

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

2014 AUG 1 PM 2 35

STEPHAN HARRIS, CLERK
CHEYENNE

Timothy Kingston (WY Bar No. 6-2720)
LAW OFFICE OF TIM KINGSTON, LLC
408 West 23rd Street, Suite 1
Cheyenne, WY 82001-3519
TEL: (307) 638-8885
FAX: (307) 637-4850

Michelle D. Sinnott (VA Bar No. 85563, *pro hac vice* submitted)
Caitlin T. Zittkowski (CA Bar No. 290108, *pro hac vice* submitted)
William S. Eubanks II (D.C. Bar No. 987036, *pro hac vice* submitted)
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave, NW, Suite 700
Washington DC, 20009
TEL: (202) 588-5206
FAX: (202) 588-5049
msinnott@meyerglitz.com
czittkowski@meyerglitz.com
beubanks@meyerglitz.com

Counsel for Petitioners

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

AMERICAN WILD HORSE PRESERVATION)
CAMPAIGN)
P.O. Box 1048)
Hillsborough, NC 27278,)
)
THE CLOUD FOUNDATION)
107 South 7th Street)
Colorado Springs, CO 80905,)
)
RETURN TO FREEDOM)
P.O. Box 926)
Lompoc, CA 93438,)
)
CAROL WALKER)
16500 N. Dakota Ridge Rd.)
Longmont, CO 80503,)
GINGER KATHRENS)
107 South 7th Street)
Colorado Springs, CO 80905,)

KIMERLEE CURYL
P.O. Box 1802
Santa Ynez, CA 93460

Petitioners,

v.

SALLY JEWELL, Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240,

NEIL KORNZE, Acting Director
Bureau of Land Management
1849 C Street, N.W.
Washington, DC 20240,

Respondents.

Civ. No. 14-CV-152-J

PETITION FOR REVIEW

1. This case challenges the unprecedented decision by the Bureau of Land Management (“BLM”) under Section 4 of the Wild Free-Roaming Horses and Burros Act (“Wild Horse Act” or “WHA”), 16 U.S.C. § 1334, to remove *all* of the wild horses from the Checkerboard lands within the Adobe Town, Salt Wells Creek, and Great Divide Basin herd management areas (“HMA”) in Wyoming. Approximately half of these Checkerboard lands are *public* lands managed by BLM specifically for the long-term maintenance of wild horses. Yet, BLM has authorized the *permanent* removal of 806 wild horses from this area of the range under the guise that this roundup is necessary to comply with Section 4 of the Wild Horse Act and the April 2013 Consent Decree in *Rock Springs Grazing Association v. Salazar*, No. 2:11-cv-263, 935 F. Supp. 2d 1179 (D. Wyo. 2013), ECF No. 81-1 (“2013 RSGA Consent Decree”).

However, Section 4 of the Wild Horse Act grants BLM the very *limited* authority to remove “wild free-roaming horses or burros [that] stray from public lands onto privately owned land” in order to return those horses back to the public lands from which they strayed. 16 U.S.C. § 1334. The Checkerboard lands in Wyoming are not just private lands. These are a patchwork of private and *public* lands – public lands that Plaintiffs use to view, photograph, and observe wild free-roaming horses.

2. BLM authorized the removal of all of the wild horses from the Checkerboard lands within the Adobe Town, Salt Wells Creek, and Great Divide Basin HMAs without conducting any analysis required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f. Rather, BLM invoked a categorical exclusion for the “[r]emoval of wild horses or burros *from private lands* at the request of the landowner.” Department of Interior Manual, BLM 516 DM 11.9, D4 (emphasis added). Given BLM’s acknowledgment that the agency will (a) round up wild horses from both private and *public* lands and (b) *permanently* remove all of these horses from the range, which will result in significant environmental impacts, this categorical exclusion is not applicable to BLM’s decision. The agency’s invocation of this categorical exclusion and its failure to analyze *any* of the environmental consequences of permanently removing 806 wild horses from the range is a blatant violation of NEPA.

3. Compounding BLM’s flagrant NEPA violations, according to the agency’s own census estimates, BLM’s permanent removal of more than 800 wild horses from the Checkerboard lands in Wyoming will bring the wild horse population in the Great Divide Basin and Adobe Town HMAs below the low appropriate management level (“AML”) for these areas, which violates the requirements of the Wild Horse Act. *See* 16 U.S.C. § 1333(b)(1). In addition,

BLM has established resource management plans (“RMPs”) for the Great Divide Basin and Adobe Town HMAs that require the agency to maintain the wild horse population in these areas within their respective AMLs. By completely ignoring these governing RMPs, BLM’s decision is arbitrary and capricious and not in accordance with law, within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(2).

4. BLM has also violated the Wild Horse Act by authorizing the *permanent* removal of wild horses from *public* land without making the statutorily required determination that: (a) there is an overpopulation of wild horses in the Adobe Town, Salt Wells Creek, and Great Divide Basin HMAs, and (b) that action is necessary to remove those wild horses determined by the agency to constitute “excess” animals. 16 U.S.C. § 1333(b)(2). The failure to make even that congressionally mandated determination before authorizing permanent removal from the range of more than 800 wild horses is a violation of the Wild Horse Act and the APA. *Id.*; 5 U.S.C. § 706(2).

5. The 2013 RSGA Consent Decree does not authorize or require BLM to violate NEPA, the Wild Horse Act, or the APA. In fact, the Consent Decree explicitly states that BLM is obligated to comply with these federal statutes and that “[n]othing in this Consent Decree shall be construed to limit or modify the discretion accorded to BLM by the applicable federal law and regulations . . . or general principles of administrative law with respect to the procedures to be followed in carrying out any of the activities required herein.” 2013 Consent Decree, ¶¶ 10, 6. BLM is merely attempting to point to the 2013 RSGA Consent Decree as an excuse not to abide by the several federal statutes and regulations that govern its actions here.

JURISDICTION

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PARTIES

7. Plaintiff American Wild Horse Preservation Campaign (“AWHPC”) is a broad-based coalition of public interest groups, environmentalists, humane organizations, and historical societies representing over ten million supporters. Supporters of the organizations represented by AWHPC enjoy viewing wild horses on public lands, including in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs, for observation, photography, and educational purposes. On behalf of its member organizations and supporters, AWHPC also regularly submits comments on various BLM actions related to the management of wild horses, such as decisions analyzing and authorizing removal of wild horses from the range.

8. BLM’s decision to remove hundreds of wild horses from the Checkerboard lands, including removing so many horses that it will bring the wild horse populations below the operative AMLs for the Great Divide Basin and Adobe Town HMAs, directly harms AWHPC’s organizational interests and the interests of its coalition members and supporters in protecting and preserving viable free-roaming herds of wild horses on public lands, and their aesthetic interests in observing and photographing wild horses engaging in their natural behaviors on these particular public lands. BLM’s failure to make an “excess” determination under the Wild Horse Act subject to public comment, coupled with BLM’s invocation of a categorical exclusion rather than preparing an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) to analyze the environmental impacts of the decision, harms the informational and other interests of AWHPC, its member organizations, and its supporters by depriving them of information related to the environmental effects of the permanent removal of hundreds of wild

horses from the Checkerboard lands and by depriving AWHPC of the opportunity to submit comments on BLM's decision regarding the management of wild horses on these HMAs.

9. A court order enjoining BLM from rounding up, removing, and otherwise harassing these wild horses will protect AWHPC's interests and those of its coalition members in the welfare and continued existence of viable free-roaming herds of wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs, and allow AWHPC and its supporters to be able to observe and otherwise enjoy the wild horse herds on these public lands, including in the Checkerboard. Requiring BLM to conduct an appropriate environmental analysis prior to deciding whether to permanently remove wild horses from the Checkerboard lands would also provide AWHPC, as well as its members and supporters, with crucial information concerning the potential environmental ramifications of such action and would afford AWHPC with the opportunity to participate in BLM's decision-making process by submitting comments.

10. Plaintiff the Cloud Foundation ("TCF" or "the Foundation") is a 501(c)(3) nonprofit organization headquartered in Colorado Springs, Colorado. TCF is dedicated to the preservation of wild horses on public lands in the western United States, including in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs. Members of TCF enjoy viewing, studying, photographing, and filming wild horses in their natural habitats, free from human interference, and they regularly travel to various areas, including the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs (including the Checkerboard), specifically for the purpose of viewing wild horses. BLM's decision authorizing the permanent removal of wild horses from these areas harms TCF's organizational interest, as well as the interest of its members, in preserving free-roaming wild horses on the public portions of the Checkerboard lands, in

addition to their aesthetic interests in observing, studying, and photographing wild horses on the range.

11. A court order enjoining BLM from rounding up, removing, and otherwise harassing these wild horses will protect TCF's and its members' interests in the welfare and continued existence of viable free-roaming herds of wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs, and will allow TCF to devote its resources to other wild horse conservation programs.

12. Plaintiff Return to Freedom ("RTF"), the AWHPC's founding organization, is a national wild horse preservation, education and sanctuary organization. RTF's American Wild Horse Sanctuary in Lompoc, California began relocating intact bands of wild horses directly from the range to the sanctuary nearly two decades ago. Since 1997, RTF has provided leadership to help define a viable direction for the preservation of America's wild horses with the understanding of their natural social behaviors and needs for long-term genetic viability and social well-being. RTF has pioneered the implementation of solution-based, non-intrusive wild horse management methods at its sanctuary, such as the use of Porcine Zona Pellucida ("PZP"), a non-hormonal birth control method that preserves the wild horses' natural behavior, and advocates for BLM to apply these minimally invasive management methods on the range. RTF's supporters also enjoy observing and photographing wild horses on public lands, including in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs (including the Checkerboard lands). BLM's decision authorizing the permanent removal of wild horses from the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs harms RTF's organizational interest, as well as the interests of its members, in using minimally invasive methods to manage

wild horses on the range in order to preserve their natural social behaviors. The permanent removal of horses from these areas also harms the aesthetic and recreational interests of RTF's supporters in observing and photographing these animals on the range.

13. A court order enjoining BLM from permanently removing wild horses from the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs will protect RTF's and its members' interests in managing these wild horses on the range by preventing the unnecessary removal of wild horses below the AMLs for these areas.

14. Plaintiff Carol Walker is a photographer with professional and personal interests in the wild horse herds in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs. She is also a board member of the Wild Horse Freedom Federation, a nonprofit organization dedicated to preventing wild equine extinction. She has spent her career photographing wild horses, particularly horses exhibiting wild and natural behaviors on the range. She sells fine art prints, calendars, and books of her photographs of wild horses engaging in their natural behaviors. Ms. Walker has visited the wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs several times a year since 2004. Most recently, she visited the Adobe Town HMA in May 2014, the Salt Wells Creek HMA in April 2013, and the Great Divide Basin HMA in June 2012. She intends to regularly return to observe the wild horses in these HMAs (including in the Checkerboard), both for her personal aesthetic interests in observing the wild horses and to pursue her professional and economic interests in photographing these animals, and is planning a trip in August 2014 to the Adobe Town and Salt Wells Creek HMAs (including the Checkerboard). A book of Ms. Walker's photographs is being published in France in October

2014, titled *Mustang: The Heart of an American Legend*, which includes photographs taken in these three HMAs.

15. BLM's proposed actions will seriously impair Ms. Walker's aesthetic, recreational, economic, and occupational interests in observing and photographing wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs. BLM's authorization of the removal of *all* wild horses from the Checkerboard lands – which is nearly a thousand wild horses that currently reside in these HMAs – will dramatically reduce her ability to observe and photograph wild horses in these HMAs, because there will be far fewer wild horses remaining after BLM implements its permanent removal, which will leave even fewer horses in the Great Divide Basin and Adobe Town HMAs than required by the governing RMPs. A court order enjoining BLM from rounding up, removing, and otherwise harassing these wild horses will redress the many personal and professional harms that this decision will cause Ms. Walker, and in the process protect Ms. Walker's ability to enjoy, photograph, and study these horses on the range.

16. Plaintiff Kimerlee Curyl is a photographer with a professional and personal interest in the wild horse herds in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs. She has spent her career photographing wild horses in hopes of inspiring others to preserve their place on the range. She sells fine art prints of wild horses and has exhibited her photographs in galleries across the country. Her work has also been used in advertising and product branding campaigns. In addition, she taught an equine photography workshop in June 2014 at RTF's sanctuary in California dedicated to preserving intact wild horse families (referred to as "bands"). Ms. Curyl has visited the wild horses in the Great Divide Basin, Adobe Town,

and Salt Wells Creek HMAs (including the Checkerboard) several times, most recently in June 2013. She intends to regularly return to observe the wild horses in these HMAs, both for her personal aesthetic and recreational interests in observing the wild horses and to pursue her professional interest in photographing these animals. More specifically, she plans to return to these areas in October 2014; however, she is much less likely to return to these HMAs if a roundup of this magnitude takes place because roundups disrupt the horses' natural social behaviors, making them more skittish and therefore more difficult to photograph.

17. BLM's decision impairs Ms. Curyl's aesthetic, recreational, economic, and occupational interests in observing and photographing wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs (including in the Checkerboard). BLM's authorization of the removal of all wild horses from the Checkerboard lands will dramatically reduce her ability to photograph wild horses in these HMAs, because there will be far fewer wild horses once BLM permanently removes them from these HMAs in numbers that will result in these areas dropping below the prescribed AMLs, making it far less likely Ms. Curyl will be able to observe and photograph wild horses on the public land in these areas. A court order enjoining BLM from rounding up, removing, and otherwise harassing these wild horses will redress the harms caused to Ms. Curyl by this decision, and in the process will protect Ms. Curyl's ability to enjoy, photograph, and study these horses in their natural habitat.

18. Plaintiff Ginger Kathrens is the founder and Executive Director of Plaintiff TCF. Since 1994 Ms. Kathrens has been studying, photographing, and filming wild horses in all ten western states as well as on Cumberland Island, Georgia. She has directed and produced three award-winning films that chronicle the life of Cloud, a pale palomino wild horse stallion and

TCF's namesake, which air on PBS's Nature series. Ms. Kathrens has also authored three natural history books about Cloud, as well as dozens of articles about wild horses. She speaks throughout the United States about her experiences in the wild and the plight of wild horses on public lands in the West. Ms. Kathrens has visited the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs (including the Checkerboard) several times for various personal and professional purposes, including photographing the horses and observing roundups. Ms. Kathrens visited the Salt Wells and Great Divide Basin HMAs as recently as January 2014 and plans to visit all three of the HMAs at issue during the summer of 2014 to observe and photograph the horses there.

19. BLM's decision authorizing the permanent removal of wild horses from the Checkerboard lands will impair Ms. Kathrens' aesthetic and professional interests in studying, photographing, and filming wild horses in the Great Divide Basin, Adobe Town, and Salt Wells Creek HMAs. BLM's decision runs directly counter to Ms. Kathrens' personal and professional goals of preserving wild horses on the range in the West by removing these animals permanently from their natural habitat in numbers that will result in the wild horse populations in these HMAs dropping below the applicable AMLs. BLM's decision will also greatly reduce Ms. Kathrens' ability to photograph and observe wild horses on the public land in these areas. Accordingly, a court order enjoining BLM from rounding up, removing, and otherwise harassing these wild horses will redress the myriad harms caused to Ms. Kathrens by BLM's decision, and in the process protect Ms. Kathrens' ability to enjoy, photograph, write about, film, and study these horses on the range.

20. Defendant Sally Jewell is the Secretary of the Department of the Interior, the parent agency of BLM, and, accordingly, is ultimately responsible for the decision challenged here.

21. Defendant Neil Kornze is the Acting Director of BLM, which is the agency that made the decision at issue, and therefore is also responsible for the decision at issue.

STATUTORY AND REGULATORY FRAMEWORK

A. The Wild Free-Roaming Horses and Burros Act

22. Congress enacted the Wild Horse Act in 1971 out of concern that wild horses were quickly “disappearing from the American scene.” 16 U.S.C. § 1331. Congress declared that “wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West” and that “they contribute to the diversity of life forms within the Nation and enrich the lives of the American people.” *Id.* As a result, by enacting the Wild Horse Act, Congress sought to guarantee that “wild free-roaming horses and burros *shall be protected* from capture, branding, harassment, [and] death,” and “be considered in the area where presently found, as an *integral part of the natural system of the public lands.*” *Id.* (emphasis added). To implement that mandate, Congress required that BLM “shall manage wild free-roaming horses and burros as *components of the public lands,*” and provided that “[a]ll management activities shall be at the minimal feasible level.” 16 U.S.C. § 1333(a) (emphasis added).

23. BLM manages wild horses and burros on public lands within certain types of management areas, one of which is a herd management area (“HMA”). An HMA is “established for the maintenance of wild horse and burro herds,” 43 C.F.R. § 4710.3-1, based on the

geographic areas that were used by these animals in 1971 when the Wild Horse Act was enacted. 43 C.F.R. § 4700.0-5(d).

24. BLM may only designate an HMA through the land-use planning process conducted pursuant to the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-1787. FLPMA’s implementing regulations require BLM to periodically develop, revise, and maintain resource management plans (“RMP”), which are written documents – adopted only after extensive public comment – that are “designed to guide and control future management actions.” 43 C.F.R. § 1601.0-2. Modifications to HMAs, including alterations to an HMA’s boundaries, may only be adopted through this land-use planning process, which requires public notice and comment. *See* 43 C.F.R. § 4710.1; BLM, Wild Horses and Burros Management Handbook H-4700-1, Rel. 4-116, at 7-8 (June 2010) (“BLM Handbook”) (explaining that decisions to “designate HMAs for the maintenance of WH&B, or to remove all or a portion of an area’s designation as an HMA must be made through a [land use plan] amendment, revision or new RMP”).

25. The Wild Horse Act requires BLM to “manage wild free-roaming horses and burros as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. § 1333(a). In accordance with this mandate, for each HMA, the Secretary must: (1) maintain a current inventory of wild horses in the management area, (2) “determine [the] appropriate management level” (“AML”) of wild horses that the HMA can sustain, and (3) determine the method of achieving the designated AML and managing horses within that AML. 16 U.S.C. § 1333(b)(1);

43 C.F.R. §§ 4710.2, 4710.3-1; *see* BLM, Wild Free-Roaming Horses and Burros Management Manual (“BLM Manual”) 4710.45 (procedures for conducting population inventories.).

26. An AML is “expressed as a population range within which [wild horses] can be managed for the long term” in a given HMA without resulting in rangeland damage. *See* BLM Handbook at 17. The upper limit of the AML is “the maximum number” of wild horses within a given HMA that “results in a [thriving natural ecological balance] and avoids a deterioration of the range.” *Id.* The lower limit of the population range is “established at a number that allows the population to grow (at the annual population growth rate) to the upper limit over a 4-5 year period, without any interim gathers.” *Id.*

27. BLM may only modify an AML after “[a]n interdisciplinary and site-specific environmental analysis and decision process (NEPA) with public involvement,” which is ordinarily done during the land-use planning process when amending the governing RMP. BLM Handbook at 18.

28. The Wild Horse Act allows BLM to manage wild horses and burros by removing “excess” animals from the public lands, but only after BLM determines that: (1) “an overpopulation [of wild horses] exists on a given area of the public lands,” and (2) “action is necessary to remove *excess* animals.” 16 U.S.C. § 1333(b)(2) (emphasis added). The Wild Horse Act defines “excess” horses as those “which must be removed from any area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” 16 U.S.C. § 1332(f).

29. Once BLM makes an “excess determination,” it may remove only those “excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. §

1333(b)(1); *see also id.* (BLM must use the wild horse inventories to “determine whether appropriate management levels should be achieved by the removal or destruction of excess animals.”). According to BLM’s own management handbook, “[w]ild horses or burros should generally *not be removed below the AML lower limit.*” BLM Manual 4720.2(21)(B) (emphasis added); BLM Handbook at 17 (wild horse removals should be conducted to “maintain population size within AML.”).

30. Removal of wild horses below low AML is warranted only when an adequate NEPA analysis subject to public participation indicates that “additional animals need to be removed to protect land health, wildlife habitat and the health of horses and burros remaining on the public land” or “in emergency situations based on limited forage, water, or other circumstances.” BLM Manual 4720.2(21)-2(22). In order for the agency to exercise its limited authority to remove horses below low AML, it must not only conduct “[a]n appropriate NEPA analysis and issuance of a decision . . . prior to removing the animals,” but must also provide a compelling “[r]ationale to justify a reduction below the AML lower limit . . . [which] should include a discussion of the available forage, water and any other limiting factors.” *Id.*

31. In addition to the statutory authority to remove “excess” horses from the range, in Section 4 of the Wild Horse Act, Congress provided BLM with the very limited authority to remove wild horses that “stray from public lands onto privately owned land,” when “the owners of such land . . . inform the nearest Federal marshall or [BLM agent].” 16 U.S.C. § 1334. This very narrow authority is triggered only by a “written request from the private landowner” that specifies “the numbers of wild horses or burros, the date(s) the animals were on the land, legal description of the private land, and any special conditions that should be considered in the

gathering plan,” 43 C.F.R. § 4720.2-1, at which point BLM must “arrange to have the animals removed.” Even where Section 4 is properly invoked, this provision does not authorize BLM to remove any wild horses from public lands, nor does it authorize BLM to permanently remove wild horses from the range. Rather, in the absence of an “excess” determination, this provision only contemplates BLM removing wild horses from the “privately owned lands” and transferring them back to the “public lands” from which they “stray[ed].” 16 U.S.C. § 1334.

B. The National Environmental Policy Act

32. Congress enacted the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f, to ensure that federal agencies consider and analyze: (1) the full environmental impacts of their actions before taking them, and (2) alternatives to proposed actions that may have less adverse impacts on the environment.

33. NEPA requires all agencies to prepare an Environmental Impact Statement (“EIS”) for major federal actions that may “significantly affect” the environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.27. The “significance” determination “requires consideration of both context and intensity” and is based on several factors, such as: (1) “the degree to which the possible effects on the human environment are likely to be highly controversial,” (2) whether the action will affect “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources,” (3) whether the action establishes a “precedent for future actions with significant effects,” and (4) whether it “causes loss or destruction of significant ‘scientific, cultural, or historical resources.’” 40 C.F.R. § 1508.27(b). If any of these factors are present, the agency must prepare an EIS.

34. To determine whether an EIS is required for a proposed action, an agency may prepare an Environmental Assessment ("EA") that analyzes the environmental impacts of the proposed action as well as reasonable alternatives to the proposed action. *See* 40 C.F.R. §§ 1501.4(c), 1508.9. The EA must analyze both the "direct" impacts of the proposed action, i.e., those that result directly from the management action, as well as the "indirect" impacts, which include those caused by the action that are later in time but are "still reasonably foreseeable." 40 C.F.R. § 1508.8(a)-(b). The EA must also analyze cumulative effects. *See* 40 C.F.R. § 1508(b).

35. When an agency determines that an EIS is not required, it must issue a Finding of No Significant Impact ("FONSI"), which must provide the reasons why the agency has determined that its proposed action "will not have a significant impact" on the environment. 40 C.F.R. § 1508.13.

36. As the Council on Environmental Quality's regulations implementing NEPA explain, the alternatives analysis is "the heart of" the NEPA document. 40 C.F.R. § 1502.14. The alternatives analysis must consider all reasonable alternatives and must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

37. In rare circumstances, an agency may "categorically exclude" certain activities from the requirements of NEPA. 40 C.F.R. § 1508.4. A categorical exclusion is defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." *Id.* However, even if a

particular kind of action normally falls within one of an agency's categorical exclusions, the agency must determine whether there are "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.* Such "extraordinary circumstances" include whether the proposed action satisfies any of the "significance criteria" included in the CEQ regulations, as set forth above. 40 C.F.R. § 1508.27(a).

38. In the Department of Interior manual governing the agency's NEPA procedures, there is a categorical exclusion that generally applies – so long as extraordinary circumstances do not exist – where the proposed action involves BLM's "[r]emoval of wild horses or burros from *private lands* at the request of the landowner." Department of Interior Manual, BLM 516 DM 11.9, D4 (emphasis added). BLM does *not* have a categorical exclusion for the permanent removal of wild horses from public lands.

C. Administrative Procedure Act

39. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for judicial review of agency action. Under the APA, the reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

A. The Adobe Town, Salt Wells Creek, and Great Divide Basin Herd Management Areas

40. The Adobe Town HMA is managed by BLM's Rawlins Field Office under the 2008 Rawlins Resource Management Plan ("Rawlins RMP"). The Adobe Town HMA consists

of a patchwork of 417,916 acres of federal public lands and 30,000 acres of non-federal, mostly private lands located in Carbon and Sweetwater counties in southwest Wyoming. See July 2013 Adobe Town and Salt Wells Creek Herd Management Areas Wild Horse Gather Environmental Assessment (“2013 Adobe Town EA”) at 1. The vast majority of the non-federal lands in the Adobe Town HMA are found in the northernmost portion of the HMA. The northern portion of the Adobe Town HMA, which includes both public and private land, consists of a continuously alternating checkerboard pattern of federal parcels and private parcels of approximately one-mile by one-mile squares – i.e., each alternate parcel of land is only about one square mile in size. *Id.* at 2.

41. The 2008 Rawlins RMP, which was subject to public scrutiny through notice and comment procedures, established that BLM must “[m]aintain wild horse populations within the appropriate management levels (AML) of [any given] HMA” covered by the plan. BLM, Rawlins Resource Management Plan (Dec. 2008) at 2-51. As a result, the RMP requires that BLM “[c]onduct regular, periodic gathers *when necessary to maintain AMLs.*” *Id.* (emphasis added). The Rawlins RMP set the operative AML for the Adobe Town HMA at 700 wild horses, which is accomplished by an AML range of 610-800. *Id.*; see also BLM Wyoming Herd Management Areas Map, available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/wildhorses/maps.Par.8682.File.dat/hma.pdf>.

42. In April 2014, the U.S. Geological Survey conducted a survey using a simultaneous double count method and estimated that there are 566 wild horses in the Adobe Town HMA. Categorical Exclusion at 3. Thus, the wild horse population in the Adobe Town HMA is currently well below the low AML of 610.

43. The Salt Wells Creek HMA (“Salt Wells HMA”) is managed by BLM’s Rock Springs Field Office under the 1997 Green River Resource Management Plan (“Green River RMP”). The Salt Wells HMA consists of a patchwork of 690,400 acres of federal public lands and 480,308 acres of non-federal, mostly private lands located in Carbon and Sweetwater counties in southwest Wyoming. *See* 2013 Adobe Town EA at 1. As in the northern portion of the Adobe Town HMA, the public and private lands of the Salt Wells Creek HMA – located in the northern two-thirds of the HMA – are approximately one-mile by one-mile square plots that alternate continuously, forming a checkerboard pattern. *See* 2013 Adobe Town EA at 2.

44. The Green River RMP established that BLM will manage wild horses “within five Wild Horse Herd Management Areas,” including the Salt Wells HMA. BLM, Green River Resource Management Plan (Oct. 1997) at 23; Map 27. This RMP further requires that the applicable AML, which was the product of NEPA review and public participation, be “maintained among the five herd management areas” covered by the plan. *Id.* The Green River RMP determined that the governing AML for the Salt Wells HMA is 251-365. *Id.* at 73, Table 15; *see also* BLM Wyoming Herd Management Areas Map, *available at* <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/wildhorses/maps.Par.8682.File.dat/hma.pdf>.

45. In April 2014, the U.S. Geological Survey conducted a survey using a simultaneous double count method and documented 728 wild horses within the Salt Wells HMA. *See* Categorical Exclusion at 3.

46. The Great Divide Basin HMA is also managed by BLM’s Rock Springs Field Office under the Green River RMP. The Great Divide Basin HMA encompasses a patchwork of 561,919 acres of federal public lands and 196,640 acres of private land located in Sweetwater

and Fremont counties in southwest Wyoming. *See* BLM, Environmental Assessment Great Divide Basin Herd Management Area Wild Horse Gather (August 2011) (“2011 Great Divide Basin EA”) at 1. The southern portion of the Great Divide Basin HMA consists of both public and private land in a continuously alternating checkerboard pattern of federal parcels and private parcels of approximately one-mile by one-mile squares. *Id.* at 2.

47. The Green River RMP determined that the appropriate AML for the Great Divide Basin HMA is 415-600. Green River RMP at 73, Table 15; *see also* BLM Wyoming Herd Management Areas Map, *available at* <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/wildhorses/maps.Par.8682.File.dat/hma.pdf>.

48. In April 2014, the U.S. Geological Survey conducted a survey using a simultaneous double count method and documented 618 wild horses within the Great Divide Basin HMA. Categorical Exclusion at 3.

49. Parts of the Adobe Town, Salt Wells, and Great Divide Basin HMAs are included within what is referred to as the “Wyoming Checkerboard” because of the alternating parcels of public and private land. Within these three HMAs, there are approximately 1,695,517 acres of public lands and 731,703 acres of private lands, meaning that 70% of the lands in these HMAs is public and only 30% is private. Categorical Exclusion at 1. Because these alternating parcels are so small in size and there is no fencing around them, wild horses (as well as privately owned livestock) freely roam between the public and private lands – e.g., a wild horse using the public lands at noon on any particular day may be on private lands by two p.m. and back on the public lands by five p.m. the same day. In fact, wild horses can travel as much as fifteen to twenty miles a day, meaning that on the Wyoming Checkerboard a single horse can traverse at least

eight to ten different private parcels in a given day even while spending half or more of that day on public lands.

50. According to BLM, a private trade organization called the Rock Springs Grazing Association (“RSGA”) currently owns or controls approximately 731,703 acres of the Checkerboard lands within the Adobe Town, Salt Wells, and Great Divide Basin HMAs – which is 100% of the private lands in these HMAs. Categorical Exclusion at 1.

B. The RSGA Litigation and the Resulting 2013 Consent Decree Between BLM and RSGA

51. On July 27, 2011, RSGA filed a complaint in the United States District Court for the District of Wyoming seeking to compel BLM to “remove all of the wild horses that have strayed onto the RSGA lands within the Wyoming Checkerboard.” Complaint, *Rock Springs Grazing Ass’n v. Salazar* (“RSGA Case”), No. 2:11-cv-263935, F. Supp. 2d 1179 (D. Wyo. 2013), ECF No. 1. The Complaint explained that RSGA brought the case because it was informed by the Assistant Secretary for the Department of Interior that “litigation would be necessary to secure additional funding for wild horses gathers.” *Id.* at ¶ 70.

52. On November 11, 2011 the International Society for the Protection of Mustangs and Burros, AWHPC, and the Cloud Foundation (herein collectively referred to as the “AWHPC Intervenors”), were granted intervention in the *RSGA Case* in order to “protect their aesthetic, recreational, educational, photographic, and other interests in protecting the wild horses that use the land’ described as the Wyoming Checkerboard.” Order Granting Motion to Intervene at 4, *RSGA Case*, ECF No. 32.

53. On February 12, 2013, BLM and RSGA reached a settlement, and filed a Joint Motion to Dismiss and a Consent Decree. Joint Motion to Dismiss, *RSGA Case*, ECF No. 81;

Proposed Consent Decree, ECF 81-1. The Consent Decree provided that: (a) BLM will “remove all wild horses located on RSGA’s private lands, including Wyoming Checkerboard lands,” Proposed Consent Decree ¶ 1, (b) “[i]f BLM determines, based on the results of any census and on projected reproduction rates, that the population in the Checkerboard lands is likely to exceed 200 wild horses for Salt Wells/Adobe Town Areas combined or 100 wild horses for Divide Basin, the BLM shall prepare to remove the wild horses from Checkerboard lands within the respective area,” *id.* ¶ 4, (c) “BLM will commit to gather and remove wild horses from Checkerboard lands within Salt Wells and Adobes Town HMAs in 2013, Divide Basin HMA in 2014, and White Mountain HMA in 2015, *id.* ¶ 5, and (d) “No later than 180 days after this Consent Decree is approved by the Court, BLM will submit to the Federal Register for publication a notice[s] of scoping under NEPA to . . . [c]hange the Salt Wells HMA to a Herd Area, which would be managed for zero wild horses . . . [c]hange the Divide Basin HMA to a Herd Area, which would be managed for zero wild horses . . . [c]hange the Adobe Town HMA AML to 224-450 wild horses or lower.” *Id.* ¶ 6.

54. In the Joint Motion to Dismiss, BLM and RSGA assured the Court that the Consent Decree promoted “the public interest by providing that *future decisions concerning the wild horse areas and numbers will occur through a public process.*” Joint Motion to Dismiss, ECF No. 81 at ¶ 4 (emphasis added). The proposed Consent Decree even contained the following provision, presumably intended to protect the public interest:

The RSGA recognizes that the Respondents are required to comply with other federal laws in conjunction with undertaking the required actions herein. *No provision of this Consent Decree shall be interpreted or constitute a commitment or requirement that the Respondents take actions in contravention of the WHA, FLPMA, NEPA, the APA, the Endangered Species Act, or any other law or regulation, either substantive or procedural.*

Proposed Consent Decree ¶ 17, ECF No. 81-1 (emphasis added). Paragraph 10 of the Consent Decree further explained that “[n]othing in this Consent Decree shall be construed to limit or modify the discretion accorded to BLM by the applicable federal law and regulations . . . or general principles of administrative law with respect to the procedures to be followed in carrying out any of the activities required herein, or as to the implementation or conduct of any of these activities.” *Id.* at ¶ 10.

55. The AWHPC Intervenor-Defendants objected to this proposed Consent Decree for several reasons. *See* Intervenor-Defendant Objections to Proposed Consent Decree, *RSGA Case*, ECF No. 86-1. One of the Intervenor’s primary concerns was that, given the nature of the Checkerboard lands, there was simply no way to distinguish between horses on RSGA’s private lands and those on public lands in the HMAs. *Id.* at 8. The AWHPC Intervenor explained that “absent more information about how this crucial determination [between horses on private and horses on public lands] will be made on any particular day, the agency’s commitment ‘to remove all wild horses located on RSGA’s private lands, including Wyoming Checkerboard lands,’ without complying with the laws that apply to decisions regarding the removal of any horses from public lands” adversely affected the Intervenor’s rights and interest. *Id.* at 9.

56. The AWHPC Intervenor also objected to the Consent Decree on the grounds that BLM was committing to remove wild horses from public land without making certain “statutorily required decisions” that “cannot be made without compliance with” the Wild Horse Act, NEPA, and other governing laws. *Id.* at 10-14. In particular, the Consent Decree appeared to require the removal of wild horses from public lands in situations that ignored BLM’s statutory obligation under the Wild Horse Act to make an “excess” determination before

conducting a roundup of only those wild horses deemed “excess” based on the operative AML in a given HMA. *Id.* at 10. Moreover, in the Consent Decree, BLM committed to take several agency actions that required compliance with NEPA – i.e., removing all wild horses from certain areas of public lands – before conducting the appropriate NEPA analysis, either an EA or EIS. *Id.* at 11-14.

57. In response to the AWHPC Intervenor’s objections, RSGA argued that:

Intervenors’ objections to the Consent Decree focus in large part on how they speculate BLM will implement the future changes that BLM has agreed to consider. The Intervenors’ arguments contradict the plain language of the Consent Decree. At this point, any objection as to implementation is premature . . . The premise that BLM will violate the law, long before any action has been taken, is not a basis to deny approval of the Consent Decree.

Reply of RSGA to Intervenors’ Objections to Motion to Dismiss at 15-16, *RSGA Case*, ECF No.

89. RSGA also emphasized that “BLM proposes to remove wild horses from RSGA lands and commits to follow the BLM NEPA and public comment procedures.” *Id.* at 16.

58. BLM also argued that AWHPC Intervenors’ “legal objections to the Consent Decree are without support and are otherwise based on mischaracterizations of the clear terms of the proposed decree.” Federal Respondents’ Reply in Support of the Joint Motion to Dismiss at 7, ECF No. 88. BLM further argued that “[u]nder the proposed Consent Decree, the BLM *agrees only to consider* the aforementioned management alternatives and the potential environmental effect thereof *in resource manage plan revisions and associated NEPA documents.*” *Id.* at 8 (emphases added).

59. On April 3, 2013, Chief Judge Freudenthal approved the Consent Decree finding that it did not “on its face violate law or public policy.” 935 F. Supp. 2d at 1191. Focusing on paragraph 10 of the Consent Decree, the Court concluded that “the Consent Decree expressly

prohibits any construction which would 'limit or modify the discretion accorded to BLM by the applicable federal law and regulations.'" *Id.* at 1189. Rather than addressing the merits of the Intervenor's objections, the Court instead held that "whether the Consent Decree actually limits the BLM's discretion will turn on the implementation and force of the Decree, which is unclear at this junction." *Id.* at 1189-90. In turn, the Court concluded "that the Consent Decree is not inconsistent on its face with the resource management or NEPA processes, and Intervenor's arguments on this point are not ripe for adjudication." *Id.* at 1190.

C. BLM's 2013 Roundup in the Adobe Town and Salt Wells HMAs

60. The RSGA Consent Decree states that "BLM will commit to gather and remove wild horses from Checkerboard lands within Salt Wells and Adobe Town HMAs in 2013." Consent Decree ¶ 5, ECF No. 81-1. As a result, in July 2013, BLM issued an EA and an accompanying FONSI for two agency actions: (1) the removal of "excess" wild horses from the Adobe Town and Salt Wells HMAs, and (2) the removal from private lands (but not from the range) of all wild horses that had strayed onto private checkerboard lands within the Adobe Town and Salt Wells HMAs. *See* 2013 Adobe Town EA at 1; 2013 Adobe Town FONSI.

61. In the 2013 EA, BLM stated that under the RSGA Consent Decree "BLM committed to gather and remove wild horses from checkerboard lands within Salt Wells Creek and Adobe Town HMAs in 2013" and that the proposed roundup was "necessary to meet the terms of the 2013 Consent Decree." Adobe Town EA at 4. BLM did not invoke a categorical exclusion to discharge these legal obligations.

62. In its 2013 EA, BLM made an explicit "excess" determination as required by the Wild Horse Act. BLM identified the applicable AML for both the Adobe Town HMA (610-800

wild horses) and the Salt Wells HMA (251-365 wild horses) as determined – through the public rulemaking process – in the Rawlins RMP and the Green River RMP. BLM then compared the projected wild horse inventory of 624 wild horses in Adobe Town and 823 wild horses in Salt Wells Creek to the operative AMLs. *See* 2013 Adobe Town EA at 3. Based on this information, BLM made a specific determination that there were 14 “excess” wild horses in the Adobe Town HMA and 572 “excess” wild horses in the Salt Wells Creek HMA. *Id.*

63. Wild horse advocacy organizations (including Plaintiffs in this case) were initially concerned that BLM’s 2013 decision to (a) remove all “excess” horses in the Adobe Town and Salt Wells HMAs, and (b) remove all horses from private checkerboard lands within these two HMAs would result in bringing the wild horse populations in these areas to below AML. However, BLM assured those organizations, through counsel, that the “wild horses will be removed from private lands (including the checkerboard lands) and the population *will be maintained at the low AML within the federal land block.*” September 30, 2013 BLM Letter to William Eubanks regarding Adobe Town/Salt Wells Creek Complex Wild Horse Gather (emphasis added).

64. In November 2013, pursuant to its EA and FONSI, BLM rounded up 668 wild horses from the Adobe Town and Salt Wells HMAs. *See* Categorical Exclusion at 2. BLM permanently removed 586 of those wild horses from the range, which was the combined number of horses determined by BLM in the 2013 EA to constitute “excess” wild horses relative to the prescribed AMLs. *Id.* The remaining 79 wild horses removed from the checkerboard lands were released back into the federal land block of these HMAs in order to stay within the operative AML in the Adobe Town and Salt Wells HMAs. *Id.*

D. BLM's Scoping for a 2014 Roundup in the Great Divide Basin HMA

65. The RSGA Consent Decree states that "BLM will commit to gather and remove wild horses from Checkerboard lands within . . . [the] Great Divide Basin HMA in 2014." Consent Decree at ¶ 5. As a result, on December 6, 2013, BLM began the NEPA process for the Great Divide Basin HMA by issuing a Scoping Statement for a proposed roundup of "excess" wild horses and for removal of all wild horses on the private Checkerboard lands within the HMA. *See* Great Divide Basin Scoping Statement. This statement identified the low AML for the Great Divide Basin HMA (415 wild horses) and made clear that, while all wild horses would be removed from private land, some "may be relocated in the northern part of the Great Divide Basin HMA" to maintain the low AML within the HMA. *Id.* BLM's scoping statement mirrored the approach undertaken by BLM in its 2013 roundup in the Adobe Town and Salt Wells HMAs.

66. In response to this scoping statement, RSGA submitted comments that "identified concerns with BLM's proposed action to remove wild horses to the low appropriate management level for the HMA, as this was believed to be inconsistent with the 2013 Consent Decree provision for removing *all wild horses from checkerboard lands.*" Categorical Exclusion at 2 (emphasis added). As a result, BLM decided not to "gather the Great Divide Basin HMA to low appropriate management level under Section 3 of the WHA" but instead to "gather all wild horses from the checkerboard within the HMAs as required by Section 4 of the WHA and the Consent Decree." Decision Record at 2. In turn, BLM abandoned the NEPA process concerning a roundup of excess wild horses in the Great Divide Basin HMA.

E. BLM's Decision to Remove All Wild Horses From the Public and Private Checkerboard Lands within the Great Divide Basin, Salt Wells, and Adobe Town HMAs

67. On July 18, 2014, BLM issued a Decision Record and a Categorical Exclusion ("CE") authorizing the "removal of all wild horses from Checkerboard Lands within the Great Divide Basin, Adobe Town, and Salt Wells Creek Herd Management Areas." Decision Record at 1. The removal of these wild horses is purportedly based on BLM's authority under Section 4 of the WHA, *see* Decision Record at 1, which only allows the agency to move wild horses from private land back onto the public lands from which they strayed. 16 U.S.C. § 1334. Based on surveys and projections, BLM estimates that at least 806 wild horses will be removed from the Checkerboard as part of this action. *See* Decision Record at 1.

68. The Decision Record and CE both state that "[a]ll captured wild horses would be removed from the checkerboard lands and entered into the Wild Horse and Burro Program to be made available for adoption." Decision Record at 1. Any horses not adopted "will be cared for in long-term pastures." Bureau of Land Mgmt., *BLM Schedules Wild Horse Removal on Checkerboard Lands* (July 18, 2014), http://www.blm.gov/wy/st/en/info/news_room/2014/july/18rsfo-removal.html. As a result, BLM makes clear that all of the wild horses removed under this Decision Record will be *permanently* removed from the range.

69. This removal will not just occur on private lands within the Checkerboard. In the Decision Record, BLM "acknowledges that in discharging its duties under Section 4 of the WHA wild horses *will also be removed from the public land* portions of the Checkerboard." Categorical Exclusion at 5 (emphasis added); Decision Record at 3. However, BLM never made any specific determination that these 806 wild horses constitute "excess" horses, as is required

by Section 3 of the Wild Horse Act before any wild horses can be permanently removed from the range.

70. BLM did not prepare an EA or an EIS before authorizing the removal of an estimated 806 wild horses from the Checkerboard lands within the Adobe Town, Salt Wells, and Great Divide Basin HMAs. Rather, BLM invoked a categorical exclusion that allows for the “[r]emoval of wild horses or burros *from private lands* at the request of the landowner.” Categorical Exclusion at 5 (emphasis added). Yet, BLM admitted that wild horses will also be removed from public land – an action that will inevitably result in significant environmental impacts. Because BLM did not subject this decision to public scrutiny through the NEPA process (or any other process) as required by law, Plaintiffs and other members of the public have not had any opportunity to obtain congressionally mandated information concerning the environmental impacts of or alternatives to the proposed action.

71. Neither the CE nor the Decision Record identify, let alone discuss, the operative AMLs for the Great Divide Basin, Salt Wells, or Adobe Town HMAs. In fact, apparently conflating the duties that apply to private lands with those that apply to public lands, BLM asserted that the “management direction set forth in the Green River and Rawlins RMPs [for the affected HMAs], including that related to appropriate management levels (AMLs) do not apply to private lands.” Decision Record at 3.

72. The CE references the April 2014 census performed by the U.S. Geological Survey that determined the estimated wild horse population within the relevant HMAs, as well as the number of horses within the Checkerboard lands. *See* Categorical Exclusion at 2-3. In the Great Divide Basin HMA, there are 618 wild horses within the entire HMA and 394 within the

Checkerboard lands. In the Salt Wells HMA, there are 728 wild horses within the entire HMA and 402 within the Checkerboard lands. In the Adobe Town HMA, there are 566 wild horses within the entire HMA and 10 within the Checkerboard lands. According to BLM's estimate, there are a total of 806 wild horses present on the Checkerboard lands within the three applicable HMAs. *See* Decision Record at 1.

73. BLM intends to remove all of the wild horses on the Checkerboard lands – a total of 806 wild horses – as estimated by the 2014 census. *See* Decision Record at 1. By authorizing the permanent removal of all 806 wild horses on the Checkerboard lands, and in light of the operative AMLs for each HMA under the governing RMPs, BLM's decision will remove so many horses from the Great Divide Basin and Adobe Town HMAs that it will bring those populations to below the low AML. Hence, BLM's decision will result in a Great Divide Basin HMA wild horse population of 224 wild horses (which is 191 fewer than the low AML of 415) and an Adobe Town HMA wild horse population of 556 wild horses (which is 54 fewer than the low AML of 610).

74. According to BLM's decision, this removal of wild horses is purportedly “necessary to comply with . . . [the] 2013 Consent Decree, *Rock Springs Grazing Assoc. vs Salazar*, which requires that all wild horses be removed from checkerboard lands within the Great Divide Basin, Salt Wells Creek, and Adobe Town herd management areas (HMAs) in accordance with the schedule set out in the decree.” Decision Record at 2. However, the Consent Decree certainly does not authorize BLM to dispense with its NEPA, WHA, and other legal duties when permanently removing any horses from the range, nor does it allow BLM to extend its very limited Section 4 authority under the WHA to permanently remove horses from

public lands. See Consent Decree ¶ 1 (providing that “BLM agrees to remove all wild horses located on *RSGA’s private lands*, including Wyoming Checkerboard lands”) (emphasis added); *id.* ¶ 17 (“requir[ing] [BLM] to comply with other federal laws in conjunction with undertaking the required actions herein,” and stating that “[n]o provision of this Consent Decree shall be interpreted or constitute a commitment or requirement that [BLM] take actions in contravention of the WHA, FLPMA, NEPA, the APA, the Endangered Species Act, or any other law or regulation, either substantive or procedural”); see also *id.* ¶ 10 (explaining that “[n]othing in this Consent Decree shall be construed to limit or modify the discretion accorded to BLM by the applicable federal law . . . or general principles of administrative law with respect to the procedures to be followed in carrying out any of the activities required herein”).

75. BLM “currently plans to commence with the removal” of all wild horses from the Checkerboard lands within the Adobe Town, Salt Wells, and Great Divide Basin HMAs “after August 18, 2014.” Decision Record at 1.

PLAINTIFFS’ CLAIMS FOR RELIEF

Claim 1 – NEPA Violations

76. In authorizing the permanent removal from the range an estimated 806 wild horses – including approximately half of which are on public Checkerboard lands in HMAs that are set aside specifically for the protection and maintenance of wild horses – BLM approved a major federal action that will inevitably result in significant environmental impacts. The unique “bands” of wild horses that live within these HMAs, as well as the other natural resources within these HMAs, including forage, water, vegetation, and other wildlife, will necessarily be affected by this decision. Despite the myriad of environmental impacts, BLM failed to prepare an EIS or,

at minimum, an EA and FONSI analyzing the impacts of its decision. This failure to conduct any NEPA review whatsoever under the circumstances violates NEPA, *see* 42 U.S.C § 4332(C), its implementing regulations, *see, e.g.*, 40 C.F.R. §§ 1501.4(c), 1508.9, 1508.13, 1508.27, BLM's own governing directives and long-standing policy and practice, *see* BLM, Wild Horse Manual §§ 4720.21(C)(6), 4720.3, and the APA, 5 U.S.C. § 706(2).

77. In addition, BLM inappropriately invoked a categorical exclusion that on its face only applies to the “[r]emoval of wild horses or burros from *private* lands at the request of the landowner” in order to return those wild horses to the public lands from which they strayed. *See* Department of Interior Manual, BLM 516 DM 11.9, D4 (emphasis added); 16 U.S.C. § 1334. This categorical exclusion does not apply to the current situation because the agency is: (a) rounding up hundreds of wild horses from *public* lands, and (b) *permanently* removing an estimated 806 wild horses from the range. Moreover, this decision is not one that “individually or cumulatively” will avoid “a significant effect on the human environment,” 40 C.F.R. § 1508.4, because of the significant environmental impacts that will flow from the permanent removal of nearly a thousand horses on both the horses themselves and other natural resources within these HMAs. Even if BLM's action were just on private land – which it is not – a categorical exclusion is nevertheless improper because the permanent removal of 806 wild horses from the range is an “extraordinary circumstance” that “may have a significant environmental effect,” *id.*, and will “establish a precedent for future actions.” 40 C.F.R. 1506.27(b)(6). Thus, BLM's invocation of this categorical exclusion under the circumstances to avoid preparing any NEPA review whatsoever violates NEPA, 42 U.S.C § 4332(C), its implementing regulations, *see* 40

C.F.R. § 1508.4, BLM's own governing directives and longstanding policy and practice, *see* BLM, Wild Horse Manual §§ 4720.21(C)(6), 4720.3, and the APA, 5 U.S.C. § 706(2).

78. Because BLM did not prepare any NEPA analysis and instead relied on a categorical exclusion to authorize the permanent removal of an estimated 806 wild horses, BLM circumvented the public participation requirements of NEPA and the APA. In so doing, BLM failed to provide notice of the proposed decision to Plaintiffs and other interested members of the public, solicit comments from those parties, and make a reasoned decision in response to those comments. This failure to involve the public at all in the decision to permanently remove hundreds of horses from the range violates NEPA, 42 U.S.C § 4332(C), its implementing regulations, *see* 40 C.F.R. §§ 1500.2(d), 1506.6(a), 40 C.F.R. § 1501.4, BLM's own governing directives and longstanding policy and practice, *see* BLM, Wild Horse Manual §§ 4720.21(C)(6), 4720.3, 4720.35, and the APA, 5 U.S.C. § 706(2).

79. For all of the reasons set forth in paragraphs 75-77, BLM's decision is a violation of NEPA and its implementing regulations, and is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706(2). Plaintiffs are harmed by these violations in the manner described in paragraphs 5-17.

Claim 2 – Wild Horse Act Violations

80. BLM has authorized the permanent removal of an estimated 806 wild horses from the range within the Adobe Town, Salt Wells, and Great Divide Basin HMAs, but failed to first make the legally required "excess" determination, which is a mandatory prerequisite under Section 3 of the Wild Horse Act before *any* horses can be permanently removed from the range. Section 4 of the Wild Horse Act does not grant BLM any authority to *permanently* remove wild

horses from the range, but rather only provides limited authority to remove horses from private land and transfer them back to the public lands from which they strayed. Moreover, Section 4 does not confer on BLM the authority to permanently remove horses from *public* lands. Only Section 3 of the Wild Horse Act grants BLM the authority to permanently remove horses from public lands, but even that authority is limited to the removal of “excess” wild horses. BLM’s failure to make that congressionally mandated “excess” determination before authorizing the permanent removal of an estimated 806 wild horses violates the Wild Horse Act, 16 U.S.C. § 1333(b)(2), its implementing regulations, *see* 43 C.F.R. § 4720.1, BLM’s own governing directives and longstanding policy and practice, *see* BLM Manual 4720.1, and the APA, 5 U.S.C. § 706(2).

81. Presumably because BLM did not make the statutorily required “excess” determination, the agency has authorized an action that will result in both the Great Divide Basin and Adobe Town wild horse populations going below low AML by a significant margin (191 horses below low AML in the Great Divide HMA and 54 horses below low AML in the Adobe Town HMA). BLM failed to disclose or acknowledge (much less analyze) the governing AMLs in each of the HMAs at issue and how the wild horse population numbers in these HMAs would be affected by its decision. BLM did not provide – or even purport to provide – any evidence that an emergency situation exists (as defined by BLM’s wild horse manual). Nor has BLM completed any public process under FLPMA and NEPA to formally lower the operative AMLs in these HMAs, which is the only legal mechanism for doing so. Therefore, in the absence of any legally adequate rationale, BLM’s decision – which will bring the wild horse populations in Great Divide and Adobe Town to below the governing AMLs – violates the Wild Horse Act, 16

U.S.C. § 1333(b)(1), BLM's own governing directives and longstanding policy and practice, *see* BLM Manual 4720.22(B); BLM Handbook at 18, and the APA, 5 U.S.C. § 706(2).

82. There are far less drastic alternatives to *permanently* removing from the range *all* 806 wild horses that are currently using the public and private lands of the Checkerboard. For example, pursuant to Section 4 of the WHA, BLM could remove all of the wild horses from the private Checkerboard lands and return them to the public lands from which they strayed. By refusing to even consider alternatives such as this one, and by instead selecting the most invasive of all management options, BLM's authorization of permanent removal of all wild horses found in the Checkerboard (including on public lands) violates the Wild Horse Act's requirement that "[a]ll management activities [related to wild horses] shall be at the *minimal feasible level*," 16 U.S.C. § 1333(a), and the APA, 5 U.S.C. § 706(2).

83. For all of the reasons set forth in paragraphs 79-81, BLM's decision violates the Wild Horse Act and its implementing regulations, and is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706(2). Plaintiffs are harmed by these violations in the manner described in paragraphs 5-17.

Claim 3 – BLM's Decision is Contrary to the 1997 Green River RMP and the 2008 Rawlins RMP, FLPMA, and the APA

84. BLM has authorized the permanent removal of wild horses in the Adobe Town and Great Divide Basin HMAs at levels that will take those wild horse populations significantly below the applicable AMLs, which were established in the governing RMPs after an extensive notice-and-comment decision-making process pursuant to FLPMA. BLM's cursory decision documents do not provide any legally adequate explanation for the agency's stark departure in this decision from its own prescribed AMLs in the Adobe Town and Great Divide Basin HMAs

as established by the governing RMPs. Nor does BLM provide any explanation for how it can *de facto* modify its AMLs in these HMAs outside of the FLPMA and NEPA processes that are legally required for such modifications. BLM has failed to adhere to its own binding RMPs and has not provided any explanation to justify this departure. As a result, BLM's decision violates the agency's own 1997 Green River RMP and 2008 Rawlins RMP, *see* Green River RMP at 23, 73, Table 15; Rawlins RMP at 2-51, FLPMA, *see* 43 U.S.C. § 1701(a)(2), FLPMA's implementing regulations, *see* 43 C.F.R. §§ 4710.1, 1601.0-2, BLM's own governing directives and longstanding policy and practice, and, *see* BLM Handbook at 18, and the APA, 5 U.S.C. § 706(2).

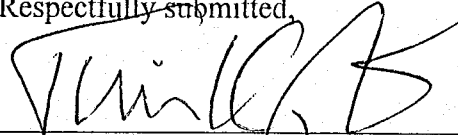
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

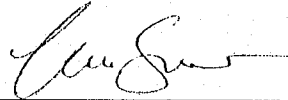
1. Declaring that Defendants have violated the Wild Free-Roaming Horses and Burros Act, the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act;
2. Setting aside Defendants' July 18, 2014 decision, and remanding the matter to BLM to comply with governing laws before taking any further action;
3. Enjoining Defendants from taking any further actions to round up and remove any wild horses from the Adobe Town, Salt Wells, and Great Divide Basin HMAs, until they have fully complied with governing laws;
4. Prohibiting Defendants from permanently removing any wild horses from the Adobe Town, Salt Wells, and Great Divide Basin HMAs not determined to be "excess";
5. Awarding plaintiffs their attorneys' fees and costs in this action; and

6. Granting plaintiffs any further relief as the Court may deem just and proper.

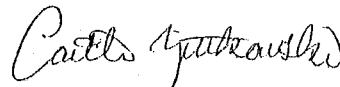
Respectfully submitted,



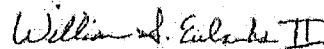
Timothy C. Kingston
Attorney for Petitioners
Law Office of Tim Kingston LLC
408 W. 23rd Street
Cheyenne, WY 82001
T. (307) 638-8885
kingston@rockymtnlaw.com



Michelle D. Sinnott
(VA Bar No. 85563)



Caitlin T Zittkowski
(CA Bar No. 290108)



William S. Eubanks II
(D.C. Bar No. 987036)

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206 / (202) 588-5049 fax
msinnott@meyerglitz.com
czittkowski@meyerglitz.com
beubanks@meyerglitz.com

Counsel for Petitioners

Date: August 1, 2014