

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

**THE CLOUD FOUNDATION, INC.
a Colorado, non-profit organization
107 South 7th Street
Colorado Springs, CO**

**FRONT RANGE EQUINE RESCUE, INC.
a Colorado non-profit organization
2200 Twylby Road
Larkspur, CO 80118**

**CAROL WALKER
16500 Dakota Ridge Rd.
Longmont, CO 80503**

Plaintiffs

v.

Civil No. 09-1651 (JSG)

**KEN SALAZAR, in his
official capacity as Secretary, Department
of the Interior
1849 C Street, N.W.
Washington DC 20240**

**ROBERT ABBEY, in his
official capacity as Director,
Bureau of Land Management,
1849 C Street NW, Rm. 5665
Washington DC 20240**

**JIM SPARKS, in his
official capacity as Field Manager, BLM,
Billings Field Office,
5001 Southgate Drive
Billings, MT 59101**

**JARED BYBEE, in his
official capacity as Wild Horse
and Burro Specialist, BLM
Billings Field Office,
5001 Southgate Drive
Billings, MT 59101**

**Thomas Vilsack, in his
official capacity as Secretary, United
States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250**

**Tom Tidwell in his
official capacity as Chief, United
States Forest Service
1400 Independence Avenue, S.W.
Washington, D.C. 20250**

**Mary Erickson, in her
official capacity as
Acting Forest Supervisor
Custer National Forest
1310 Main Street
Billings, MT 59105**

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Introduction

1. This action concerns federal agencies' illegal treatment of wild horses in Wyoming and Montana. This wild horse herd occupies the designated Pryor Mountain Wild Horse Range ("PMWHR" or "Range") and the primarily public lands surrounding the PMWHR. The horses comprising this herd are protected under the (a) 1968 Executive Order which established the PMWHR primarily for the benefit of wild horses and (b) Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. §§ 1331 et

seq., which protects wild horses from harassment, commercial exploitation and death. The PMWHR consists of primarily public lands administered by the United States Bureau of Land Management (BLM); an area in the southeastern portion administered by the National Park Service (NPS); and a small portion of land administered by the United States Forest Service (FS) in the northwest corner of the Range. The PMWHR is located in southeastern Carbon County, Montana and northern Big Horn County, Wyoming and encompasses about 39,651 acres. This herd migrates into and out of federal lands in a seasonal pattern of use that extends beyond the PMWHR boundary. It uses these lands because they offer melting snow for drinking, lush grass for grazing and cooler weather that brings relief from biting insects.

2. This is an action to declare illegal and set aside defendants' actions that adversely affect this herd, and to enjoin BLM's improper use of a "Categorical Exclusion" which it uses to circumvent its statutory requirements to address the environmental effects of its conduct.

JURISDICTION AND VENUE

3. This case concerns a federal question and, therefore, jurisdiction is proper under 28 U.S.C. §1331. Venue is also proper under 28 U.S.C. § 1391(e). This Court may review defendants' actions and order appropriate relief under the Administrative Procedure Act, 5 U.S.C. §§701 et seq.

PLAINTIFFS

4. Plaintiff, The Cloud Foundation (TCF), is a Colorado non-profit corporation. Its purposes are to protect the Pryor Mountain Wild Horse herd and other wild horse herds with unique characteristics and historical significance. Specifically, the Cloud

Foundation is dedicated to preventing the extinction of this herd through education, media programming and public involvement. TCF was founded by Ginger Kathrens, its Volunteer Executive Director.

5. TCF sues on behalf of its supporters to protect their aesthetic interests in viewing wild horses on the Range and surrounding areas in a natural setting, free from human manipulation and to ensure that if the horses are removed from the public lands, they are provided suitable homes and are not sold for slaughter. Throughout each year, Ms. Kathrens, supporters of TCF, and thousands of other members of the public visit the PMWHR and see the behavior and life cycle of the wild horses. The PMWHR is the only Western U.S. location in which the interaction of mares, stallions and foals, and their complex communication and behaviors, can be safely viewed at close range without impacting their natural behavior.

6. Ms. Kathrens, who also brings this suit as an individual, is an award-winning filmmaker and author whose work focuses on the PMWHR wild horses. Since 1994, she has observed, studied, documented and enjoyed these horses. She knows the individual members of the herd and their histories, personalities, behaviors, and family structures. She will return to the PMWHR in August.

7. Front Range Equine Rescue (FRER) is a Colorado non-profit corporation established in 1997. Its mission is to prevent the abuse and neglect of horses through rescue and education. One of FRER's primary goals is to educate new, potential, and existing horse owners on basic horse care responsibilities. Additionally, FRER has assisted hundreds of horses through its rescue program and impacted countless others through its educational efforts. FRER has rescued many wild horses, including several

from the PMWHR, which were destined for killer buyer auctions, at auction, and through direct adoption or owner surrender. Once rescued, horses are cared for directly by FRER through the rehabilitation process, and are then placed into training assessment prior to adoption to qualified homes.

8. FRER represents its supporters' interests in protecting wild horses on the range and those who have been adopted and need to be rescued from improper adoptive homes. FRER does this by (a) commenting on BLM efforts to remove wild horses from their range, (b) urging federal agencies to ensure that any actions taken with regard to wild horses are based on a legitimate need to undertake those actions, and (c) requesting that horses' safety and welfare will be assured during those actions.

9. Carol Walker is a nature photographer. She has studied literature, portraiture and nature photography. She has travelled all over the world photographing wildlife for the past 28 years. Carol specializes in photographing horses. Carol's images illuminate the relationship between horses and people, and highlight stunning images of free wild horses. Carol has become aware of how precarious their situation on public lands has become and she is dedicated to educating people about wild horses. Ms. Walker has photographed two wild horse roundups, and has presented the evidence of the harm done to these horses during the round up process to the BLM. Ms. Walker has visited the PMWHR regularly for the last six years and has commented on BLM's recent proposal to remove 70 horses from the range. Ms. Walker will return to the PMWHR in September.

10. Plaintiffs are also injured by BLM's categorical exclusion of certain actions from analysis under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.

11. Defendants' actions alleged herein have harmed and injured the interests and aesthetic enjoyment of plaintiffs in the PMWHR herd by threatening irreversible adverse effects to the PMWHR herd, their interests in the individual horses removed, and the individual horses that remain on the range.

DEFENDANTS

12. Ken Salazar is the Secretary of the Department of the Interior. Pursuant to the WFHBA, he is responsible for the oversight of BLM's management of wild horses and burros on the Nation's public lands, including the PMWHR.

13. Robert Abbey is the Director of the BLM and is responsible for implementing management decisions for wild horses in accordance with the WFHBA.

14. Jim Sparks is the Field Manager for Billings Field Office.

15. Jared Bybee is the Wild Horse and Burro Specialist for the PMWHR.

16. Tom Vilsack is Secretary of the United States Department of Agriculture. Pursuant to the WFHBA, he is responsible for the oversight of FS's management of wild horses and burros on the Nation's public lands, including the PMWHR.

17. Tom Tidwell is Chief of the FS, an agency within the United States Department of Agriculture. The FS is responsible for managing wild horses and burros on Forest Service lands.

18. Mary Erickson is the Acting Forest Supervisor of the Custer National Forest.

19. The FS, BLM and the NPS have entered into a Memorandum of Understanding (MOU) that governs the treatment of the wild horses of the PMWHR on their respective areas of the public lands. BLM has been designated as the "lead agency" with regard to management of the wild horses within the PMWHR. BLM is responsible

for taking any actions to round up or move the wild horses of the PMWHR and surrounding lands, has done this at the request of the FS and remains ready to do this.

FACTS

I. The PMWHR Herd, the Pryor Range and Adjacent FS Lands

20. The BLM historically directed permittees on public grazing land to round up wild horses by aircraft. Once rounded up, the wild horses were either killed and butchered on the range or were shipped live to meat packing plants. In 1968, the public expressed its extreme opposition to supposed BLM plans to trap wild horses. In response, the Secretary of the Interior issued an Executive Order on September 9, 1968 creating the PMWHR from lands administered by BLM and the NPS.²¹ The PMWHR, encompassing approximately 39,000 acres, was established as a sanctuary for the protection of the wild horses living there. It was the first public range ever dedicated in the United States for the protection of wild horses, and it was intended to protect the horses, other wildlife, and the natural state of the area.

22. The PMWHR is composed of public lands administered by the BLM, the FS, and the NPS, and a small area of private land. The PMWHR does not at this time have a fence which encloses it.

23. A subpopulation of wild horses from the PMWHR permanently inhabits FS lands that lie beyond the boundary of the PMWHR. These animals also travel to areas within the PMWHR boundaries and interact with the wild horses that live primarily on the PMWHR unless they are fenced into nearby livestock allotments.

24. The vast majority of the PMWHR consists of BLM lands. The northwestern portion of the PMWHR consists of FS lands known as Management Area Q.

25. The PMWHR horses historically occupied adjacent FS lands beyond Management Area Q, and are entitled by the WFHBA to use those lands. Nevertheless, the BLM and FS have refused to expand the Range to include these areas of historical use.

26. Because the FS has not authorized wild horses to be in these historical range areas, the horses are subject to capture and removal by BLM, as they were during the September 2009 round up, or forced back into the PMWHR as they have in years past.

27. In further violation of the WFHBA, the FS has planned for a “Northern Boundary” fence to prohibit wild horses from using these FS lands beyond Management Area Q and has issued a Solicitation for Bids for construction of this fence, cattle guards and gates which will block the horses from entering these lands and confine them to the PMWHR proper. On information and belief, the FS is arranging for the building of this fence to facilitate cattle grazing.

28. The exclusion of the wild horses from these lands and the fence containment of the herd will significantly reduce the horses’ range, as that term is defined under the WFHBA, will prevent their ingress and egress onto lands necessary for their welfare and survival and threaten to cause physical injuries to the horses while they attempt to carry out their normal migratory patterns. For centuries, in mid-summer, the horses have traveled to these higher elevation lands to graze on rich and abundant meadows within their historic range. If restricted, the year-long grazing pattern choices of the horses would be disrupted. Over 100 horses use this area and it is critical to meet their nutritional demands. Typically, the horses gain significant weight in the summer and fall and then survive the winter by foraging in less productive areas at lower elevations.

Eliminating this area of traditional use threatens the future survival of the herd. If allowed to use the FS lands, the herd can grow to a population level great enough to ensure their genetic health. Cutting off the horses' access to these lands with the fence will significantly decrease the size and quality of the area available to the horses for grazing and will result in BLM's self-serving conclusions that the herd size must be decreased even further, resulting in the capture and removal of additional wild horses from the range.

29. The FS has denied Plaintiffs' administrative appeal against the building of the fence.

30. In 2009, BLM and the FS finalized the PMWHR Herd Management Area Plan (HMAP). The HMAP authorized BLM to manage the herd at a number of wild horses that is not supported scientifically and violates the WFHBA's requirements. Plaintiffs TCF, FRER and others appealed and sought a stay of this HMAP. The Interior Board of Land Appeals denied Plaintiffs' challenge.

II. BLM's Treatment of the Horses During the September 2009 Roundup

31. In the 2009 roundup, BLM ignored the safety of newly born foals by refusing to wait until the foals were older and might better stand the rigors of being chased for miles by a helicopter.

32. BLM also engaged in the cruel process of removing horses 10 years and older. These horses have lived their entire lives in freedom, include the majority of band stallions and lead mares who lead the herd. BLM is also aware that these horses are referred to as "sale authority" horses, and may eventually end up in bad situations in which they are eventually sold to slaughter.

33. The BLM rejected Ms. Kathrens' requests for a reasonable approach to the capture and engaged in harmful actions, including chasing newborn foals down steep inclines and running the horses for 10 miles in 90 degree weather. Many of the young foals were lame and some were barely able to walk once they arrived at the corrals where the temperature reached 100 degrees. Respiration rates of young bachelor stallions, who tend to be some of the fittest members of the herd, were recorded at dangerously high levels. After the round up, some of the horses that had been released back into the Range were struggling to walk, holding their legs in the air or were laying down for hours at a time due to exhaustion.

34. Ms. Kathrens and Ms. Walker have experienced extreme distress at witnessing the BLM's harassment of these horses and foals and they fear that they will again witness this type of treatment of the horses during the next roundup. For Ms. Kathrens and Ms. Walker, it is distressing to visit the range in 2010 and not see horses that they have watched for years in the FS lands. It degrades their experience and saddens them every time they return. Even though Ms. Kathrens and Ms. Walker can visit some of the wild horses removed from the FS lands on a ranch near the range, it is not the same as viewing these animals in the wild.

III. Studies Have Concluded that A Minimum Population Size of 150 to 200 Adult Animals is Necessary to Ensure the Herd's Genetic Viability

35. After the Range was designated, then Secretary of the Interior Stewart Udall appointed a committee of persons knowledgeable about wild horses and range conditions to make recommendations concerning administration of the Range. Range management authorities concluded that any degradation of the designated range had occurred from

commercial uses and the horses had neither caused nor were increasing the Range's degradation.

36. Genetic scientists have concluded that a minimum of 150-200 adult horses need to be present on the Range in order to ensure genetic viability and a minimum effective population size.

37. In 2004, the herd suffered the loss of all but one of the foals that were born that year due to presumed mountain lion predation. Between 2003 and 2005, the herd's population was maintained naturally by predators and other environmental effects before mountain lions were hunted and killed.

38. From 1999 through 2009, BLM maintained the wild horse population at over 150 adult animals, which was over the "Appropriate Management Level," to avoid the inevitable genetic degradation to the herd that would follow managing it at too small a number.

IV. Historical Management Documents Regarding the PMWHR

39. In 1984, BLM issued the Billings Resource Management Plan (BRMP), which stated that "[f]ive water catchments will be required to improve grazing distribution by bands of horses (in the PMWHR)." 1984 Billings RMP at 23 (explanatory parenthetical added). Until just recently, there are only two water catchments on the range. Thus, BLM failed to make these range improvements to improve grazing distribution by the horses for twenty-five years and instead engaged in intrusive, invasive removals of the horses from the PMWHR.

40. In 1987, the FS finalized its Custer National Forest Plan (CNFP). In this document, the FS directed that only Management Area Q would be available to the wild

horses for use, thus violating the WFHBA by not including the horses' historic rangelands.

41. In 1984, the BLM, FS and the NPS issued a Herd Management Area Plan. In 1992, the BLM revised the 1984 HMAP and issued what it determined to be the "appropriate management level" for the PMWHR. That calculation was based on outdated data, collected when BLM had little knowledge of genetics and was ignorant of the need to maintain minimum numbers of breeding individuals to insure herd viability.

42. In August 2005, the BLM, FS and NPS entered into a Memorandum of Understanding (MOU) regarding their respective roles with regard to the wild horses on the PMWHR and any potential management actions proposed on lands under their respective jurisdictions.

V. Defendants' Management Actions Regarding the PMWHR and its Wild Horses

43. In 2004, BLM issued a report of range conditions conducted during some of the driest years of a multi-year drought. The BLM has relied on this report – based on a study of conditions in atypical years -- for its conclusions (a) that an overpopulation of wild horses exists on the PMWHR, and (b) for every decision to remove wild horses from the PMWHR since 2004. Neither the report nor the 2007 Range Evaluation relied upon by BLM in making its removal decisions were subject to the required analysis under NEPA.

44. In support of its recent removals, BLM has cited drought conditions which have not existed for over three years. Adequate and unusually heavy amounts of precipitation have occurred during the last three years, so that the area has not experienced drought since 2006. Furthermore, while acknowledging that the PMWHR contains areas with differing levels of precipitation and depths of soils, the BLM has

never analyzed whether an area normally receiving limited precipitation (such as a desert) may normally support limited forage without regard to any effects of grazing animals.

45. In an effort to enforce the AMLs for wild horses set in often decades-old land use plans, BLM has, since 2001, conducted massive removals of wild horses from the ten Western states which they inhabit. BLM now holds over 38,000 wild horses in short term and long term holding facilities, creating significant management problems. Despite this glut of wild horses that have been displaced and brought into captivity, BLM continues to remove wild horses from the range at what can objectively be referred to as an alarming rate.

46. Upon realizing that they have been caught, wild horses have been known to jump or attempt to jump the six foot panels of corrals in which they are held and/or throw themselves against the panels out of fear or in a desperate attempt to escape the restrictions on their movement imposed by the corrals. Some of these horses run head long into the barriers that restrict their escape, break their necks and die. Others severely injure themselves in the process or are shot due to their injuries. Still other trapped wild horses suffer from what is called “capture myopathy,” in which they become depressed and despondent over the loss of their freedom or separation from their family members.

47. Defendants’ actions with regard to the Pryor herd have violated the WFHBA command that the range is to be “devoted principally but not necessarily exclusively to [the] welfare of the existing herd or herds of wild free-roaming horses.”

48. BLM’s reliance on an AML to determine how many wild horses should be removed from the PMWHR is not based on current range data and allows BLM to forego

the required inventory and range condition assessment it is required by statute to undertake to determine whether or not wild horses are excess.

49. In issuing the HMAP for the PMWHR, BLM and the FS failed to consider a reasonable range of alternatives as is required under NEPA. Defendants failed to adequately explore TCF's proffered alternative of allowing the herd to be managed by natural factors, such as predation. BLM possesses information that historically predation and other factors have allowed the wild horse population to regulate itself on the PMWHR. The BLM should have subjected this alternative to more detailed review and, at a minimum, integrated elements of this alternative into a broader alternative subject to detailed analysis. The BLM also failed to consider expansion of the range.

50. BLM's 2009 roundup caused at least seven very young foals and other adult wild horses to become foot sore and lame due to the excessively rough manner in which they were captured. In observations made for two days following BLM's cessation of round up activities, plaintiff Kathrens and others assessed the horses, recording lameness and lethargy not only in foals but adults.

STATUTORY AND REGULATORY BACKGROUND

I. The WFHBA and BLM's Regulations Implementing the Act

51. In 1971, Congress declared that "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene." 16 U.S.C. §§ 1331 *et seq.* The Senate Committee report accompanying the bill noted that "the very concept that this legislation seeks to preserve [is] leaving the animals alone to fend for

themselves and placing primary emphasis on protecting the animals from continued slaughter and harassment by man.”

52. Congress further ordered that “wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death.” Under the WFHBA, they were to be considered “as an integral part of the natural system of public lands” in the area they were living in 1971. 16 U.S.C. § 1331. These legally protected areas are known as “herd areas” (HAs) and are defined as “the geographic area identified as having been used by a herd as its habitat in 1971.” 43 C.F.R. § 4710.3-1.

53. A herd’s “range” is “the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and *which is devoted principally but not necessarily exclusively to their welfare* in keeping with the multiple-use management concept for the public lands.” 16 U.S.C. §1332 (c).

54. The Act requires the Secretaries of Interior and Agriculture of the Interior to “protect and manage wild free-roaming horses and burros as components of the public lands. . . . The Secretary shall manage wild free-roaming horses and burros 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). The Secretary

shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands. The purpose of such inventory shall be to: make determinations as to whether and where an overpopulation exists *and* whether action should be taken to remove excess animals, determine appropriate management levels and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).

16 U.S.C. § 1333 (b)(1) (emphasis supplied).

55. BLM and the FS have exclusive authority under the WFHBA for the protection of wild horses and burros on the public lands administered by those agencies. The WFHBA requires that the agencies interfere with the horses at “the minimal feasible level.” According to BLM’s own regulations, BLM must protect wild horses and burros from “unauthorized capture, branding, harassment or death and provide these animals with humane care and treatment,” 43 C.F.R. § 4700.0-2. The FS is under a similar duty pursuant to its regulations.

56. BLM’s regulations implementing the WFHBA provide that the use of helicopters “shall be conducted in a humane manner.” 43 C.F.R. § 4749.1(a). BLM’s regulations implementing the WFHBA define “humane treatment” as “handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a wild horse or burro.” 43 C.F.R. § 4700.0-5(e). These regulations also define “inhumane treatment” as “any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community.” 43 C.F.R. § 4700.0-5(f).

57. BLM’s regulations implementing the WFHBA state that “[m]anagement activities affecting wild horses and burros shall be undertaken with the goal of maintaining free-roaming behavior.” 43 C.F.R. §4700.0-6.

58. In 2004, the WFHBA was amended to provide that wild horses taken off the range that are over 10 years of age or who were not selected for adoption after three

offers could be sold to private buyers. Some horses meeting this description have been purchased from BLM by individuals who sold them for slaughter.

II. The National Environmental Policy Act (NEPA) and CEQ Regulations

59. Under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321et seq., any major federal action that significantly affects the quality of the human environment requires the preparation of an environmental impact statement (EIS). The language and spirit of NEPA is aimed at ensuring that an agency's single-minded approach to a proposed action is tempered by consideration of a reasonable range of alternatives, including those with fewer adverse environmental impacts than the proposed action.

60. The Council on Environmental Quality ("CEQ"), the agency responsible for implementing NEPA, has developed regulations with which agencies must comply. The Department of Interior has adopted additional regulations implementing NEPA. When considering a proposed action under NEPA, the CEQ regulations require an agency to first determine whether the action is one that will normally have "significant" impacts and thus require the preparation of an EIS. 40 C.F.R. § 1501.4(a). In determining whether an EIS is required, the agency must analyze the impacts of the proposed action in terms of "context" and "intensity." Id. at §1508.27. "Context" requires the agency to evaluate the action "on society as a whole (human, national), the affected region, the affected interests, and the locality... Both short term and long term effects are relevant." Id. at §1508.27(a). "Intensity" refers to the severity of the impact and the relevant factors applied in evaluating this criteria include whether

- (1). . . A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial; . . . (4) the degree to which the effects on the

human environment are likely to be controversial; (5) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (6) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) whether the action is related to other actions with individually insignificant but cumulatively significant impacts. . . (10) whether the action threatens a violation of Federal, state or local law or requirements for protection of the environment.

Id. at § 1508.27(b). Agencies should prepare an EIS where these factors are present. An EIS serves “as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g).

61. Agencies may prepare an environmental analysis (EA) prior to an EIS. An EA serves three purposes: it assists in agency decision-making on whether to prepare an EIS or Finding of No Significant Impact (FONSI); it independently ensures compliance with NEPA even when no EIS is required; and it facilitates the preparation of an EIS if one is required. 40 C.F.R. § 1508.9(a).

62. NEPA, the CEQ regulations and the Department’s own regulations implementing NEPA require BLM to analyze in an EA alternatives which involve unresolved conflicts concerning alternative uses of available resources even when an EIS is not required. See, e.g., 40 C.F.R. §1502.14(a). Agencies must insure that “high quality” information is utilized during the NEPA process and “that environmental information is available to public officials and citizens *before decisions are made and before actions are taken.*” 40 C.F.R. § 1500.1(b) (emphasis added).

63. Although an EA is a “concise, public document,” it must include a discussion and consideration of the need for the proposal, all reasonable alternatives and the reason for rejecting alternatives, environmental impacts of the proposed action and a listing of

the persons and agencies consulted. 40 C.F.R. §§ 1508.9(a), 1508.9(b). The BLM must use the best available information and objectively analyze all impacts on the environment under the proposed action and each alternative to determine if the impacts are significant.

64. An EA's FONSI is only considered adequate if the agency took a "hard look" at the problem, identified the relevant areas of environmental concern, made a convincing case that the environmental impacts were insignificant as to the problems studied and identified; and if there were significant impacts, that the agency's plan reduced the impacts to a minimum.

65. BLM's Departmental Manual provides that certain activities are entitled to a "Categorical Exclusion" (CX) from NEPA requirements. CXs are available for "extraordinary circumstances" and for the "(5) Processing (transporting, sorting, providing veterinary care, vaccinating, testing for communicable diseases, training, gelding, marketing, maintaining, feeding, and trimming of hooves of) excess wild horses and burros [and] (6) Approval of the adoption of healthy, excess wild horses and burros." 516 DM 11.9. No activities regarding wild horses and burros are categorically excluded from NEPA analysis.

CLAIMS FOR RELIEF

COUNT ONE **(Violations of the WFHBA and APA)**

66. Plaintiffs incorporate by reference here the allegations of the preceding paragraphs of this Complaint.

67. BLM has failed to protect the PMWHR herd and individual wild horses from harassment, capture and death and it has failed to devote the range to the welfare of the

horses to the degree mandated by the WFHBA and the Executive Order establishing the PMWHR.

68. BLM's actions violate the mandate of the Act that management actions shall be at the minimal feasible level. BLM has violated the Act by not undertaking and coordinating range improvements that would promote the welfare of the horses and eliminate the basis of BLM's conclusory assertions that the range is in deteriorating condition and that removals of the horses are necessary.

69. BLM's inappropriate reliance on irrelevant documentation is arbitrary and capricious.

70. BLM's removal of wild horses from the PMWHR in such numbers that it leaves a population size that is insufficient to ensure genetic diversity violates implementing regulations for the WFHBA that "wild horses and burros shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat." 43 C.F.R. §4700.06. Furthermore, doing so destroys the uniqueness of this herd and their special adaptations that have evolved over the past 200 years.

71. BLM's determination that the PMWHR wild horses it removed were "excess" violates the WFHBA and is arbitrary and capricious.

72. BLM's actions threaten genetic diversity and survival of the PMWHR herd.

73. BLM's capture and removal of horses ten years of age and older who have lived their entire lives on the range with the possibility of and actuality of sale constitutes harassment and is cruel.

74. BLM reliance on AMLs set in the absence of data on the population number necessary to ensure wild horse herd survival and genetic viability of the herd violate the spirit of the WFHBA.

75. BLM's actions in removing these wild horses constituted harassment and inhumane treatment, in violation of the Act and the BLM regulations implementing the WFHBA.

76. Defendants' issuance of an HMAP which 1) fails to take into account the needs for a population size of a wild horse herd that will ensure genetic viability; 2) fails to provide for the natural management of the herd; 3) fails to provide for expansion of the range to include FS lands outside the boundary of the PMWHR and provide for the continued historical and biologically necessary use of these lands violates the WFHBA and is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law.

77. The FS's direction that a Northern Boundary Fence be built to restrict the movements of the wild horses to and from areas that they have used historically since before passage of the WFHBA violates the WFHBA and is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law.

78. The FS's failure to provide in the CNFP and HMAP that wild horses may occupy areas of historical use since before passage of the WFHBA violates the WFHBA and is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law

79. All of these acts violate the WFHBA and its implementing regulations and are subject to reversal under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.

COUNT TWO

(Violations of NEPA and the APA)

80. BLM's use of a Categorical Exclusion (CE) to circumvent NEPA's requirement to address the environmental effects of its processing, disposition and other activities with respect to the Pryor wild horses it removes from the range is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law, and are thereby subject to reversal under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (APA).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and grant the following relief:

A. Issue a declaratory judgment that:

1. Defendant BLM's EA and associated Decision Record and FONSI and the removal of the wild horses violate the Wild Free Roaming Horses and Burros Act, and its implementing regulations, and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law, contrary to the APA, 5 U.S.C. §706(2)(A)-(F).

2. Defendant BLM's use of a Categorical Exclusion to circumvent the requirement to provide plaintiffs and members of the public with information concerning its post-removal actions with regard to the wild horses of the PMWHR and to address the environmental effects of all of the actions it takes with respect to these wild horses after it

removes them from the range is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law, and are thereby subject to reversal under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.

3. Defendant BLM's rounding up of the Pryor wild horses by chasing them down an elevation of approximately 5000 feet at a distance of between 10 to 15 miles constitutes harassment and inhumane treatment in violation of the WFHBA and its implementing regulations.

4. The Pryor wild horses are entitled to occupy areas that the herds have used historically on lands of the Custer National Forest;

5. Fences and other encumbrances on areas of the Custer National Forest which restrict wild horses from areas that the herds have used historically and so impede their free-roaming behavior and seasonal migration on lands of the Custer National Forest and their ingress to and egress from the PMWHR violate the Wild Free Roaming Horses and Burros Act and the APA;

6. The 2009 HMAP is arbitrary and capricious and an abuse of discretion to the extent that it does not provide for a genetically viable population of wild horses on the PMWHR and adjacent lands.

7. The 2009 HMAP is arbitrary, capricious, an abuse of discretion to the extent that it does not provide for use of the natural management provisions;

B.

1. Set aside and vacate BLM's EA, Decision Record and FONSI to the extent it provides for the removals of wild horses and any removals of the horses BLM conducted therein.

2. Set aside the 2009 HMAP and require BLM and the FS to provide for the alternatives of Natural Management of the herd and expansion of the Range that they rejected.

C. Require BLM to rescind its Categorical Exclusion for its processing, disposition and other activities with respect to the Pryor wild horses it removes from the range, and to disclose to plaintiffs, members of the public and this Court the disposition, whether through adoption or sale or any other disposition of each and every wild horse removed from the PMWHR including, but not limited to the names of individuals or other entities receiving such wild horses, and the location to which the wild horses will be moved, and to provide weekly updates of this information until the conclusion of this litigation.

D. Require BLM to take affirmative actions to ensure that any PMWHR horses that are adopted, auctioned or sold will not be used for commercial exploitation, sold for slaughter or subject to further disposition in any other manner that would violate the requirements of the WFHBA.

E. Require BLM to address in its PMWHR gather plans, the post-gather transport, processing, disposition and all other actions contemplated with regard to the wild horses following their removal from the range.

F. Require BLM to make available to the public and to include in any and all PMWHR gather plans data regarding the estimated number of wild horses per year, population

trend data, annual mortality data or a description of the census methodologies used by the BLM to estimate the size of the PMWHR population and how those methodologies have changed over time.

G. Require BLM to make available to the public all data in its possession concerning range conditions, use of forage, impact of precipitation and creation of additional water catchments.

H. Enjoin the BLM and its contractors from harassing the PMWHR wild horses by using inhumane methods to haze, trap and capture the horses.

I. Enjoin the FS from arranging for the building of any fences and/or require that the FS remove any fences that restrict wild horses from using areas that the herds have used historically and impedes their free-roaming behavior and seasonal migration;

J. Enjoin the BLM from hazing wild horses from the FS lands back into the PMWHR.

K. Award Plaintiffs their costs and expenses (including reasonable attorney, expert witness and consultant fees); and

L. Award Plaintiffs such other relief as the Court deems appropriate.

DATED: July 21, 2010

Respectfully submitted,

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*Application to appear
Pro hac vice pending