

## Ninth Circuit Clarifies When Uncertainty Requires an Environmental Impact Statement



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plaintiffs challenged the Bureau of Land Management's plan to geld wild male horses as part of its program for managing an overpopulation of wild horses in northeastern Nevada. To comply with NEPA, BLM prepared an environmental assessment and issued a finding of no significant impact. The plaintiffs argued that BLM should have prepared an EIS, citing several of the intensity factors that may require an EIS according to the Council on Environmental Quality's NEPA regulations in effect at the time. Those regulations required agencies to consider whether an action would have significant impacts based on the action's context and ten factors regarding the intensity of the action's effects. The plaintiffs also argued that BLM did not adequately address comments suggesting an alternative of surgical vasectomy. In addition, the plaintiffs claimed that BLM violated the Wild Free-Roaming Horses and Burros Act. The court ruled in favor of BLM on all claims, upholding its gelding plan. **Highly Uncertain Effects.** The plaintiffs argued that BLM should have prepared an EIS because the effects of its gelding plan were highly uncertain. The court held that BLM reasonably concluded, based on available evidence, that there were no substantial questions as to whether gelding and releasing horses back into the wild would have a significant effect on the environment. The EA acknowledged that there were few studies on the behavior of geldings released into wild, but it predicted that effects would be insignificant based on existing research addressing the behavior of gelded domesticated and semi-feral horses, the natural social behavior of wild horses,

and the effects of castration on other species. The record did not contain any evidence affirmatively showing that releasing geldings into the wild could affect herd behavior. The plaintiffs pointed to a National Academy of Sciences report that concluded the effects of releasing geldings could not be predicted; the court determined that this single report was not sufficient to demonstrate that the effects were highly uncertain. Furthermore, the court held that BLM was not required to wait to take action until it could complete an in-progress study on the effects of gelding wild horses. **Highly Controversial Effects.** The court rejected the plaintiffs' claim that BLM should have prepared an EIS because the effects of the gelding plan were highly controversial. The court explained that there was no controversy because the plaintiffs did not identify any evidence that contradicted the BLM's findings. The court implied that expert opinions cited by the plaintiffs were not credible because they were not based on the experts' own studies and they contained speculation unsupported by existing research. **Unique Characteristics.** The court rejected the plaintiffs' argument that BLM should have prepared an EIS because its action was in close proximity to cultural resources, i.e., wild horses. The court held that wild horses are not a cultural resource for purposes of NEPA. The court explained that the Wild Horses Act mandated how agencies should manage wild horses and how the environmental effects of those management actions should be evaluated; this specific statute took precedence over NEPA, which is a general law. **Precedent for Future Actions with Significant Effects.** The court held that the gelding plan did not create a precedent for future actions with significant effects, which is another intensity factor that may require an EIS. The court explained that the gelding plan did not establish gelding as an accepted strategy for future population management programs, and it was not the first instance of releasing geldings into the wild. **Response to Comments.** The court held that BLM's failure to respond to comments suggesting surgical vasectomy as an alternative was not arbitrary or capricious. The court explained that evidence in the record, including a BLM guidebook, indicated that the effects of vasectomy and gelding were similarly uncertain. Although BLM did not explicitly respond to the comments about vasectomies, the court held this evidence supported BLM's decision, and it could therefore discern the reasons for BLM's rejection of vasectomy as an alternative. **Wild Horses Act.** The court ruled that BLM complied with the Wild Horses Act's requirements to consult with the National Academy of Sciences and other experts. The court held that BLM consulted with the National Academy of Sciences by considering its report on gelding and acknowledging the report's uncertain conclusions in the EA. In addition, the court held, BLM consulted with scientific experts by accepting public comments, responding to the comments, and addressing their substantive concerns in the EA.

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