. Forest Service has taken the position that all horses residing in the public lands of the Tonto National Forest are stray, domestic horses and are not considered wild. See United States Department of Agriculture, Forest Service, Public Notice dated July 31, 2015, a copy of which is attached hereto as Exhibit B and incorporated herein by this reference. The ultimate plan pursuant to the Public Notice is to round-up and capture all horses found within the borders of the Tonto National Forest, regardless of whether the horses are branded or unbranded. Id.

Plaintiff, SRWH, as well as other organizations, have contacted Defendant U.S. Forest Service, and requested that it reconsider its decision to capture and remove these horses. See Letter from William Eubanks dated August 4, 2015, copy attached hereto as Exhibit C and incorporated herein by this reference. Plaintiff, SRWH, has further presented Defendant U.S. Forest Service with a fifty page proposal setting forth a humane and sustainable management protocol for the management of the Salt River Wild Horses, but Defendant has apparently rejected such proposal (which also included a second option to introduce the herd into a Prescott Wild Horse Sanctuary).

According to the Public Notice of Unauthorized Livestock and Intent to Impound ("Public Notice") issued by Defendant U.S. Forest Service, all horses found in the Tonto National Forest are to be captured and transported to an auction house for public sale if they remain unclaimed for a brief period of time. See Exhibit B. The Public Notice provides for a round-up and capture of all horses in Tonto National Forest, including all mares (even those with foals). The majority, if not all of these foals were born on public lands, in the national forest, and are unbranded and unclaimed. As a result, the foals or any horses born on the public lands, would have the protection of the applicable laws

such as the Wild Free-Roaming Horses and Burros Act of 1971 and its corresponding regulations.

Upon information and belief, the U.S. Forest Service has does little or nothing over the past few decades to manage or take an accounting of the horses. Plaintiffs have asked the U.S. Forest Service to reconsider or delay its round-up and capture of the horses and to comply with applicable federal statutes, but Defendants have refused.

Argument

A temporary restraining order ("TRO") preserves the status quo and prevents irreparable harm from occurring until the Court may hold a preliminary injunction hearing. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423, 439 (1974). Because preliminary injunctions last for a longer time period and involve more extensive control over the parties than TRO's, a showing that meets the requirements for a preliminary injunction a fortiori meets the requirements of a TRO. Rice v. Caytano, 141 F.Supp. 1529, 1537 (D. Hawaii 1996) holding that in the Ninth Circuit the standard for issuing a preliminary injunction is identical to the standard for TRO's). This Court may issue a TRO without notice when immediate and irreparable injury will occur before the adverse party can be heard in opposition. See Fed. R. Civ. P. 65(b).

Here, Defendants intend to irreparably violate the status quo by "secretly" (under the guise that the horses are "unauthorized livestock") removing wild horses from the Tonto National Forest without allowing for public comment, preparing an Environmental Impact Statement ("EIS"), or satisfying any of their obligations under the APA and NEPA. Defendants have given public notice of their intention to begin the round-up, capture, and removal of the wild free-roaming horses in the Tonto National Forest beginning August 7, 2015. Plaintiffs have made several efforts to persuade Defendants

from beginning the round-up to no avail. As a result absent the requested ex parte relief, Plaintiffs will suffer immediate and irreparable harm.

Consequently, the Court should issue a TRO prohibiting Defendants from allowing or undertaking the rounding up, removing, and impounding all horses living in the Tonto National Forest. The TRO should enjoin Defendants from allowing or undertaking any removal or capture activities within the Tonto National Forest until Defendants have complied with the various requirements of the APA and NEPA, including but not limited to the preparation of an EIS and allowing for public comment on the proposed removal.

Moreover, this Court has original jurisdiction "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Consequently, Plaintiffs request a writ of mandamus compelling Defendants to fulfill their obligations under the Wild Horse Act to protect and manage wild horses within the Tonto National Forest.

I. Plaintiffs are Entitled to a TRO Enjoining Defendants from Acting Prior to Satisfying the Requirements of NEPA, the APA, and the Wild Horse Act.

A moving party is entitled to a preliminary injunction if it demonstrates that it is likely to succeed on the merits of its claims and may suffer irreparable injury absent injunctive relief. See *Self-Realization Fellowship Church v. Ananda*, 59 F.3d 902, 913 (9th Cir. 1995). Moreover, a court may grant a TRO or preliminary injunction if serious questions going to the merits of a claim and the balance of the hardships tips in favor of the moving party. Id. Serious questions refer to matters which cannot be resolved one way or the other by the court at the hearing on the injunction and which present a need to preserve the status quo lest one side prevent resolution of the matter by altering the status quo. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988 (en banc)), cert. denied, 490 U.S. 1035, 109 S.Ct. 1933 (1989). These two tests are not

separate, but rather represent a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases. See *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985); *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516-17 (9th Cir. 1993).

As shown below, Plaintiffs have a strong likelihood of succeeding on their claims.

A. Likelihood of Success

1. Likelihood of Success of Plaintiff's Claim Under NEPA.

Defendants are hard pressed to argue that their decision to capture and remove, or allow the capture and removal of, all of the approximately one hundred horses from Tonto National Forest will not "significantly impact the environment." There is no question that NEPA governs Defendants' present course of action and that Defendants have failed to comply with any of NEPA's mandatory requirements. Consequently, Plaintiffs are likely to succeed on their NEPA claims.

NEPA requires a federal agency, such as the U.S. Forest Service, to prepare a detailed Environmental Impact Statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211-12 (9th Cir. 1998) (citing 42 U.S.C. §4332(2)(C)); *National Wildlife Fed'n v. Spespy*, 45 F.3d 1337, 1343 (9th Cir. 1994). The decision to permanently remove horses from a protected territory constitutes a "major" action. See *American Horse Protection Assoc. v. Andrus*, 608 F.2d 811, 814-15 (9th Cir. 1979). The plain language of NEPA makes clear that Defendants must comply with the EIS requirement to the "fullest extent possible." 42 U.S.C. §4332(c). Defendants have no discretion regarding compliance with NEPA; the requirement that an EIS be prepared for all major federal actions significantly affecting the quality of the human environment is mandatory.1 See *Andrus*, 608 F.2d at 815.

NEPA "ensures that the agency ... will have available, and will carefully consider, detailed information concerning significant environmental impact; it also guarantees that the relevant information will be made available to the larger [public] audience." *Blue Mountains*, 161 F.3d at 1212 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989). Prior to posting the Public Notice announcing the round-up of horses in the Tonto National Forest, Defendants failed to comply with NEPA. Defendants did not undertake any efforts to determine whether the capture and removal of more than one hundred wild free-roaming horses from the protected Tonto National Forest would significantly impact the environment. Defendants did not "carefully consider" the potential impact of their actions. Defendants did not make any information available to the public for comment. Defendants failed to even analyze whether the horses at issue are "wild" and, therefore, entitled to federal protection. Instead, Defendants simply ignored NEPA's requirements.

In contrast to Defendants' actions, NEPA requires agencies to take into account the environmental impacts of proposed regulations on the physical "world around us." *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466 (9th Cir. 1996). An agency must prepare an EIS if potentially affected parties raise substantial questions as to whether a proposed rule may cause significant degradation of some human environmental factor. Id. A threshold questions in a NEPA case is whether a proposed project may "significantly affect" the human environment, thereby triggering the requirement for an EIS. See *Blue Mountains*, 161 F.3d at 1212; accord 42 U.S.C. §4332(2)(C). Thus, to

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1 The Council on Environmental Quality ("CEQ") – an agency within the Executive Office of the President – has promulgated regulations implementing NEPA's requirements that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. Those regulations provide that, where the agency has not determined whether an EIS is required, it must generally prepare an "Environmental Assessment" ("EA") to determine whether the environmental effects of its proposed action are "significant," thereby requiring preparation of an EIS. *Id.* § 1501.4(b). The EA must analyze both "direct" impacts of the proposed action, i.e., those that result immediately from the proposed management action, as well as the "indirect" impacts, which are those caused by the action later in time but "still reasonably foreseeable." *Id.* § 1508.8(a)-(b).

prevail on a claim that Defendants violated their statutory duties under NEPA, Plaintiffs need not show that significant effects will in fact occur. It is enough for the Plaintiffs to raise substantial questions as to whether the horse removal may have a significant effect on the environment. See, e.g., *Blue Mountains*, 161 F.3d at 1212.

NEPA defines the "human environment" as the "natural and physical environment and the relationship of people to that environment." 40 C.F.R. §1508.14. Agencies should interpret human environment "comprehensively to include the natural and physical environment and the relationship of people with that environment." Id. Determination of whether a proposed regulation or action significantly affects the human environment requires consideration of two broad factors" context and intensity. See 40 C.F.R. §1508.27; 42 U.S.C. §4332(2)(c); *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). Context delimits the scope of the agency's action, including the interests affected. Intensity relates to the degree to which an agency's action affects the locale and interests identified in the context part of the inquiry. Id. Effect or impact includes "ecological ... aesthetic, historical, cultural, economic, social, or health effects. Id. at §1508.8; *Middle Rio Grande Conservancy Dist. V. Norton*, 294 F.2d 1220, 1229 (10th Cir. 2002).

Congress has specifically declared that wild horses "are living symbols of the historic and pioneer spirit of the West" and "contribute to the diversity of life forms within the Nation and enrich the lives of the American people." As such, the removal of wild horses will significantly impact the historical and cultural aspects of the human environment. There is no question that wild horses currently reside in the Tonto National Forest and have done so for more than eight decades. Consequently, Plaintiffs have shown that the proposed removal may, and likely will, significantly impact the human and natural environment.

In order to assess the impact of their removal on the human environment,

Defendants must prepare an EIS to determine if any of the affected horses are in fact "wild horses." Mere cursory statements that Defendants believe the horses in question to be domestic strays or unauthorized livestock are insufficient. See e.g., Blue Mountains, 161 F.3d at 1213-14 (holding that lack of supporting data and cursory treatment of environmental impacts does not satisfy the requirements of NEPA). NEPA mandates preparation of an EIS where uncertainty may be resolved by further collection of data, see Blue Mountains, 161 F.3d at 1213-14 (lack of supporting data and cursory treatment of environmental effects in EA does not support refusal to produce EIS), or where the collection of such data may prevent speculation on potential effects. See *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001). The very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to implementation of the proposed action. See *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982).

If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts on the environment are insignificant. See *Blue Mountains*, 161 F.3d at 1212. "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." Id.; accord *Cold Mountain v. Garber*, 357 F.3d 884, 893 (9th Cir. 2004) (allowing a bison capture project to proceed because the agency complied with EPA by exhaustively evaluating the potential impacts of the bison capture, soliciting public comment, and making available all relevant documents).

Here, Defendants have failed to supply the requisite statement of reasons to explain why the removal of over one hundred potentially protected wild horses from the Tonto National Forest fails to significantly impact the human environment. As such,

Defendants have offered no justification for their failure to prepare an EIS. Through the preparation of an EIS, Defendants must necessarily obtain information regarding the nature of the horses it seeks to remove. Such data will resolve the uncertainty, if any, regarding whether the horses in question are in fact wild horses entitled to protection. Indeed, the evidence available thus far clearly shows that the horses are unbranded and wild. Consequently, this Court should issue a TRO restraining Defendants from removing any horse from the Tonto National Forest until the completion of a proper EIS as required under NEPA.

2. Likelihood of Success of Claim Under the Wild Horse Act.

As Defendants have completely failed to protect and manage the wild horse population in the Tonto National Forest, Plaintiffs are likely to succeed on their claims under the Wild Horse Act. In 1971, Congress recognized that "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people." 16 U.S.C. §1331. Congress, therefore, announced the policy that "wild free-roaming horses and burros shall be protected ... and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public land." Id. The Wild Horse Act further declares that all wild free-roaming horses placed under the jurisdiction of the Secretaries of Interior and Agriculture and administered through the Bureau of Land Management and USFS. See 16 U.S.C. §1331(a). The Wild Horse Act directs the Secretaries to protect and manage the wild horses as components of public lands. Id.

Under the Wild Horse Act, wild free-roaming horses and burros means all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forests system on or after December 15, 1971, or do hereafter use these lands as

all or part of their habitat. See 36 C.F.R. §222.20(13). Unbranded claimed horses and burros for which the claim is found to be erroneous are also considered as wild and free-roaming if they meet the criteria above. Id. The regulations also provide that wild horses not meeting the above definition, but which become intermingled with wild free-roaming horses or burros, are accorded the same protection as "wild" horses. See 36 C.F.R. §222.23.

Plaintiffs have presented evidence that the horses sought to be removed meet the definition of wild, free-roaming horses under the Wild Horse Act. Defendants have not (and indeed cannot) produce any evidence to contradict Plaintiff's characterization of these horses. As a result, Defendant's Public Notice regarding the removal and capture of these horses violates the mandates of the Wild Horse Act which requires Defendants to protect such horses from capture, branding, harassment, or death.

Moreover, the Wild Horse Act requires Defendants to maintain a current inventory of wild, free-roaming horses in the Tonto National Forest. See 16 U.S.C. §1333(b). In fact, Congress specifically amended the Wild Horse Act in 1978 by passing the Public Range Lands Improvement Act. By the 1978 Act, the Secretary is required to maintain a current inventory of wild horses on given areas of the public lands so that determinations can be made as to whether overpopulation exists and whether action should be taken to remove excess animals. See 43 C.F.R. §4700.0-5(d) (1983). Defendants have failed to maintain any such inventory.

The evidence presented by Plaintiffs establishes that the horse sought to be removed constitute wild horses qualifying for protection under the Wild Horse Act. As a result, this Court should issue the requested TRO to preserve the status quo lest Defendants prevent resolution of Plaintiff's claim by removing or allowing the removal of the wild horses from the area in question. See *Marcos*, 862 F.2d at 1362.

3. Likelihood of Success Under the APA.

The APA prohibits Defendants from acting arbitrarily and capriciously in issuing regulations and decisions such as the present capture and removal of horses in the Tonto National Forest. Defendants' efforts to initiate removal of over one hundred horses without first conducting a full and proper investigation as required under NEPA is arbitrary and "otherwise not in accordance with law." 5 U.S.C. §706(2)(a). Moreover, Defendants' failure to manage and protect the horses in the Tonto National Forest also constitutes a violation of the APA. As a result Plaintiffs are likely to succeed on their claim that Defendant's actions violate the mandate of the APA.

B. Irreparable Injury.

Allowing Defendants to proceed with or allow the unlawful removal of over one hundred wild horses will result in irreparable injury. In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action. *High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004). While an injunction does not automatically issue upon a finding that an agency violated NEPA, the presence of strong NEPA claims, like Plaintiffs' present cause of action, gives rise to more liberal standards for granting an injunction. Id. If environmental injury is sufficiently likely, the balance of harm will usually favor the issuance of an injunction to protect the environment. Id.

The circumstances here require the immediate issuance of an injunction. Defendants seek to begin or allow the immediate removal and capture of these horses on August 7, 2015. Once these horses, who are individually known and documented, are captured and removed, they cannot be replaced. As indicated by the wording of the Wild Horse Act, wild horses "enrich the lives of the American people" and "contribute to the diversity of life forms within the Nation." 16 U.S.C. §1331. As Congress declared in

1971, "these horses ... are fast disappearing from the American scene."

Defendants' proposed actions will facilitate this disappearance. Defendants' August 7, 2015 deadline to begin or allow the capture, removal, and eventual slaughter of these unclaimed horses presents an immediate and irreparable harm. Defendants' actions constitute more than simply thinning the population of wild horses in the Tonto National Forest, but rather a total extermination of all horse within the Forest. Any wild horses within the Tonto National Forest will be rendered extinct. The subsequent damage to the human environment would be beyond repair. As a result of the irreparable and immediate injury that will necessarily flow from Defendants' capture and removal of the horses at issue, this Court should issue the requested TRO.

II. The Court Should Issue a Writ of Mandamus to Compel Defendants to Comply With Their Statutory Obligations.

The conditions precedent for issuing a writ of mandamus are as follows: (1) the plaintiff's claim is clear and certain; (2) the defendant official's duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. See *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002). While true that the writ of mandamus is used primarily to compel the performance of a ministerial duty, "[i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion." Id.; see also *Miguel v. McCarl*, 291 U.S. 442, 451, 54 S.Ct. 465 (1934); FEDERAL PROCEDURE, L.Ed. §20:662 (1992 & Supp. 2001).

Defendants' duties under the Wild Horse Act are ministerial and clear. Defendants have the obligation to protect wild horses from capture, branding, harassment or death. Moreover, the Wild Horse Act requires the maintenance of a current inventory of wild, free-roaming horses on given areas of public lands. Defendants have no discretion in complying with the terms of the Wild Horse Act. There exists no other

adequate remedy available to protect these horses other than compliance with the Wild Horse Act. As a result, this Court should enter a writ of mandamus requiring Defendants to comply with their statutory duties.

III. The Court Should Not Require Plaintiffs to Post a Bond.

The Court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review. See *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (bond not required because of the "chilling effect" on public interest litigants seeking to protect the environment). Plaintiffs are a non-profit group and an individual with limited means seeking only to protect the wild horses in the Tonto National Forest and consequently the human environment. Therefore, to encourage actions for the protection of the human and natural environment, this Court should not require the posting of security.

The TRO will not economically harm Defendants, but rather will maintain the status quo that has been in place for decades and ensure that the requirements of the APA, NEPA, and the Wild Horse Act are followed. In fact, as the TRO will prevent the mobilization of men and equipment to capture the wild horses, it may actually eliminate economic expenditures. Thus, no security or, at most, a nominal security is required. See *Coquina Oil Corp. v. TransWestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987) (holding that no security is required when there exists no likelihood of legitimate financial harm to a defendant). Moreover, the strong likelihood of success on the merits tips in favor of a minimal bond or no bond at all. See *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975).

Relief Requested

As specifically stated in this Application, Plaintiffs request that this Court (a) issue a temporary restraining order prohibiting Defendants, its officers, agents, servants, employees, and those acting in active concert or participation with them receiving actual notice of the Order to refrain from rounding up or allowing the rounding-up and removal approximately on hundred wild horses from the Tonto National Forest until Defendants have complied with the requirements of the APA and NEPA as specifically stated above, including the preparation of an EIS, scientific and observational confirmation of the presence of wild horses in the Tonto National Forest, and allowing for public comment on the removal; and (b) issue a writ of mandamus compelling Defendants to comply with the requirements of the Wild Horse Act in protecting and managing horses on public lands with the Tonto National Forest, including the preparation of a current inventory and census indicating the number of wild horses presently residing on protected land. Furthermore, Plaintiffs ask the Court to set a briefing schedule and hearing date for consideration of a preliminary injunction application brought by Plaintiffs.

DATED this 6th day of August, 2015.

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