

# Ninth Circuit Reins in Bad Rulemaking for Wild Horses

## INTRODUCTION

Wild horses and cattle are quintessential symbols of the American West. These animals are favorite subjects of American art, depicted grazing side by side on sweeping grasslands, drinking from the same streams. This nostalgic picture, however, is foreclosed by reality. Overgrazing has led to ecosystem degradation and has exacerbated biodiversity loss.<sup>1</sup> Though the sheer number of these animals threatens Western ecosystems, laws entrench their presence on public lands.<sup>2</sup> Federal agencies have yet to develop an effective, evidence-based strategy to mitigate the negative impacts of overgrazing on rangelands.<sup>3</sup>

In *Friends of Animals v. Haaland*, the Ninth Circuit removed a barrier to petitioning a species under the Endangered Species Act (ESA), creating new hope for grazing policy reform.<sup>4</sup> The decision may empower agencies to indirectly restrict grazing on millions of acres of American rangelands, in turn improving ecosystem health.<sup>5</sup> The U.S. Fish and Wildlife Service (FWS), in assessing the merits of listing wild horses, must confront overwhelming data that implicates both horses and cattle in rangeland degradation.<sup>6</sup> Therefore, an agency decision to list rangeland species as threatened or endangered can be a mechanism to curb the damaging impacts of horses and cattle, too. The court

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1. Paul R. Krausman et al., *Chapter 6 An Assessment of Rangeland Activities on Wildlife Populations and Habitats*, in U.S. DEP'T OF AGRIC., CONSERVATION BENEFITS OF RANGELAND PRACTICES: ASSESSMENT, RECOMMENDATIONS, AND KNOWLEDGE GAPS 266 (David D. Brisk ed., 2011) (finding that livestock grazing on public lands led to reductions in nesting success of quail and sage grouse, increased predation of small rangeland mammals, disease in bighorn sheep from interactions with domestic stock, competition for forage that negatively impacted pronghorn and mule deer, and degradation of riparian areas, which threatened carnivores reliant on well-vegetated riparian areas for hunting).

2. See Press Release, Pub. Emps. for Env't Resp., *America's Rangelands Deeply Damaged by Overgrazing* (Mar. 5, 2020), <https://peer.org/americas-rangelands-deeply-damaged-by-overgrazing/>.

3. See Mara C. Hurwitt, *Freedom Versus Forage Balancing Wild Horse and Livestock Grazing on Public Lands*, 53 IDAHO L. REV. 425, 426 (2017).

4. *Friends of Animals v. Haaland*, 997 F.3d 1010, 1013 (9th Cir. 2021).

5. See Jennifer Yachnin, *Could Conservation Plan Prompt Tougher Grazing Oversight?*, E&E NEWS GREENWIRE, (Nov. 1, 2021, 12:29 PM), <https://www.eenews.net/articles/could-conservation-plan-prompt-tougher-grazing-oversight/> (describing the 30 by 30 conservation goal: conserving 30 percent of the land to support biodiversity in the United States by 2030).

6. See, e.g., Molly M. Kaweck et al., *Impacts of Wild Horses, Cattle, and Wildlife on Riparian Areas in Idaho*, 40 RANGELANDS 45, 45 (2018).

discarded the “pre-file notice rule” (the Rule)<sup>7</sup> because it interfered with the FWS’s duty to base its review of the Pryor Mountain wild horse petition on “the best scientific and commercial data available.”<sup>8</sup> Best-available science supports sharply reducing livestock on the range.<sup>9</sup> Therefore, the FWS could leverage its regulatory power to restrict public lands grazing.

Agency delegation is essential for expertise-driven application of laws.<sup>10</sup> Especially given congressional gridlock, regulatory agencies have the power to innovate law and policy absent legislation. Agencies can “push policy in new directions with limited fear of congressional reversal”<sup>11</sup> and bring laws into alignment with current science.<sup>12</sup> Here, regulatory power allowed the FWS to create a procedural rule that was antithetical to the substance of the law. However, the Ninth Circuit’s decision in *Friends of Animals* showed just how powerful delegation can be when the rule promulgated is not “arbitrary and capricious.”<sup>13</sup> In summary, the FWS should use their power of delegation to push the needle towards more ecologically-sound policies, and capitalize on the Ninth Circuit’s expansion of the ESA to designate more critical habitat for deserving threatened and endangered species, indirectly displacing wild horses and cattle from public lands.

## I. BACKGROUND

### A. Legal Background

The cause of action in *Friends of Animals* is based on the Endangered Species Act of 1973, which aims to protect endangered and threatened species and their habitats.<sup>14</sup> Section 4 of the ESA is central to this case, which details the process of designating critical habitat and listing, delisting, or modifying the status of species by petition.<sup>15</sup> Section 4 provides that petitioners are entitled to a review and answer by the agency within ninety days after receiving the petition, wherein the Secretary of the Interior shall decide if the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”<sup>16</sup> The agency must base its actions on evidence

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7. 50 C.F.R. § 424.14(b) (required that affected states receive 30-day notice of an intent to file a petition to list an endangered species.)

8. *Friends of Animals*, 997 F.3d at 1017; see 16 U.S.C. § 1536(a)(2).

9. Press Release, Pub. Emps. for Env’t Resp., *supra* note 2.

10. See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

11. Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1757 (2015).

12. John P.A. Ioannidis, *All Science Should Inform Policy and Regulation*, 15 PLOS MED. 5, 5 (2018).

13. See *Friends of Animals*, 997 F.3d at 1017; 5 U.S.C. § 706(a) (stating that agency actions should be set aside if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” which was the standard of review in *Friends of Animals*.)

14. See 16 U.S.C. § 1531(b).

15. *Id.* §§ 1531–44.

16. *Id.* § 1533(b)(3)(A).

supported by “the best scientific and commercial data available.”<sup>17</sup> Private entities have a right of action to sue any private or public person for an alleged violation of an ESA rule, and members of the public can file a petition to list a species.<sup>18</sup>

### B. Case Background

In 2017, Friends of Animals filed a petition requesting that the FWS list the Pryor Mountain wild horse population as a threatened or endangered population under the ESA.<sup>19</sup> The FWS declared that the petition did not qualify for review solely because Friends did not file required notification letters to agencies in the affected states of Montana and Wyoming.<sup>20</sup> Friends challenged the denial in the District Court of Montana.<sup>21</sup> Friends argued that the FWS violated the ESA and the Administrative Procedure Act (APA) by refusing to issue a finding on Friends’ petition within ninety days.<sup>22</sup> The plaintiff also claimed the Rule was inconsistent with the ESA’s standards for petition review and unlawfully restricted the petitioner’s discretion to control timing of filing petitions.<sup>23</sup> The district court held that the Rule was a permissible construction of the ESA and granted summary judgment to the government.<sup>24</sup> On appeal, the Ninth Circuit reversed the decision, holding that the Rule contravened the ESA.<sup>25</sup>

The court applied the *Chevron* two-step framework and the APA’s arbitrary and capricious standard to strike down the Rule, remove a procedural hurdle, and make filing under the ESA more accessible to petitioners.<sup>26</sup> The court found that the Rule allowed the FWS to forgo its responsibility as administrator of the ESA.<sup>27</sup> The Rule “frustrate[d] the ESA by arbitrarily impeding petitioners’ ability to submit—or the FWS obligation to review—meritorious petitions.”<sup>28</sup> Friends’ petition “complied with the substantive requirements” and was entitled to a ninety-day review.<sup>29</sup>

Because the action under review involved agency rulemaking, courts applied the two-step framework established in *Chevron v. Natural Resource*

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17. 50 C.F.R. § 402.14(g)(8) (2003); 16 U.S.C. § 1536(a)(2).

18. See 50 C.F.R. § 424.14; 16 U.S.C. § 1533(h).

19. Friends of Animals, Petition Submitted to the U.S. Secretary of the Interior and U.S. Fish and Wildlife Service to List the Pryor Mountain Mustang Population as Threatened under the Endangered Species Act (Jun. 12, 2017), <https://ecos.fws.gov/docs/tess/petition/77.pdf> [hereinafter Friends of Animals Petition].

20. Friends of Animals, 997 F.3d at 1014.

21. *Id.*

22. *Id.* at 1015.

23. *Id.*

24. *Id.*

25. *Id.* at 1013.

26. *Id.* at 1017.

27. *Id.*

28. *Id.*

29. *Id.*

*Defense Council*.<sup>30</sup> *Chevron* step one asks whether Congress has “directly spoken to the precise question at issue.”<sup>31</sup> If the federal statute is “silent or ambiguous with respect to the specific issue,” then the relevant regulatory agency is given deference to interpret it.<sup>32</sup> Step two requires courts to determine whether the agency’s interpretation is reasonable.<sup>33</sup> Agencies are given latitude to make reasonable interpretations of statutes, even if the court had a different interpretation, so long as they comport with the statute and Congress’s intent.<sup>34</sup> The Ninth Circuit agreed with the District Court on step one: the ESA is silent as to pre-petition procedures and notice requirements.<sup>35</sup> The court found the Rule failed on step two: the Rule was unreasonable because it created a procedural barrier to agency review and therefore “[ran] afoul of the ESA’s plain directive that the Services’ initial assessment be based on the contents of the petition.”<sup>36</sup> The purpose behind the Rule was to encourage states to provide information with which the FWS could consult when making their ninety-day finding.<sup>37</sup> This was contrary to the ESA’s requirement that the FWS should not consult materials outside of the petition.<sup>38</sup>

### C. The Administrative Procedure Act

Judicial review of administrative decisions regarding the ESA is governed by the APA.<sup>39</sup> Under the APA, courts must set aside actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>40</sup> The standard for an arbitrary and capricious determination is high: the agency interpretation is typically only struck down when the agency has “relied on factors which Congress has not intended it to consider . . . or is so implausible that it could not be . . . the product of agency expertise.”<sup>41</sup> Courts are not to substitute their own judgment for the agency’s judgment.<sup>42</sup> Agencies have technical expertise, and are therefore better positioned to make good policy and

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30. See *Chevron*, 467 U.S. at 842.

31. *Id.*

32. *Id.* at 843.

33. *Id.* at 844.

34. *Id.* at 861.

35. *Friends of Animals*, 997 F.3d at 1016.

36. *Id.* at 1017.

37. *Id.* at 1016.

38. *Id.*; see also *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142–44 (D. Colo. 2004) (finding that the FWS arbitrarily and capriciously performed a 90-day review relying on information and opinions of a few outside sources).

39. See 5 U.S.C. §§ 701–06.

40. *Id.* § 706(2)(A).

41. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

42. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (stating that review under the arbitrary and capricious standard “is narrow, and [we do] not substitute [our] judgment for that of the agency.”).

regulatory decisions.<sup>43</sup> Courts do not have the same depth of expertise.<sup>44</sup> Consequently, when technical issues arise, it is undesirable for courts to “say what the law is.”<sup>45</sup>

In 2016, the FWS enacted the Rule that modified the ESA petition process.<sup>46</sup> The Rule required that a petitioner “provide notice to the state agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species . . . occurs” at least thirty days prior to submitting the petition.<sup>47</sup> This change was intended to “improve the quality of petitions through clarified content requirements and guidelines,” and “better focus the Services’ resources on petitions that merit further analysis.”<sup>48</sup>

## II. ANALYSIS

### *A. The Court Was Right to Strike Down the Agency Rule Because It Violated the Substance of the ESA*

The ESA’s directive is clear: the Secretary of the Interior must make determinations on petitions “solely on the basis of the best scientific and commercial data available to [them] after conducting a review of the status of the species.”<sup>49</sup> Here, the FWS refused to review the petition on a procedural basis, which contravened the ESA’s requirement that the agency conduct a scientific review of the wild horse population’s status.<sup>50</sup> In striking down the Rule, the Ninth Circuit removed a procedural barrier for Friends and for future ESA petitioners.<sup>51</sup> The court distinguished the Rule from the FWS’s other rules regarding petition requirements, which “encourage efficiency in petition processing by ensuring that the Services have necessary information.”<sup>52</sup>

Courts’ checks on agency power are as important as allowing agencies to interpret ambiguities.<sup>53</sup> *Friends of Animals* shows how judicial oversight keeps

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43. See Daniel T. Shedd & Todd Garvey, CONG. RSCH. SERV., R43203, CHEVRON DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES 1, 4 (Aug. 28, 2013); see also Daniel J. Hemel & Aaron L. Nielson, “Chevron” *Step One-and-a-Half*, 84 UNIV. CHI. L. REV. 2, 757–824 n.29 (2017).

44. See Shedd & Garvey, *supra* note 43, at 4.

45. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

46. 50 C.F.R. § 424.14.

47. *Id.* § 424.14(b).

48. Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions; 81 Fed. Reg. 66,462, 66,462 (Sept. 27, 2016) (codified at 50 C.F.R. pt. 424).

49. 16 U.S.C. § 1533(b)(1)(A).

50. *Friends of Animals*, 997 F.3d at 1017.

51. *Id.*

52. *Id.*; see also Andrea Wortzel et al., *Federal Agencies Revise Endangered Species Act Listing Petition Process*, ENV’T L. & POL’Y MONITOR (Oct. 3, 2016), <https://www.environmentallawandpolicy.com/2016/10/federal-agencies-revise-endangered-species-act-listing-petition-process/> (Around the same time as the pre-file notice rule, the FWS created a limitation on the number of species per petition. The FWS also eliminated the regulation requiring the agency to confirm that a petition complies with applicable regulations within 30 days.).

53. C.R. Sunstein, *Chevron as Law*, 107 GEO. L. REV. 1613, 1674 (2019).

agencies from “straying outside the boundaries Congress created.”<sup>54</sup> However, this relationship should be carefully balanced so as not to constrict good agency rulemaking.<sup>55</sup> Knowing it will be judicially reviewed, an agency is pressured to produce well-reasoned and researched rules.<sup>56</sup> This relationship creates a “lever” by which those who care about well-documented rules inside the judiciary and agencies can move those who act contrary to science or technical expertise.<sup>57</sup> In *Friends of Animals*, the court used the lever to prevent the FWS from abdicating its responsibility to review petitions on the merits.<sup>58</sup>

*B. Horses and Cows Are Overgrazing Public Lands and the Environmental Impacts Are Not Adequately Mitigated by Law and Policy*

Friends’ petition asserted that the Pryor Mountain wild horse population is critically small—170 horses left on 27,000 acres—and that the horses’ continued survival was threatened by habitat reduction, the inadequacy of existing regulations, and the political pressure to remove wild horses.<sup>59</sup> If the FWS had conducted a ninety-day review of Friends’ petition, it seems unlikely it would have granted protections to the population. The FWS denied a similar petition on the basis that the wild horse was not genetically distinct from the domesticated horse.<sup>60</sup> Furthermore, wild horses threaten native species and plant diversity and impair habitat quality.<sup>61</sup> They continuously graze in sensitive ecosystems, like riparian zones, and they reproduce quickly—herd levels can grow up to 20 percent per year.<sup>62</sup> With few predators, wild horses easily degrade ecosystems.<sup>63</sup> Herd management is a tool to intervene and reduce these negative impacts.<sup>64</sup>

The BLM has failed to keep wild horse populations below the agency-determined “appropriate management levels” and is scrambling to handle the

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54. Richard J. Pierce, *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L. J. 91, 94 (2021).

55. Sunstein, *supra* note 53, at 1629.

56. See Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 UNIV. CHI. L. REV. 815, 829 (2008).

57. See *id.*

58. See *id.*

59. See *Friends of Animals Petition*, *supra* note 17.

60. Molly Priddy, *US Wildlife Agency Won’t List Wild Horse as Endangered*, FLATHEAD BEACON (Jul. 2, 2015), <https://flatheadbeacon.com/2015/07/02/us-wildlife-agency-wont-list-wild-horse-as-endangered/> (explaining that the FWS denied a similar petition to list a wild horse population, stating that, “although behaviors between domestic and wild, or feral, animals of the same species may differ . . . we find that the petition does not present substantial information that the North American wild horse may be markedly separate from other populations of horse as a consequence of behavioral differences.”).

61. Kirk W. Davies & Chad S. Boyd, *Ecological Effects of Free-Roaming Horses in North American Rangelands*, 69 BIOSCIENCE 558, 563 (2019).

62. *Id.* at 558–59.

63. Daniel S. Licht et al., *Using Small Populations of Wolves for Ecosystem Restoration and Stewardship*, 60 BIOSCIENCE 147, 147 (2010).

64. Davies & Boyd, *supra* note 61, at 562.

excess animals.<sup>65</sup> Managers admit this.<sup>66</sup> The Bureau of Land Management (BLM) manages herds according to the Wild Free-Roaming Horses and Burros Act (WHBA) of 1971, which requires that managers act to “maintain a thriving natural ecological balance . . . and protect the range from the deterioration associated with [free-roaming horse and burro] overpopulation.”<sup>67</sup> Opponents argue that the appropriate management levels BLM has set to maintain the WHBA’s vaguely defined “ecological balance” are too low and compensate for the impacts of so many cows.<sup>68</sup>

An individual cow’s effect on the landscape is not as damaging as a wild horse’s, but by sheer numbers, cattle are incredibly harmful.<sup>69</sup> Though the government controls grazing locations seasonally and by levels of use, cows are still degrading riparian plant biomass and streambank integrity.<sup>70</sup> Despite these controlled management measures, cattle still outnumber wild horses thirty-to-one on public lands.<sup>71</sup> The Taylor Grazing Act (TGA) of 1934 was enacted to slow rangeland degradation from cattle grazing.<sup>72</sup> The statute requires that owners buy permits to graze their cattle on federal lands.<sup>73</sup> The TGA did not achieve its goal. In 1962, over 83 percent of the public grasslands remained in fair or poor condition.<sup>74</sup> Today, more than a third of the 155 million acres leased to ranchers for cattle and other domestic livestock does not meet minimum standards for water and vegetation health.<sup>75</sup>

The federal government’s attempts to reduce livestock on the range have been met with strong, even violent, push back.<sup>76</sup> The 1970s “Sagebrush

65. Lindsay Martinez, *BLM Needs More Time, Money for Wild Horse Management, Report Says*, WILDLIFE SOC. (May 27, 2020), <https://wildlife.org/blm-needs-more-time-money-for-wild-horse-management-report-says/>.

66. Britta Lokting, *The Wild Horse Wars*, WASH. POST, Nov. 18, 2020, <https://www.washingtonpost.com/magazine/2020/11/18/wild-horses-ranchers-animal-rights-activists/> (quoting Jenny Lesieutre, a spokeswoman for wild horse and burro issues at the Bureau’s Nevada office: “We’re at a point that we’ve never been before . . . it’s more than three times what the land can sustainably support in the long term, and we are a multi-use agency. That land is shared by all kinds of wildlife and plants.”).

67. 16 U.S.C. § 1333(b)(2).

68. See, e.g., Brian Maffly, *Report BLM Turns a Blind Eye to Cattle Grazing Impacts, Blames Wild Horses*, SALT LAKE TRIB. (Sept. 26, 2021, 2:23 PM), <https://www.sltrib.com/news/environment/2021/09/24/report-blm-turns-blind/>; Erik Molvar, *The Scapegoating of Wild Horses*, W. WATERSHED PROJECT (Oct. 31, 2019), <https://americanwildhorsecampaign.org/media/scapegoating-wild-horses>; *Wild Horse and Burro Program*, BUREAU OF LAND MGMT., <https://www.blm.gov/whb> (last visited Mar. 15, 2022); see also 16 U.S.C. §§ 1331–40.

69. See Kaweck et al., *supra* note 6, at 51.

70. *Id.*

71. See Maffly, *supra* note 68; Press Release, Pub. Emps. for Env’t Resp., *supra* note 2.

72. See Hurwitt, *supra* note 3, at 440.

73. 43 U.S.C. § 315.

74. Hurwitt, *supra* note 3, at 440 (citing *Public Lands Council v. Babbit*, 529 U.S. 728, 737 (2000)).

75. Yachnin, *supra* note 5.

76. *The Sagebrush Rebellion, 1960-1982*, LIBR. OF CONG., <https://www.loc.gov/collections/ranching-culture-in-northern-nevada-from-1945-to-1982/articles-and-essays/a-history-of-the-ninety-six-ranch/the-sagebrush-rebellion-1960-1982/> (last visited Mar. 15, 2022).

Rebellion” was, in part, livestock owners’ reaction to the BLM reducing cattle on the range by a third in the 1950s.<sup>77</sup> In 1971, Congress mandated livestock reductions to balance wild horse and burro grazing.<sup>78</sup> Several years later, the Natural Resources Defense Council sued the Secretary of the Interior, arguing that public lands were being overgrazed and the effects of the use must be quantified by environmental impact studies.<sup>79</sup> Oversight of grazing districts has evolved, according to the BLM, to consider new expectations and uses of public lands in the West.<sup>80</sup> However, the TGA and these other government actions have not successfully stopped rangeland degradation.<sup>81</sup>

Wild horse and cattle grazing on federal lands must be effectively restricted to achieve biodiversity conservation goals.<sup>82</sup> Multi-use lands should be factored into the “30 by 30” goal—the Biden administration’s plan to conserve 30 percent of land to support biodiversity in the United States by 2030.<sup>83</sup> Such broad conservation goals are impeded by policy favoring cattle interests. Old grazing laws, like the TGA, are upheld despite the modern need to reduce the number of cows in environmentally sensitive areas.<sup>84</sup> Advocates believe wild horses have become scapegoats for the impacts of cows on public lands.<sup>85</sup> They allege disproportionate attention on horses and that to focus efforts on “impacts made by thousands of wild horses, while ignoring troves of data on the impacts from millions of cattle, undermines . . . efforts to create a culture of scientific integrity at the DOI.”<sup>86</sup> Indeed, there is a myriad of studies detailing the negative impacts of overgrazing and a need for robust government action to remedy the environmental impacts on native species.<sup>87</sup>

*C. The FWS Should Use the ESA to Indirectly Displace Ungulates and Meet Minimum Health Standards for Water and Vegetation*

In *Friends of Animals*, the court’s decision expands access to the ESA and indirectly helps the FWS reshape the status quo on cattle grazing policy.<sup>88</sup> Regardless of the outcome for the Pryor Mountain wild horse, the Ninth Circuit was right to strike down an agency rule that contravened the ESA. In doing so,

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77. *Id.*

78. Joseph E. Taylor III et al., *Follow the Money: A Spatial History of In-Lieu Programs for Western Federal Lands*, STAN. CTR. FOR SPACIAL & TECH. ANALYSIS, [http://followthemoney.stanford.edu/pages/BLM\\_Grz\\_3.html](http://followthemoney.stanford.edu/pages/BLM_Grz_3.html) (last visited Mar. 15, 2022).

79. Nat. Res. Def. Council v. Morton, 388 F. Supp. 829, 833 (D.D.C. 1974).

80. BUREAU OF LAND MGMT., *About Livestock Grazing on Public Lands*, <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing/about> (last visited Mar. 15, 2022).

81. See Hurwitt, *supra* note 3, at 440.

82. Yachnin, *supra* note 5.

83. *Id.*

84. *Id.*

85. Maffly, *supra* note 68; Molvar, *supra* note 68.

86. Maffly, *supra* note 68.

87. See Hurwitt, *supra* note 3, at 426.

88. See *Friends of Animals*, 997 F.3d at 1017.



the court made the ESA more accessible to the public and reminded the FWS of the ESA's directive to review petitions using best-available science.<sup>89</sup> One cannot consider wild horse management and ignore the intertwined impacts of cattle on land degradation.<sup>90</sup> With this procedural hurdle removed, more petitioners can file, thus giving the FWS more chances to designate ungrazed-degraded public land as critical habitat for species that warrant ESA protection. Indirectly, the FWS can use the ESA to reduce the number of acres open for public grazing.

Species by species, the FWS can chip away at the 155-million-acre monolith of publicly-grazed lands and use its power of delegation to mitigate rangeland harm. The court's decision should result in more petitions filed and, consequently, give the FWS more opportunities to designate critical habitat for species it grants ESA protections. This will result in a piecemeal reclamation of overgrazed lands. For example, if a species of ground-nesting bird is severely diminished due to ungulates' trampling of vegetation, the FWS could grant the species protection under the ESA and designate the species' home range as critical habitat. Petitioners can also shape grazing policy by petitioning to list wildlife in the most ecologically sensitive and degraded ecosystems and play a part in removing livestock from public lands.

#### CONCLUSION

The *Friends of Animals* decision provides a way for the FWS to address the specific issue of environmental degradation of horses and cows on public lands—an issue that is not adequately addressed by current management practices or legal frameworks.<sup>91</sup> The court here performed the important role of acting as a lever to make the FWS rely on best-available science in decision making.<sup>92</sup> Moving forward, the FWS should use best-available science to effectively regulate overgrazing despite the complex politics of public lands grazing. This decision makes the ESA more accessible for petitioners. The FWS can capitalize on this new accessibility and designate land degraded by cattle and horses as critical habitat for threatened or endangered wildlife.

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89. See 16 U.S.C. § 1536(a)(2).

90. See Kaweck et al., *supra* note 6, at 51.

91. See *Friends of Animals*, 997 F.3d at 1017; see also Hurwitt, *supra* note 3, at 426.

92. See Strauss, *supra* note 56, at 829; 16 U.S.C. § 1536(a)(2).

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**We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**