

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

**THE CLOUD FOUNDATION, INC.,
et al.,**

Plaintiffs

v.

Civil Action No. 09-1651 (EGS)

**KEN SALAZAR, in his capacity as
Secretary,
United States Department of Interior,
et al.,**

Defendants

**PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION**

Plaintiffs hereby move this Honorable Court for an order restraining defendants BLM, and all those acting in concert with them, from removing any wild horses, including foals and yearlings from the Pryor Mountain Wild Horse Range (PMWHR) in Montana and Wyoming, as set forth in the DR, FONSI and associated EA, DOI-BLM-MT-C010-2009-35-EA and from adopting, selling or giving away any wild horses, foals, and yearlings who may have already been rounded up from the PMWHR until the Court issues an order resolving these matters.

The undersigned represents that on Friday, August 28th and Sunday, August 30, 2009, she spoke with John Most, Esquire of the Department of Justice to advise him that she would be seeking this Motion for Temporary Restraining Order and/or Preliminary Injunction. Mr. Most advised that BLM will hold off beginning the round up and removal of the horses from the PMWHR for two days in order to allow the Court time to rule on the motion.

The undersigned represents that, in light of the expedited nature of the briefing required in this action, that today at 11:43 a.m., she sent John Most, counsel for BLM, a copy of the Memorandum of Points and Authorities via email.

Respectfully submitted,

/s/ Valerie J. Stanley
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Dated: August 31, 2009

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Civil Action No. 09-1651 (EGS)

**KEN SALAZAR, in his capacity as
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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY
INJUNCTION**

I. Introduction

A. Timing of BLM's Action and this Litigation

Plaintiffs, by and through counsel, hereby submit this memorandum in support of their Motion for a Temporary Restraining Order and/or Preliminary Injunction against the Bureau of Land Management (BLM), to prevent BLM from implementing the Environmental Assessment (EA), Decision Record (DR) and Finding of No Significant Impact (FONSI) issued on August 27, 2009 to remove any wild horses from the Pryor Mountain Wild Horse Range (PMWHR) in Montana and Wyoming.

On July 17, 2009, BLM issued for a thirty (30) day public comment period a Preliminary EA and Draft Gather Plan proposing to remove 70 wild horses from this range. The round up and removal of the horses from the range is to include aged and young horses and is the largest removal of wild horses from this range since before passage of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §1331 et seq. in 1971. Plaintiffs, other individuals and experts in genetic diversity have warned BLM that proceeding with such a removal threatens the continued genetic viability of the herd, as well as subjects the horses to stress, harassment and possible death. The public comment period ended on August 18, 2009.

BLM plans to take the extraordinary step of closing access to the public lands of the PMWHR on August 31, 2009. BLM did not notify the public of this plan until after it issued its DR on August 27, 2009. To the best of plaintiffs' knowledge BLM has never closed the public lands of the PMWHR and surrounding areas when it has conducted a roundup of wild horses. While BLM has previously, for the safety of the public, dictated where observers may stay during a roundup, the closure of the entire range, encompassing over 39,000 acres is unprecedented.

BLM initially planned to begin the round up of the wild horses on September 1, 2009, however, counsel for defendants advised the undersigned on Sunday evening, August 30, 2009, that BLM will agree to hold off on beginning the removal until September 3, 2009.

B. Plaintiffs, Their Interests in Protecting the Wild Horses of the PMWHR and the Irreparable Harm They and Members of the Public Will Suffer if BLM's Removal of Horses from the Range is not Enjoined

Ginger Kathrens, Volunteer Executive Director of The Cloud Foundation (TCF), began filming this herd in 1994, has visited the herd several times a year since then, not only to film them, but to observe them engaging in their natural behaviors and enjoying their lives and family members in the wild. Ms. Kathrens plans to visit the herd again in August and September, 2009. Ms. Kathrens knows almost all of the wild horses in this herd by name. Ms. Kathrens began TCF, a Colorado non-profit corporation in 2005, to attempt to ensure the protection of the horses that live there, to ensure their ability to live free-roaming on the range, as provided for by the Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. §§ 1331 *et seq.* TCF has supporters worldwide, many of whom, after viewing the horses on film, have journeyed to the Pryor Mountain Wild Horse range to see the horses in person.

Front Range Equine Rescue (FRER) is a Colorado, non-profit organization. whose purposes are to rescue, rehabilitate and adopt out domestic and wild horses, many of whom are rescued from neglect, abuse and from auctions to save them from slaughter. FRER also has supporters and donors who have visited and will continue to visit the wild horses of the PMWHR. FRER has previously rescued Pryor Mountain Wild Horses, whom BLM has adopted out but whose owners were then not able to keep them. FRER has also experienced the difficulties of domesticating, working with and training those wild horses who are removed at 5-6 years of age, due to the fact that they have lived in the wild for such a long period of time. For this reason, FRER has urged BLM not to remove older horses from the range due to the difficulties in training them and finding

suitable, adoptive homes for them. TCF and FRER are bringing this litigation on behalf of their members.

Carol Walker is a nature photographer. Carol has travelled all over the world photographing wildlife for the past 28 years. Six years ago, Carol began photographing wild horses. As she followed several herds in Wyoming, Colorado and Montana, she became aware of how precarious their situation on public lands has become. Since then, she has dedicated herself to educating people with her photographs and stories about the wild horses. Her book “Wild Hoofbeats: America’s Vanishing Wild Horses,” was released in the winter of 2008 and is currently in its second printing and has won 5 book awards. Ms. Walker has photographed two wild horse roundups, one from the Piceance-East Douglas Herd Management Area in 2006 and from the Sand Wash Area in Colorado in 2008; she presented the evidence of the harm done to these horses during these roundups to BLM’s Wild Horse and Burro Advisory Board, yet the Board took no action on her evidence. Carol Walker has visited the PMWHR once or twice a year 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 this month. Ms. Walker advised BLM that they should not remove the horses because the herd is unique, valuable, and a National treasure. In her comments, she explained,

I have been visiting the horse range for 6 years and did not see the degradation you speak of – the range has been in better health the last 2 years due to good precipitation than I have ever seen it. The horse range needs to be expanded into areas historically used by the wild horses. While negotiating or waiting for an agreement with the Forest Service, put this gather on hold! You cannot undo the damage you will do later. Last, taking 70+ horses out is absolutely irresponsible in this economy. There is no way that

the older horses will be adopted – they will be sent to holding facilities and be subject to possible euthanization.

Ginger Kathrens, Volunteer Executive Director of The Cloud Foundation (TCF), began filming this herd in 1994 and knows almost all of the wild horses on this range by name. See Verified Complaint, ¶¶ 6-8. As she explains,

They are like members of my family and the loss of these animals and potentially the whole herd is so sad that I find no adequate way to express my grief. In creating the three Cloud films for PBS's Nature series, I have spent weeks at a time with them in every season of the year and I have learned what they value most---their freedom and their families. The bonds they develop with each other last, in some cases, a lifetime. To potentially witness their society torn apart is difficult for me to even think about.

See Exhibit 1, Declaration of Ginger Kathrens ("Kathrens Decl.") ¶ 1.

Ms. Kathrens explains how the removal of the older horses robs not only the individual horses of their freedom and separation from their families, Kathrens Decl. at ¶¶ 2-6, but the herd of its teachers ("These are the herd leaders, the band stallions and lead mares who pass on their wisdom to the younger horses, wisdom needed to survive the surprise snowstorm, or the hidden waterholes only available in early spring or late autumn. They are essential to a healthy herd that can survive into the future") Ms. Kathrens explains that BLM's roundup, which, according to the agency must go ahead at this time due to the availability of the helicopter crew, is potentially deadly not only for the young foals, who have recently been born on the range, but other horses. Kathrens Decl. at ¶¶ 6-7; see also Verified Complaint at ¶ 41.

Ms. Kathrens explains that BLM's actions will not only harm her but many, many members of the public who have come to know the herd as a whole and its individual

members through their portrayal in her PBS specials. Kathrens Decl. at ¶1. BLM's actions threaten to destroy the animals these viewers have come to love and who have had a profound impact on their lives. Kathrens Decl. at ¶¶ 10-13.

Ms. Kathrens has learned from her study of the history of the Pryors, that BLM's threats to remove the Pryor wild horses from the area back in 1968 due to alleged overgrazing, were found, after further investigation by range experts and others, not to be attributable to wild horses, but rather, the result of sheep grazing some 50-100 years earlier. See Kathrens Decl. ¶ 9 and Exhibit A¹ thereto and Verified Complaint ¶¶ 21, 22.

Ms. Kathrens has visited the PMWHR in June, July and August of this year and filmed the bountiful vegetation on the range due to the increased precipitation. See Kathrens Decl. ¶ 17 and Exhibit B. ("Exhibit 2 is a DVD of pictures I took on my most recent visit to the range in July, 2009. Local residents and regular visitors to the PMWHR recognize that the amount of precipitation has created a range in great shape with green hills even in the low desert country. This is amazing for August.") Ms. Kathrens submitted this DVD to BLM during the public comment period on BLM's Environmental Assessment for the removal.

C. The Pryor Mountain Wild Horse Range and the Wild Horses Living There

The Pryor Mountain Wild Horse Range (PMWHR) is located approximately 50 to 70 miles south of Billings, Montana and 10 miles north of Lovell, Wyoming. EA at 3. Elevations range from 3,850 feet to 8,750 feet above sea level. Id. Annual precipitation varies with elevation with six inches at the lower elevations to upward of 20 inches at the higher elevations. Id. Plant communities also vary with elevations and due to

¹ Exhibits A and B to the Kathrens Declaration are too large to be filed via ECF; a copy will be delivered to the Clerk's office as soon as possible.

precipitation from cold desert shrub to sub-alpine forests and meadows. Id. Soils vary in depth from shallow (less than ten inches) to 20 to 40 inches deep depending on location. Id.

The primary big game species found in the project area are mule deer, Rocky Mountain bighorn sheep, elk, and black bear. EA at 22. Mule deer are the most abundant of these species and most widely distributed. Id. The sagebrush, juniper/mountain mahogany belt at lower elevations in the southern foothills is considered crucial mule deer winter range. Id. In 2007, a shift toward a downward trend in ecological condition was documented for the low elevation areas of BLM and NPS lands. Heavy forage utilization continues to be documented in the same areas. Id. The “Turkey Flat” area depicted by a single picture in the EA that represents an area of “overuse” is in the southern portion of the range. According to BLM,

The Natural Resource Conservation Service’s (NRCS) *Pryor Mountain Wild Horse Range Survey and Assessment* (2004)² and the *Interagency Pryor Mountain Wild Horse Range Evaluation* (February 2008) documented the occurrence of resource damage in the low elevation desert areas and sub-alpine meadows of the PMWHR (see Photo 1). Such resource damage is likely to continue unless immediate action is taken. In 2007, a shift toward a downward trend in ecological condition was documented for the low elevation areas of BLM and NPS lands. Heavy forage utilization continues to be documented in the same areas.

Experts analyzing the PMWHR have concluded that precipitation is the major factor affecting vegetation growth on the range. In “The Influence of Herbivory on Plant Cover and Species Composition in the Pryor Mountain Wild Horse Range, USA,” Jace T. Fahnestock and James K. Detling, 1999 (hereinafter “Fahnestock study”), state, “Our study

² The NRCS study, completed in 2004, which BLM relies on for its conclusion that the range is overgrazed by wild horses, was conducted during 2002-2003, the worst two years of a drought. Verified Complaint ¶31.

indicates that abiotic factors (e.g. precipitation) are more likely than grazing to affect abundances of key plant species, and hence ecosystem dynamics in the PMWHR, and that the effects of herbivory are more localized and more prevalent in the lowland grasses than in the other plant function groups.” (emphasis supplied)³ . In support of this action, BLM cites drought conditions, which existed on the range up until 3 years ago. Adequate, and unusually heavy amounts of precipitation have occurred during the last 3 years, however, so that the area has not experienced drought since 2006. See Exhibit 2 (Statement of Jeff Powell, Certified Range Management Consultant, that, “ BLM’s conclusion that unusual display of wild flowers seen this spring on the Pryor Mountain Wild Horse Range is due to overgrazing and poor range condition may be a misconception and that in his experience having conducted several years of range research in the Bighorns just south of the Pryors, the unusual display of wild flowers is more likely due to the unusually high amount of precipitation received by the Pryors this past winter and spring. According to the NRCS Montana basin precipitation reports, the 2009 year-to-date precipitation is double that of average”; See Exhibit 3 (Statement of Dr. Judith P. Ahlefeldt, PhD, a former Ecologist for the Medicine Bow Forest, with a PhD in Plant Ecology from Colorado State University, explaining that BLM’s techniques for assessing range conditions are outdated, that “more modern models take into account factors which produce a variety of stable states “capable of sustaining healthy animal populations, but which may not happen to fit the models that BLM and NRCS have chosen to apply” and that “even if all the horses were moved to another area for a decade, that climate would

³ The Fahnestock study is well known not only to students of the Pryors, whose ecosystem has been studied extensively, but also to BLM.

still be the main driver for the year-to-year range condition, and the desert and high elevation ends of the range, will be extremely slow to change.”)

Furthermore, BLM’s former Wild Horse and Burro Specialist testified that BLM was unable to determine which species of wildlife were consuming which vegetation. See Exhibit 4 (Testimony of Linda Coates-Markle). In addition, a GAO study of the Wild Horse and Burro Program concluded that BLM’s removal of wild horses from the range did not result in improvement of range conditions. See Exhibit 5.⁴

D. Studies of the Pryor Herd Demonstrate that the Number of Wild Horses on the Range Determines Whether the Herd Will Remain Genetically Viable or Whether the Herd’s Viability Will Be Threatened

The DR now calls for BLM to permanently remove 70 wild horses from the PMWHR. The Pryor wild horse herd, now approximating a total population of 190 horses one year and older is Montana’s only remaining herd of wild free-roaming horses. Not only are there few of these horses on the range, and in the state, but they are of unique and rare ancestry. According to scientific commentators who have studied this range and its equid inhabitants, the PMWHR wild horse population is one of a “few populations [that remain] that descend from types and breeds now otherwise rare or extinct, mainly the Spanish colonial type . . . The North American Colonial Spanish breed type is otherwise very rare globally, and only a small reservoir exists in domestication.”

(D.Phillip Sponenberg, DVM, Ph.D., Professor, Pathology and Genetics, Virginia-Maryland Regional College of Veterinary Medicine, Virginia Tech, Blacksburg, VA; BLM Resource Notes No. 25, Date 07/19/2000.

⁴ All Exhibits attached hereto were presented to BLM during the comment period in response to the challenged EA.

Dr. Gus Cothran, Director of the Equine Blood Typing Research Laboratory at the University of Kentucky, has been studying the Pryor Mountain wild horse herd of southern Montana since 1991 and advising BLM on the genetic viability of this herd as well as other wild horse herds on public lands in the West. On July 16, 2009, in response to BLM's decision to lower the Appropriate Management Level (AML)⁵ for horses on the PMWHR to 95 individuals, Dr. Cothran wrote a strongly worded cautionary letter to BLM. He explained,

As has been stressed several times, the effective population size is generally 1/4th to 1/3rd of the census population so that a census population size of 150 to 200 is required to achieve the minimum effective population size. It is not possible to accurately determine the real effective population size of a wild population such as the PMWH so estimates such as those above must be used. It also is important to understand that within a closed population, genetic diversity does not increase the genetic variation, it only slows the rate of loss of existing variation. . . My purpose here is to make sure that it is understood what the potential consequences of a reduction in population size are in terms of genetic diversity.

See Exhibit 6. Dr. Cothran submitted this letter to the Billings Field Office of BLM.

Dr. Cothran's 2009 letter comports with genetic evidence that has been presented to BLM with regard to the PMWHR horses for a decade. For example, in a report entitled, "Habitat Suitability Model For Bighorn Sheep and Wild Horses in Bighorn Canyon and The Pryor Mountain Wild Horse Range", October 6, 2003, by Gary Wockner, Francis Singer, Kate Schoenecker, it was stated that:

⁵ The WFHBA states that BLM shall determine "appropriate management levels" of wild horses on particular areas of the range. 16 U.S.C. § 1332 after inventorying and assessing range conditions

...minimum goals for genetic viability in the Pryor Mountain wild horses ($N_e \geq 50$) require that at least 160 animals be present on the range (Singer et al., 2000). Since the $N_e \geq 50$ goal is set for the breeding of domestic animals, and since the vagaries of drought, severe winter, predation, and other stochastic events cause stress in wild animals, larger goals for N_e (e.g. $N_e \geq 100$) [more than or equal to 300 wild horses] for wild horses are even more desirable (USDI, BLM 1999; Gross 2000).

Not long after the results of these studies were reported to BLM, the Field Manager for the Pryors herd and range expressed her concern for the genetic viability of the Pryor herd due to their being managed at dangerously low numbers. See July 7, 1999 Letter from Sandra S. to Rand Herzberg, Custer National Forest, attached hereto as Exhibit 7. At the time Ms. Brooks wrote this letter, the BLM had not begun administering the immunocontraceptive fertility control drug PZP to the Pryor herd. BLM has been administering an immunocontraceptive drug to the herd since 2001.

Since BLM has historically been concerned about maintaining the genetic diversity of the herd, and not risking this loss, BLM has allowed the PMWHR wild horse population to remain above the AML set in 1984 and 1992, even before the issue of genetic diversity in this population had the benefit of expert attention and study. See EA at 29 (“However, the wild horse population over the last decade has been on average 60 horses over the established AML.”)

D. BLM Has Administered the WFHBA by Removing Wild Horses from the Range and is now Managing Over 30,000 Wild Horses Off the Range Captive in Holding Facilities

BLM’s problems in caring for the 30,000 plus wild horses it has removed from range are well known and have been reported on extensively in the media. 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. As Judge Collyer noted in ” Colorado Wild Horse and Burro Coalition v. Salazar, 2009 WL 2386140 (D.D.C),

BLM's directive is “to protect and manage *wild free-roaming* horses and burros *as components of the public lands....* ” 16 U.S.C. §1333(a) (emphasis added). Congress did not authorize BLM to “manage” the wild horses by corralling them for private maintenance or long-term care as *non-wild free-roaming animals off* of the public lands.

Id. at 7.

BLM’s purported urgent need to add 70 wild horses from a small population subject to irreversible genetic loss to the over 30,000 wild horses it holds in captivity is transparent and should be rejected by this Court.

I. STATUTORY AND REGULATORY SCHEME

A. The Secretary of the Interior Designated the Pryor Mountain Wild Horse Range as the First Range for the Protection of Wild Horses in 1968

In response to public outcry over BLM’s plans to remove wild horses from the Pryor Mountains and sell the horses for slaughter, in 1968, the Secretary of Interior designated the Pryor Mountain Wild Horse Range, an area encompassing approximately 39,000 acres, as a sanctuary for the protection of the wild horses living there. The PMWHR was created by Executive Order on September 9, 1968. The purpose of this designation was to “protect the unique population of wild horses of Spanish ancestry and protect native wildlife, watershed, recreation, archaeological, and scenic values,” 33 Fed. Reg. 12920 (1968).

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. A member of the committee, Dr. Wayne Cook of Colorado State

University, an authority on range management, concluded that any degradation of the range

had actually occurred some 50-100 years earlier due to domestic sheep grazing. Dr. Cook determined that “the horses neither caused this condition, nor were they greatly aggravating it, except for the network of trails they had created in their long treks to water. If plastic water tanks could be put into the region to relieve the horses of the necessity of so much traveling in search of water, the trails, he felt, might even heal over. . . . After ten months of study, . . . the committee’s unanimous recommendation was that the public lands in the Pryor Mountains be retained for the use of wild horses above all other purposes.

Ryden, Hope, *America’s Last Wild Horses*, 256-261, attached as Exhibit A to the Declaration of Ginger Kathrens.

B. Wild Free-Roaming Horses and Burros Act – Statutory Provisions and Legislative History

Three years after the PMWHR was created, Congress passed the 1971 Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. §§ 1331 et seq., Congress found and 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.” Upon finding this, Congress stated that its policy was that

wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death, and to accomplish this they are to be

considered in the area where presently found as an integral part of the natural system of public lands,

16 U.S.C. § 1331.

BLM and the Forest Service (FS) have exclusive authority under the WFHBA for the protection of wild horses and burros on the public lands administered by those agencies, 16 U.S.C. § 1331(a). The WFHBA requires that BLM's and FS's management activities be at "the minimal feasible level," *Id.* 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 Forest Service is under a similar duty pursuant to its regulations.

Under the WFHBA, wild horses are "to be considered in the area" where they were found in 1971 "as an integral part of the natural system of the public lands," 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.

Under the WFHBA, "range," means "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). ***The Pryor Mountain Wild Horse Range was designated as one of the three wild horse ranges before passage of the WFHBA.***

The Act requires the Secretary 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 Act provides that, “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).

The 1971 WHBA provides that , “Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people...” 16 U.S.C. § 1331.

In the Senate Committee report accompanying the bill that became law, the Senate noted, “The committee wishes to emphasize that the management of the wild free-roaming horses and burros be kept to a minimum both from the aspect of reducing costs of such a program as well as to deter the possibility of “zoolike” developments. An intensive management program of breeding, branding, and physical care would destroy the very concept that this legislation seeks to preserve...leaving the animals alone to fend for themselves and placing primary emphasis on protecting the animals from continued slaughter and harassment by man.”

From 1882 until passage of the Wild Free-Roaming Horses and Burros Act in 1971, wild horses of these areas, as well as wild horses throughout the nation, were routinely rounded up by the thousands by private and government individuals to be made

into commercial products or to be used. See Johnston, “The Fight to Save a Memory,” 50 Texas L. Rev. 1055, 1056 n.2 (1972), noting that, “throughout the West, [wild horse] numbers, which had been assessed in the millions, were reduced to an estimated 14, 810 to 29,260 in the 1950s.” W. Wyman, The Wild Horse of the West (1945).

Approximately twenty years later, at the passage of the WFHBA in 1971, BLM advised Congress that “the number of . . . free-roaming horses, found mainly in Nevada, Oregon and Wyoming, has remained relatively stable at 17,000. Of this total, it is estimated that 7,500 are branded or probably will be claimed by private owners, leaving about 9,500 unclaimed, free-roaming horses.” See Protection of Wild Horses and Burros on Public Lands, Hearing on S. 862, S. 1116, S. 1090 and S. 1119 Before the Senate Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, 92nd Cong. 20 (1971) (hereinafter “Senate Hearing”) (Statement of Harrison Loesch, Assistant Secretary of the Interior).

Prior to passage of the WFHBA, wild horses and burros had been rounded up by the thousands and removed from the public lands by persons who profited from the animals by selling them for slaughter. One of the issues Congress debated as it considered how best to protect these animals was whether the horses should be confined to specific ranges, which may have differed from areas that they currently occupied, or whether they should be left to roam in the areas of the public lands that they then occupied. The issue of whether specific ranges should be created arose, in part, because three years earlier, the Secretary of the Interior created the Pryor Mountain Wild Horse Range (PMWHR) from public lands in Wyoming and Montana. See 33 Fed. Reg. 12920 (1968). BLM also favored the creation of specific ranges – a total of five within the

United States – and urged Congress to adopt a bill providing for these ranges, where it would place such free-roaming horses and burros as the Secretary “deems worthy and capable of protection as a national heritage,” and providing that “[t]he Secretary shall select areas [for those ranges] which he finds will provide a habitat on which such horses and burros can thrive in harmony with the environment. . . .” See Senate Hearing at 21.

Thus, while Congress had the model of limiting wild horse occupancy of the public lands to specific, delineated areas by providing for the dedication of specific ranges for wild horses – and BLM even submitted a draft bill that would have continued this course – Congress explicitly rejected this particular model of providing for the protection of wild horses and burros in general on the public lands. Instead, Congress provided that wild horses would be protected in all areas where they were found at the passage of the Act, and wild horses would be considered comparably among other uses in the administration of the public lands. Congress declared that:

It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of public lands.

16 U.S.C. § 1332 (emphasis supplied).

In addition, Congress heeded witnesses’ concerns that wild horses not be managed in park or zoo type settings with intense manipulations such as introducing new bloodlines etc. because to do so would interfere with the nature of wild horses. See Protection of Wild Horses and Burros on Public Lands. Hearing on S. 862, S. 1116, S. 1090 and S. 1119 before the Senate Subcomm. on Public Lands of the Comm. on

Interior and Insular Affairs, 92nd Cong. 71 (1971) (Statement of Hope Ryden); id. at 75-121 (Statement of Velma Johnson).

The WFHBA provides that “[t]he 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” and that “[a]ll management activities shall be at the minimal feasible level ... in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.” Colorado Wild Horse and Burro Coalition v. Salazar, 2009 WL 2386140 at 4 (D.D.C) (Collyer, J.), citing, 16 U.S.C. § 1333(a).

In 2004, via an amendment inserted without debate by then Montana Senator Conrad Burns into a massive Budget Appropriation bill, the WFHBA was amended to provide that wild horses taken off the range that were over 10 years of age or who were not selected for adoption after three offers could be sold without reservation. 16 U.S.C. § 1333(e). Some horses meeting this description have been purchased by individuals who sold them for slaughter.

C. Federal Land Policy Management Act and Land Use Plans

The Federal Land Policy Management Act (“FLPMA”) establishes requirements for land use planning of public lands. 43 U.S.C. §§ 1701, et seq. FLPMA recognizes, however, that a land use plan does not trump the statutory command of other federal law, such as WFHBA, which requires BLM to consider wild horses as an integral part of the public lands. 43 U.S.C. § 1701(b); 16 U.S.C. § 1331. The PMWHR, which contains both BLM and Forest Service lands is governed by both the 1984 Billings Resource Management Plan (BRMP) and the Custer National Forest Plan (CNFP).

The 1984 BRMP noted that ““*Five* water catchments will be required to improve grazing distribution by bands of horses.” 1984 Billings RMP at 23 (emphasis added). There are only two water catchments on the range currently. BLM has failed to make these range improvements to improve grazing distribution by the horses for twenty-five years.

D. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) requires all federal agencies to prepare an Environmental Impact Statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Even if the agency believes that, on balance, the effect of the proposed action will be beneficial, for the purposes of NEPA its impact may still be significant. 40 C.F.R. 1508.27(b)(1).

The language and spirit of NEPA are aimed at ensuring that an agency’s single-minded approach to a proposed action is tempered by consideration of a reasonable range of alternatives. 40 C.F.R. §§ 1500, *et seq.* “NEPA operates to prevent a federal agency from taking any major action *before* that agency has considered the environmental effects of that action.” Citizen Advocates for Responsible Expansion, Inc. v. Dole, 770 F.2d 423, 431 (5th Cir. 1985) (emphasis in original) (citing H.R. Rep. No. 765, *as reprinted in* 1969 U.S.C.C.A.N. 2751, 2756, 2757 & 2771)).

Implementing regulations issued by the Council on Environmental Quality (the “CEQ”) mandate that federal agencies use the process set forth in NEPA to “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. §§ 1500.2(a), 1500.2 (e), 1500.3. “Simply by focusing the agency’s attention on the

environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). This is particularly relevant in this instance, where BLM plans to drastically reduce a wild horse population despite expert opinions that doing so will jeopardize a unique and irreplaceable treasure, the only wild horse area in Montana. When Congress mandated that wild horses were to be an “integral” part of the system of public lands, it hardly envisioned that the agency charged with protecting wild horses would threaten them with such harm.

Rather than preparing an Environmental Impact Statement (“EIS”), agencies may choose to first prepare an Environmental Assessment (“EA”). An EA (1) assists the agency in determining whether to prepare an EIS or Finding of No Significant Impact (“FONSI”); (2) independently ensures compliance with NEPA even where an EIS is not required; and, (3) facilitates the preparation of an EIS when one is required. 40 C.F.R. § 1508.9(a). An EA is considered adequate only if the agency has taken a “hard look” at the problem; identified the relevant areas of environmental concern; made a convincing case that the environmental impacts were insignificant to the problems studied and identified; and, if there were significant impacts, convincingly established changes that reduced the impacts to a minimum. Grand Canyon Trust v. FAA, 290 F.3d 339, 341 (D.C. Cir. 2002). An EA must discuss, in adequate detail, a reasonable range of alternatives and must also give a reasoned explanation for rejecting each alternative that it does not accept. 40 C.F.R. § 1502.14(a).

ARGUMENT

I. THE COURT SHOULD ISSUE A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION TO MAINTAIN THE STATUS QUO

I. STANDARDS FOR INJUNCTIVE RELIEF

A temporary restraining order should be issued where plaintiffs demonstrate that: (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable injury if the restraining order is not granted; (3) the balance of hardships weighs in their favor; and (4) injunctive relief is in the public interest. See, e.g., Ramirez v. U.S. Customs and Border Protection, 477 F. Supp. 2d 150, 154-55 (D.D.C. 2007) (citing Al Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001)). The standard is flexible, requiring a court to balance the strengths of each of the arguments in these four areas. Cityfed Financial v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995). "[W]here a party demonstrates 'probable success on the merits,' the party need only establish a 'possibility of irreparable injury.'" Fund for Animals v. Norton, 281 F. Supp. 2d 209, 219 (D.D.C. 2003). Conversely, the Court "may grant injunctive relief upon a lesser showing of a 'substantial case on the merits,' where 'the other three factors strongly favor interim relief.'" Id. See also, Ramirez, 477 F. Supp. 2d at 155 ("When the balance of hardships tips decidedly toward the movant, it will 'ordinarily be enough that the Plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." (quoting Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 844 (D.C. Cir. 1977))).

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (U.S. 1987).

A. Plaintiffs are Likely to Succeed on the Merits or Have Raised Substantial Questions Going to the Merits

1. BLM's Determination that Wild Horses Have Caused Any Range Degradation and that a Drought Which Ended Three Years Ago Mandates Removal of Horses From the Range Now is Arbitrary and Capricious and Contrary to the Evidence Before BLM

The evidence before the agency is that:

- Precipitation is the major factor influencing vegetation growth on the range.
- The drought existing during 2002 and 2003, upon which the 2004 NRCS Study was based ended in 2006; precipitation in the area has been above average and the area is no longer experiencing a drought.
- The lowland areas experiencing any range overuse are areas that are desert-like.
- The lowland areas are also inhabited primarily by mule deer.
- BLM is not able to tell which species of animals consume which forage.
- The 1990 GAO report on Rangeland Management: Improvements Needed in Federal Wild Horse Program concluded, and it is still true today, that "BLM's decisions on how many wild horses to remove from the federal rangelands had not been based on direct evidence that existing wild horse populations exceed what the range can support," and that "existing information is insufficient to determine how many wild horses the range can support."

BLM has failed to demonstrate that an overpopulation of wild horses exists in the PMWHR. BLM claims that the determination is based on a review of, inter alia, forage utilization, precipitation data, and ecological condition and that the planned round-up is necessary to restore “a thriving ecological balance and preserve multiple use relationships.” EA at 2.⁶ As a justification for the planned round-up of PMWHR wild horses, in its DR, BLM states that the action will “[d]ecrease forage competition among wild horses and wildlife.” DR/FONSI at 3-4. Yet, in Section 3.5 of the EA, Wildlife, Including Migratory Birds, BLM expressly states: “Competition between terrestrial big game wildlife and wild horses for forage is minimal.” EA at 23.

Heavy forage utilization has purportedly resulted in resource damage in the low elevation desert areas and sub-alpine meadows of the PMWHR. EA at 5. However, BLM fails to explain what resource damage has occurred. BLM argues that heavy utilization is continuing in these few areas, but if they are as badly overgrazed as BLM alleges, then it makes no sense that the horses will continue to use these areas when abundant, accessible forage is available to them elsewhere in the PMWHR.

BLM also argues that range conditions have deteriorated because it allowed “excess” wild horses to remain on their range during drought years. EA at 6. However, the last three years have experienced significantly higher levels of precipitation. EA at 6 (“The precipitation levels in 2008 were near the 30 year average (Western Regional Climate Center) and current years precipitation data indicates 90% of average for 2009.”) Therefore, the range can be expected to recover without the unnecessary removal of wild horses from the PMWHR and, therefore, removal of wild horses from the PMWHR would violate BLM’s statutory duty to ensure that its management activities for wild

⁶ BLM’s EA, DR and FONSI issued August 27, 2009 are set forth at Exhibit 8.

horses are at the “minimal feasible level.” Again, as Judge Collyer explained in CWHBC, “[I]t is difficult to think of a ‘management activity’ that is farther from a ‘minimal feasible level’ than removal,” 2009 WL 2386140 at 7.

BLM also argues that management actions within the Burnt Timber Canyon wilderness study area (“WSA”) must not impair the viewshed, because WSA designation automatically defaults to a Class I visual resource management (“VRM”) classification (presumably because BLM has taken no action to assign any alternative classification to the area). EA at 24. Nonetheless, BLM offers no evidence that the current population of wild horses is incompatible with VRM or WSA status. Rather, the EA states:

Canyon bottoms are deep and profusely vegetated. They are difficult to traverse but offer outstanding opportunities for solitude and isolation. The ridges and canyon rims are open and sparsely vegetated. These ridge tops constitute about 10 percent of the total WSA area. . . . All but 430 acres of the Burnt Timber WSA lies within the Pryor Mountain Wild Horse Range (PMWHR). The WSA also is inhabited by bighorn sheep, mule deer and black bear; however, **big game hunting is quite restricted by topography and dense vegetation.** . . . **Conflicts with other resource uses in the Pryor Mountain WSA are minimal.** Topography severely limits any potential cross country vehicle travel. Commercial timber harvesting in the WSA is not allowed. No livestock use is authorized in the WSA nor are there any oil and gas leases. The development potential for petroleum resources is rated low to moderate.

EA at 24-25 (emphasis added).

The WFHBA provides that, “The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of public lands.” 16 U.S.C.

§ 1333(b)(1). This inventory shall be used to “make determinations as to whether and

where an overpopulation exists **and** whether action should be taken to remove excess⁷ animals.” Id. (emphasis supplied)

Here BLM never explains how or where an overpopulation exists. Instead, BLM states, “This determination (of excess horses) was made by correlating census data with vegetation monitoring data to determine the level of wild horse use.” EA at 5 (explanatory parenthetical added). The census data is nowhere set forth in the EA nor is the vegetation monitoring data. Either BLM knows what the level of wild horse use is or it doesn’t. The fact that it has to “correlate” two different types of data to “determine” what has happened is suspect.

As Judge Urbina has explained, “[i]n an instance in which two items separated by the conjunctive ‘and’ it makes little sense to interpret those items as synonymous.” Guam Indus. Services, Inc. v. Rumsfeld, 383 F. Supp. 2d 112, 119 n.5 (D.D.C. 2005)

Here, BLM has treated the two pronged finding that Congress said must be made before horses are removed as a single determination. In light of BLM’s statutory duty to ensure that its management activities for wild horses are at the “minimal feasible level,” its failure to ignore other alternatives than removal not only violates NEPA but the WFHBA. As Judge Collyer explained in Colorado Wild Horse and Burro Coalition v. Salazar, “[I]t is difficult to think of a ‘management activity’ that is farther from a “minimal feasible level” than removal,” 2009 WL 2386140 at 7. Here, BLM’s two alternatives, that of its proposed action or nothing is reminiscent of the equally illusory choice between “my way or the highway.”

⁷ As defined by the WFHBA, “excess animals” means wild free-roaming horses and burros “which must be removed from an area in order to preserve and maintain a thriving

BLM's interpretation of the WFHBA that once it determines that there is an overuse or "early use" of a particular portion of a 39,000 acre range, that it must remove over a third of the estimated population of 185 wild horses without attempting lesser intrusive action is not entitled to Chevron v. NRDC, 467 U.S. 837 (1984) deference.

Furthermore, where the land use plan that has been in effect since 1984 concludes that five water developments "*will be required*" to distribute wild horses over the range so as to prevent overgrazing, it is arbitrary and capricious for BLM not to develop those sources to distribute wild horses over the range and, instead, take the intrusive action of removing wild horses instead.

Furthermore, while acknowledging that the PMWHR contains areas with differing levels of precipitation and depths of soils, EA at 3, BLM never analyzes whether an area normally receiving limited precipitation may normally support limited forage without regard to any effects of grazing animals. BLM is aware of previous studies addressing this specific point. BLM appears to ignore this study, which was undertaken on the very range analyzed in the EA and which is included in the "Managers' Summary – Ecological Studies of the Pryor Mountain Wild Horse Range, 1992-1997, USGS in cooperation with BLM, National Park Service and Montana Department of Fish, Wildlife and Parks.

The Supreme Court has explained, and numerous courts and administrative tribunals have recognized that

An administrative action must be vacated where the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a

difference in view or the product of agency expertise.

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

Here, BLM's reliance on a past condition of the range, without considering a current condition of the range has improved, is arbitrary and capricious.

2. BLM's FONSI Determination Must Be Set Aside Because It is Belied by its Own Findings and Failed to Take Into Account that the Removal of 70 Wild Horses is Controversial Warranting an EIS

BLM's Finding of No Significant Impact ("FONSI") for the PMWHR 2009 Gather Plan violates NEPA. BLM's determination that "the environmental impacts associated with the Proposed Action are not significant individually or cumulatively and will not significantly affect the quality of the human environment," DR/FONSI at 7, stands in direct contradiction of its conclusion that the "[o]pportunities to view and photograph large groups of wild horses would be diminished." EA at 27.

This loss will undeniably have a significantly negative impact on the quality of the human environment in the PMWHR because - as BLM's own analysis concludes - the wild horses provide the first and foremost recreational activity in the area. EA at 27-28 ("Recreation opportunities are primarily wild horse viewing during the warmer months of the year, especially during foaling season."). BLM has further noted that "[r]ecreation-related visitation has been increasing in the Pryor Mountains over the last several years and that trend is expected to continue." Id. Wild horse photography tours and wild horse viewing tours comprise two of the top three recreation-permitted activities in the PMWHR, "activities [that] provide a gateway for future visitation by an ever growing segment of the public." Id.

An agency action that reduces opportunities for the primary recreational activity in an area of public land - an activity that continues to grow in popularity due to the quality of the participants' experience - does not meet the requirements for a Finding of No Significant Impact under NEPA. As such, BLM has not made a convincing case that its action does not have a significant impact; in fact, its EA demonstrates that its impact will be significant. For this reason, the EA should be set aside.

In addition, the effects of BLM's removal of 70 wild horses from the range are controversial under BLM's regulations implementing NEPA. 43 CFR 46.30 Definitions- Controversial (as used in 40 CFR 1508.27 & paraphrased in FONSI) provides, "controversial refers to circumstances where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed. There is a substantial dispute as to the environmental consequences of the action with respect to whether or not the Pryor Herd would be able to survive genetically. BLM's own genetics expert, who has studied this herd since 1992, warns BLM of the consequences of its action, while BLM determines – contrary to its historical concern for the genetic viability of the herd – that its actions will not be guided by its concern for the genetic viability of the herd but by a generic "National Selective Removal Policy." EA at 9, which essentially forces the agency to make up why there is no cause for concern.

3. BLM Has Failed to Explain How Removing the Horses From the Range Benefits the Horses Being Removed

Nowhere in BLM's DR does BLM explain how removing 70 wild horses from the range impacts, much less benefits, these horses. It is as if they didn't exist. Under a statute whose primary purpose is the protection and management of wild horses *on the*

range as an integral part of the public lands, and with respect to a range, which was created for the primary benefit of the wild horses there, the BLM's silence is telling. Cf. Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183, 192 (D.D.C. 2008), citing S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 826 (10th Cir. 2000) (National Park Service cannot circumvent the limitation on discretion imposed by statute through conclusory declarations that certain adverse impacts are acceptable without explaining why those impacts are necessary and appropriate to fulfill the purposes of the Park.) Here, similarly, BLM fails to explain exactly how all the highly intrusive actions it plans on taking with regard to this herd of wild horses – i.e. removal of older animals who have lived their entire lives on the range, disruption of family bands, driving of young foals by helicopter, addition of these animals to an already overloaded holding lot warehouse of over 30,000 other captive wild horses -- fulfills the purposes of the WFHBA. As this Court noted in Greater Yellowstone, “a conclusion, with no supporting analysis or explanation, is quintessentially arbitrary.” Id. at 195.

B. Plaintiffs Will Suffer Irreparable Injury

As set forth in the Declaration of Ginger Kathrens which is attached hereto and incorporated by reference and described in detail above, BLM will soon undertake removals of a large number of wild horses which will irreparably harm plaintiffs. Such removals also threaten the continued existence of the herd. Appellants will lose the ability to see many of the individual horses in the wild, as integral parts of the natural system of public lands that Congress intended. Not only will their individual aesthetic interest in seeing these animals be eliminated but they will suffer the harm that accompanies one who has lost something of value. Not only will plaintiffs suffer an irreparable injury, but

the horses themselves are threatened with grave danger on an individual and herd basis. Once these horses are removed from the range, they are gone forever and the remaining herd's ability to continue is threatened.

C. Balance of Hardships

The balance of hardships tips clearly in plaintiffs' favor. Where the agency's own genetic expert warns the agency against removal of the numbers of wild horses BLM contemplates, the agency itself has allowed the range to have 60 wild horses over AML for a decade, and the agency has not made a verifiable, objective determination that the horses it plans to remove are indeed excess, there can be no question that BLM will not be harmed by maintenance of the status quo until this case be resolved on a combined preliminary injunction/summary judgment basis.

D. Public Interest

The public interest in these horses is codified in the Executive Order that created the PMWHR and the WFHBA, which governs it. Through the PBS Specials which have documented this herd, the individual lives of its members, their families and their home have been brought to hearts and minds throughout the world. The public opposition to BLM's planned highly intrusive, arbitrary and callous actions has been overwhelming. The public also has an interest in ensuring that when Congress passes a law aimed at protecting a national treasure, the courts will step in when the agency charged with

protecting that national treasure threatens it with harm.

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Respectfully submitted,

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