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Attorney for Plaintiff Salt River Wild Horse Management Group

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

**SALT RIVER WILD HORSE
MANAGEMENT GROUP, INC., a non-profit
organization; SIMONE NETHERLANDS, an
individual,**

Plaintiff,

v.

**UNITED STATES GOVERNMENT,
DEPARTMENT OF INTERIOR, Tom Vilsack,
as acting SECRETARY OF AGRICULTURE;
U.S. FOREST SERVICE, and Neil Bosworth,
as the acting U.S. Forest Supervisor,**

Defendants.

Case No.

**VERIFIED COMPLAINT
SEEKING A TEMPORARY
RESTRAINING ORDER,
PRELIMINARY INJUNCTION
AND WRIT OF MANDAMUS**

Plaintiff Salt River Wild Horse Management Group, a non-profit organization,
hereby alleges as follows:

Nature of the Action

1. This is an action for declaratory and injunctive relief, as well as seeking redress for violation of several federal statutes.
2. This action arises out of the United States Forest Service's decision to round-up and remove approximately one hundred "feral" or wild horses from the Tonto National Forest. The Forest Service has ordered that all horses in the Tonto National Forest be rounded-up because they are allegedly "unauthorized livestock" or "trespass animals." Thereafter, the horses, per Forest Service order, will be impounded and

transported to a livestock auction house. Upon information and belief, the majority of these horses will be purchased for slaughter and sold for their meat.

Jurisdiction and Venue

3. Jurisdiction is proper in this action pursuant to 28 U.S.C. Section 1331 (federal question), 28 U.S.C. Section 1361 (mandamus), the Declaratory Judgment Act (28 U.S.C. Sections 2201, 2201), the Administrative Procedure Act (5 U.S.C. Section 701, et seq.)(“APA”), and the National Environmental Policy Act (42 U.S.C. Section 4321, et seq.)(“NEPA”).

4. Venue is appropriate in this Court pursuant to 28 U.S.C. Sections 1391(b) and (e).

5. The amount in controversy exceeds the jurisdictional requirements of this court and includes (at a minimum) the cost to taxpayers of rounding-up and removing the wild horses.

The Parties

6. Plaintiff, Salt River Wild Horse Management Group, Inc. (“SRWH”), is a non-profit organization formed for the purpose of monitoring and scientifically studying the wild horse population commonly referred to as the Salt River Wild Horses. SRWH is incorporated in the state of Arizona and has a domestic address of 4610 North 68th Street, #477 in Scottsdale, AZ 85251. SRWH brings this action on its own behalf and on behalf of all of its members.

7. Plaintiff, Simone Netherlands, is the President of SRWH and resides in Phoenix, Arizona. She is a concerned citizen who enjoys viewing the Salt River Wild Horses in their natural habitat.

8. Defendant, the U.S. Department of Agriculture, is a branch of the United

States government which has been charged with the responsibility of overseeing the protection and management of wild free-roaming horses.

9. Defendant, Tom Vilsack, is named only in his capacity as the current Secretary of Agriculture, United States Government.

10. Defendant, U.S. Forest Service, is a governmental agency of the United States and is under the direction and control of the Secretary of Agriculture.

11. Defendant, Neil Bosworth, is named only in his capacity as the acting U.S. Forest Supervisor for the Tonto National Forest. His business office is located in Phoenix, Arizona.

General Allegations

12. Sometime prior to July 31, 2015, the U.S. Forest Service arbitrarily and without adequate investigation, determined that approximately one hundred horses living and grazing in the Tonto National Forest near and along the Lower Salt River, were “trespass” or stray horses and that all must be removed from the forest.

13. Records confirm that wild horses have roamed along the Lower Salt River near and along a grazing allotment known as the Sunflower grazing allotment since at least the 1930’s.

14. By the Forest Service’s own admission, “Range records indicate that there has been a population of trespass horses along the Lower Salt River (river), southwest of the allotment, since the 1930s.” (Final Environmental Assessment for Sunflower Allotment Grazing Analysis, Forest Service Southwestern Region, Tonto National Forest, July 2015 attached hereto as Exhibit A at p. 61).

15. Historical articles document the presence of these animals in the area since the late 1800’s, and SRWH has kept records and can establish bloodlines for many of these horses dating back at least twenty years.

16. The U.S. Forest Service, upon information and belief, has not conducted a census, inventory, or any other type of survey to determine how many of these approximately one hundred horses are branded or unbranded. Nor has the U.S. Forest Service made any attempt to determine if any of these horses are “wild free-roaming” horses and thus entitled to protection under the Wild Horses and Burros Act of 1971.

17. The U.S. Forest Service has an obligation to manage and protect wild horses residing on any public lands such as Tonto National Forest.

18. The U.S. Forest Service has taken the position that all horses residing in the public lands of the Tonto National Forest are stray, domestic horses and are not considered wild. See United States Department of Agriculture, Forest Service, Public Notice dated July 31, 2015, a copy of which is attached hereto as Exhibit B and incorporated herein by this reference.

19. Plaintiff, SRWH, as well as other organizations, have contacted Defendant U.S. Forest Service, and requested that it reconsider its decision to capture and remove these horses. Defendants have refused. See Letter from William Eubanks dated August 4, 2015, copy attached hereto as Exhibit C and incorporated herein by this reference.

20. Plaintiff, SRWH, has further presented Defendant U.S. Forest Service with a fifty page proposal setting forth a humane and sustainable management protocol for the management of the Salt River Wild Horses, but Defendant has apparently rejected such proposal (which also included a second option to introduce the herd into a Prescott Wild Horse Sanctuary).

21. According to the Public Notice of Unauthorized Livestock and Intent to Impound (“Public Notice”) issued by Defendant U.S. Forest Service, the Salt River Wild Horses are to be captured and “will be offered for sale at public auction.” See Exhibit B.

22. The Public Notice provides for a round-up and capture of all horses in Tonto National Forest, including all mares (even those with foals).

23. The majority, if not all of these foals were born on public lands, in the national forest, and are unbranded and unclaimed. As a result, the foals or any horses born on the public lands, should have the protection of the applicable laws such as the Wild Free-Roaming Horses and Burros Act of 1971 and its corresponding regulations.

24. Upon information and belief, the U.S. Forest Service has does little or nothing over the past few decades to manage or take an accounting of the horses, or to protect them under the 1971 Act.

25. Plaintiffs have asked the U.S. Forest Service to reconsider or delay its round-up and capture of the horses and to comply with applicable federal statutes, but Defendants have refused.

COUNT ONE
(VIOLATION OF WILD FRE-ROAMING HORSES
AND BURROS ACT OF 1971)

26. The above paragraphs, numbered 1 through 25, are incorporated herein by reference.

27. The preamble and statement of policy for the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. Section 1331, *et seq.*, states:

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; and that these horses and burros are fast disappearing from the American scene. 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 the public lands.

28. Under the 1971 Act, the Secretary of Agriculture is “directed to protect and manage wild free-roaming horses as components of the public lands” 16 U.S.C.

Section 1333(a).

29. The term “wild free-roaming horses and burros” is specifically defined under the 1971 Act to mean “all unbranded and unclaimed horses and burros on public lands of the United States.” (Emphasis added). 16 U.S.C. Section 1333(a).

30. The 1971 Act also states that the Secretary “shall manage wild free-roaming horses and burros in a manner that is designated to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. Section 1333(a). The Secretary “shall consider the recommendations of qualified scientists in the field of biology and ecology, some of whom shall be independent of both Federal and State agencies and may include members of the Advisory Board established in section 1337 of this title.” 16 U.S.C. Section 1333(a).

31. Section 1337 of the Act “directs” the Secretary of Agriculture “to appoint a joint advisory board of not more than nine members to advise them on any matter relating to wild free-roaming horses and burros and their management and protection.” Upon information and belief, no such advisory board has ever been appointed to assist with the wild horses in Tonto National Forest, or any other national forest in the United States.

32. The 1971 Act further provides that the Secretary “shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands.” Section 1333(b).

33. The Code of Federal Register (“CFR”) Section 222.23 entitled “Removal of Other Horses and Burros,” defines the conditions for treating certain horses as “unauthorized livestock” which could then be impounded and properly disposed. Section 222.23 provides special protection for horses that do not fall initially within the protection of the 1971 Act, if they are subsequently introduced into a protected territory “by accident, negligence or willful disregard of private ownership” and which become intermingled with wild free-roaming horses.

34. Only if these newly introduced horses do not intermingle may they be considered "unauthorized livestock." Upon information and belief, to the extent there are any domestic horses now living within the wild herds, they have intermingled and under the 1971 Act are entitled to protection as well. Similarly any newly born foals into the wild would be entitled to the protection of the 1971 Act.

35. CFR Section 222.25 of the regulations provides protection for the wild free-roaming horses even if they were to move or migrate off of protected territories onto lands of other ownership or jurisdiction.

36. Section 1338(a) of the 1971 Act provides that while the Secretary may use or contract for the use of motor vehicles for the purpose of transporting captured animals, such can only be undertaken after a public hearing, among other things. Upon information and belief, no public hearing was held prior to the decision to capture and remove these horses which will be performed by use of motorized vehicles.

37. The Defendants, including the U.S. Forest Service, have made an uninformed and unilateral decision to remove all horses from the Tonto National Forest as strays or "unauthorized livestock." This decision is unsupported by the facts and was made with little to no investigation or inventory of the horses. In so doing, the Defendants have violated the Wild Horses and Burros Act of 1971, including but not limited to:

- (a) making the decision to capture and remove all horses without first conducting an inventory or accounting of the horses to determine their status as wild or domestic trespass, branded versus unbranded;

- (b) making the assumption, without reliable data or investigation to support it, such as input from scientists and biologists, that none of the horses in the Tonto National Forest and surrounding area are wild free-roaming horses or offspring of those horses;

- (c) failing to appoint or consult a joint advisory board concerning this decision to remove all horses;
- (d) attempting to remove wild free-roaming horses from the Tonto National Forest, including the removal of foals who have been born there;
- (e) failing to manage the wild horses in the area;
- (f) failing to conduct an inventory or census of the number, types, age, and condition of the wild free-roaming horses in the Tonto National Forest;
- (g) failing to hold a public hearing for comment on the decision to use motor vehicles – including aircraft – in the capture and transport of these horses;
- (h) failing to make an effort to segregate any wild horses from domestic horses before ordering the removal of all horses from the Tonto National Forest.

COUNT TWO

(VIOLATION OF NEPA)

38. The above paragraphs, numbered 1 through 37, are incorporated herein by reference.

39. The U.S. Forest Service and Department of Agriculture must comply with the National Environmental Policy Act of 1969, 42 U.S.C. Section 4321, et seq. (“NEPA”) before taking any “major federal action.”

40. Specifically, Section 4332 of NEPA provides in pertinent part:

(2) [A]ll agencies of the Federal Government shall ***

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-terms productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

41. The order or decision to capture and remove all horses from the Tonto National Forest constitutes a "major federal action" under NEPA.

42. As such, NEPA requires that an environmental assessment or impact study be conducted as well as a census to determine the precise nature and number of horses residing in Tonto National Forest.

43. The Defendants must comply with NEPA before taking any major federal action. The removal of all horses from the Tonto National Forest is a major federal action.

44. The Defendants have failed to comply with NEPA before making the decision to and attempting to remove all horses from Tonto National Forest.

COUNT THREE

(VIOLATION OF ADMINISTRATIVE PROCEDURES ACT)

45. The above paragraphs, numbered 1 through 44, are incorporated herein by reference.

46. The Administrative Procedures Act, 5 U.S.C. Sections 551, et seq. ("APA") applies to the U.S. Forest Service actions and decisions.

47. Taking steps to remove all horses from the Tonto National Forest without first conducting a full investigation, study, consultation with scientists and biologists, and without any inventory or management of the horses for decades is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."

48. The Defendants have violated the APA. See 5 U.S.C. Section 706(2)(a).

COUNT FOUR

(DECLARATORY RELIEF)

49. The above paragraphs, numbered 1 through 48, are incorporated herein by reference.

50. Under the Declaratory Judgment Act, 28 U.S.C. Section 2201-2201, an actual controversy has arisen between Plaintiffs and Defendants involving the interpretation of certain federal statutes and acts within this Court's jurisdiction.

51. Plaintiffs seek a declaration that the Department of Agriculture and U.S. Forest Service, and their respective agents and acting representatives in office, have an obligation under the Wild Free-Roaming Horses and Burros Act of 1971 to manage and care for wild free-roaming horses on federal public lands and that the Defendants have failed to and must comply with those obligations.

52. Plaintiffs also seek a declaration that the Department of Agriculture and U.S. Forest Service, and their respective agents and acting representatives in office, have

an obligation under NEPA to conduct environmental assessment and/or impact study before ordering the removal of all horses from the Tonto National Forest.

53. Plaintiffs also seek a declaration that the Department of Agriculture and U.S. Forest Service, and their respective agents and acting representatives in office, have violated the APA by making an arbitrary and capricious decision to remove all horses from the Tonto National Forest and that the Defendants must take the proper steps to comply with the APA.

54. Plaintiffs also seek a declaration that the Department of Agriculture and U.S. Forest Service, and their respective agents and acting representatives in office, must comply with the Wild Free-Roaming Horses and Burros Act of 1971, NEPA, and the APA before moving forward with any decision to remove all horses from the Tonto National Forest and surrounding areas.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

That the Court temporarily and preliminarily restrain Defendants, its officers, agents, servants, employees, and those in active concert or participation with Defendants from:

(A) Rounding up and/or removing any horses from the Tonto National Forest until Defendants have complied with the requirements of the Wild Free-Roaming Horses and Burros Act of 1971, NEPA, and the APA, including, but not limited to:

- (1) Preparing an Environmental Impact Statement to determine the impact of the proposed removal on the human and natural environment;
- (2) Determining the number of wild horses located in the Tonto National Forest including means such as observation for branding or domestic markings, use of genetic testing and/or other means or study;

- (3) Determining the number of branded horses (if any) in the Tonto National Forest that may qualify for protection under the Wild Horses and Burros Act through intermingling under 36 CFR Section 222.23; and
- (4) Providing the public with notice of any proposed action with regard to horses within the Tonto National Forest and allowing for public comment on that proposed action and then take into consideration those comments prior to any future action.

Absent the requested relief, Plaintiffs will suffer immediate and irreparable injury.

Furthermore, pursuant to 28 U.S.C. Section 1361, Plaintiffs seek a writ of mandamus compelling Defendants to comply with the requirements of the Wild Horse Act in protecting and managing horses within the Tonto National Forest, including:

- (A) Conducting an inventory or accounting of the horses located within the Tonto National Forest to determine their status as wild or domestic trespass, branded versus unbranded. See 16 U.S.C. Section 1333(b).
- (B) Presenting reliable data or investigative reports to support the assertion, if supportable, that horses in the Tonto National Forest are “unauthorized livestock,” as opposed to protected “wild free-roaming horses” or offspring of those horses. Id.;
- (C) Protecting any and all wild free-roaming horses in the Tonto National Forest, including but not limited to foals born there and/or branded horses that have intermingled with the wild horses from capture, branding, harassment and death. See 16 U.S.C. Section 1331;
- (D) Managing the wild horses in the Tonto National Forest and surrounding public lands. See 16 U.S.C. Section 1333;
- (E) Conducting an inventory or census of the number, type, age, and condition of the wild free-roaming horses in the Tonto National Forest and surrounding

public lands. See 16 U.S.C. Section 1338(a);

(F) Conducting a scientific and independent study to determine the interaction with and relationship of the horses to other wildlife and foliage in the Tonto National Forest.

For such other relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury.

DATED this 6th day of August, 2015.

William A. Miller, PLLC

By /s/ William A. Miller
8170 N. 86th Place, Suite 208
Scottsdale, Arizona 85258
Attorney for Plaintiffs

VERIFICATION

SIMONE NETHERLANDS, being first duly sworn upon her oath, deposes and says that I the President of Salt River Wild Horse Management Group. In such capacity, I am authorized to make this verification for and on behalf of Plaintiffs. I have read the foregoing Verified Complaint and know the contents thereof to be true and correct to the best of my information and belief.

“I, SIMONE NETHERLANDS, hereby declare under penalty of perjury that the foregoing is true and correct.

SIMONE NETHERLANDS

EXHIBIT “A”



United States Department of Agriculture

Forest
Service

Southwestern
Region

Tonto National
Forest

July 2015



Final Environmental Assessment for Sunflower Allotment Grazing Analysis

Gila and Maricopa Counties, Arizona

For information about this project, contact:
Kelly M. Kessler
5140 East Ingram Street
Mesa, Arizona 85205
(480) 610-3300 or kmkessler@fs.fed.us

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average precipitation years. Additionally, an adequate forage surplus will become abundant in and adjacent to key areas of the allotment and will become important in years of below average precipitation by assisting to support livestock numbers and distribution. All these factors combined will influence range condition and trend to continue to remain stable or improve.

An ongoing Terrestrial Ecological Unit Inventory (TEUI) [formerly Terrestrial Ecosystem Survey (TES)] is currently being conducted on the Tonto National Forest. The Sunflower Allotment hasn't yet been mapped in its entirety. Once completed, these data will provide valuable information on site potential.

The proposed range improvement infrastructure, when implemented, in no particular order or time frame (driven by management objectives), will aid in growing season rest or deferment of pastures and will facilitate livestock distribution throughout the allotment. Typically, even during dry years, reliable water sources and water distribution throughout the allotment are the limiting factors, not forage availability.

Cumulative Effects

The Sunflower allotment is adjacent to nine other livestock grazing allotments, and two additional Ranger Districts; Cave Creek (CCRD) and Tonto Basin Ranger Districts (TBRD). The eight allotments include; Bartlett (CCRD), Tonto Basin, Three Bar, Roosevelt, and 7/K all on TBRD, and Diamond, Goldfield, Superstition, and Reavis on the Mesa Ranger District. Of these, only three allotments (Diamond, Tonto Basin, and 7/K) are currently stocked and within the same watersheds as the Sunflower Allotment. Each of these allotments are conservatively stocked and monitored to ensure conservative utilization standards are being met. As a result, cumulative watershed effects for these allotments are anticipated to be minimal in contrast to the size and complexity of the watersheds themselves.

Historic grazing on this allotment also contributed to cumulative effects. Stocking rates were disproportionately high during the first half of the 20th century. Impaired soils and vegetation observed today are likely a result of those early impacts followed by stocking rates of greater than 1,000 head of adults into the mid-1990s. Historical overuse by livestock, particularly in the lower elevations and flatter terrain of the allotment has led to impaired soil conditions and a reduction in the vigor and diversity of desirable plant species.

Range records indicate that there has been a population of trespass horses along the Lower Salt River (river), southwest of the allotment, since the 1930s. These horses presumably originated from the neighboring Ft. McDowell Indian Reservation and/or Salt River Pima Maricopa Indian Community, both of which border the Mesa Ranger District to the west/northwest. Although the horses are typically found along the river, within the boundary of the closed Goldfield Allotment, on occasion, they are observed east of the Bush Highway within the southernmost portion of the Desert Unit.

Unmanaged OHV use, as described under the "unit conflicts" section above, has had an enormous impact on the vegetation resource, particularly in the Adams and Otero pastures of the Dos S unit and the entire Desert unit. OHV use and unauthorized route proliferation have increased

EXHIBIT “B”

**PUBLIC NOTICE
NOTICE OF UNAUTHORIZED LIVESTOCK AND INTENT TO
IMPOUND**

(Reference FSM 5330) Notice is hereby given that pursuant to Regulation of the Secretary of Agriculture, 36 CFR 262.10, all unauthorized livestock found upon National Forest System lands or other lands under Forest Service control within the area identified below, will be impounded by the United States Forest Service on or after 8/07/15. All persons not wanting their unauthorized livestock gathered must remove them from the impoundment area before the gathering occurs.

TOPOGRAPHIC UNIT, LEGAL SUBDIVISION OR ALLOTMENT National Forest System Lands within the boundaries of the Mesa Ranger District, Tonto National Forest, located within all or portions of the following Townships and ranges, Townships 2-4 North, Range 7-8 East, NATIONAL FOREST OR GRASSLAND Tonto National Forest RANGER DISTRICT Mesa Ranger District STATE Arizona

The livestock are described as follows: Any unauthorized horses. May be impounded by the United States Forest Service on or after 8/07/2015, unless said livestock is permanently removed from the above described lands.

Any unbranded livestock, or any livestock bearing brands of previously unauthorized livestock which are found to be making continuing or subsequent unauthorized use within twelve months after publication of this notice may be impounded without further notice.

After the impoundment, owners of unauthorized livestock may regain possession thereof only by first showing proof of ownership and reimbursing the United States in full for the expense incurred in impounding, feeding, and care of such livestock, or if impoundment costs exceed fair market value, by a payment equal to the fair market value of the impounded livestock. All impounded animals not redeemed within 5 days after notice of sale of impounded livestock has been published in a local newspaper, posted in the county court house and in one or more local post offices, will be offered for sale at public auction. Livestock not sold at public sale may be sold at private sale or condemned and destroyed, or otherwise disposed of as provided by Regulation 36 CFR 262.10(f).

Signed at: Phoenix, AZ this 24th day of July, 2015. /s/ Neil Bosworth, Forest Supervisor
7/31, 2015 edition Arizona Capitol Times

EXHIBIT “C”

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August 4, 2015

Sent By Electronic Mail

Cal Joyner, Regional Forester
U.S. Forest Service, Region 3
333 Broadway, Southeast
Albuquerque, NM 87102
Facsimile: 505-842-3800
Email: cjoyner@fs.fed.us

Neil Bosworth, Tonto National Forest Supervisor
2324 E. McDowell Road
Phoenix, AZ 85006
Facsimile: 602-225-5201
Email: nbosworth@fs.fed.us

Re: Forest Service's Obligation To Comply With The National Environmental Policy
Act In Connection With the Removal Of Horses From Forest Service Lands

Dear Mr. Joyner and Mr. Bosworth:

I write this letter on behalf of two leading conservation organizations—the American Wild Horse Preservation Campaign (AWHPC) and the Animal Legal Defense Fund (ALDF)—to urge the U.S. Forest Service to fully comply with its obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, in connection with the July 31, 2015 public notice of intent to impound all “unauthorized” horses in the Tonto National Forest. As the Forest Service’s public notice explains, “all unauthorized livestock found upon National Forest System lands or other lands under Forest Service control within the area identified below, will be impounded by the United States Forest Service on or after 8/07/15, *unless said livestock is permanently removed from the above described lands.*”

By the Forest Service’s own admission, “[r]ange records indicate that there has been a population of *trespass horses* along the Lower Salt River (river), southwest of the allotment,



since the 1930s.” U.S. Forest Service, Final Environmental Assessment for the Sunflower Allotment Grazing Analysis (July 2015) at 61 (emphases added).

Before the Forest Service—or any parties asserting ownership of free-roaming, unbranded, previously unclaimed horses—conduct a wild horse roundup, gather, or capture operation through the use of helicopters, motorized vehicles, and/or bait or water traps, the Service has, at minimum, a clear obligation under NEPA and its implementing regulations to conduct an analysis of the impacts of such an action on the affected environment.

The Service’s attempt to permanently remove horses from a population that has existed on Forest Service land for at least 80 years in a free-roaming, unbranded, unclaimed condition by merely labeling these horses as “unauthorized livestock” does *not* exempt the Forest Service from its responsibilities under NEPA to analyze the environmental impacts of this major action that will be conducted on Forest Service lands. In particular, NEPA—which serves as the nation’s “basic national charter for the protection of the environment,” 40 C.F.R. § 1500.1—requires that, for all “major Federal actions significantly affecting the quality of the human environment,” federal agencies “shall” prepare a “detailed statement,” called an “Environmental Impact Statement” (EIS). 42 U.S.C. §4332(C). The EIS must consider (1) the “environmental impact of the proposed action”; (2) any “adverse environmental effects which cannot be avoided”; (3) “alternatives to the proposed action”; (4) the relationship between “local short-term use of man’s environment and the maintenance of long-term productivity”; and (5) “any irreversible and irretrievable commitment of resources” involved in the proposal. *Id.* § 4332(c)(i)-(v).

The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA’s requirements that are “binding on all Federal agencies.” 40 C.F.R. § 1500.3. Those regulations provide that, where the agency has not determined whether an EIS is required, it must generally prepare an “Environmental Assessment” (EA) to determine whether the environmental effects of its proposed action are “significant,” thereby requiring preparation of an EIS. *Id.* § 1501.4(b). The EA must analyze both “direct” impacts of the proposed action, i.e., those that result immediately from the proposed management action, as well as the “indirect” impacts, which are those caused by the action later in time but “still reasonably foreseeable.” *Id.* § 1508.8(a)-(b). The CEQ regulations further provide that “NEPA procedures must ensure 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). Indeed, recognizing that “public scrutiny [is] essential to implementing NEPA,” *id.*, the regulations provide that “Federal agencies shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment.” *Id.* § 1500.2(d).

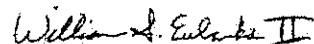
It is indisputable that a gather of this magnitude on federal land involving dozens of free-roaming horses using helicopters, motorized vehicles, and/or bait or water traps will result in myriad environmental impacts to this horse population, individual horses, and natural resources located in the geographic area encompassed by the gather such as vegetation, hydrological resources, and wildlife. In addition, such an action will have long-term aesthetic, recreational,

and scientific consequences for the many visitors to this region who come primarily—if not exclusively—to observe, view, and study this free-roaming horse population, and, in turn, will have economic implications as tourism dollars decrease after any roundup takes place. Hence, as the Forest Service—and its sister agency Bureau of Land Management—have long recognized in conducting gathers of horses on federal land, such decisions invariably require NEPA analysis *before* they may commence in order to analyze precisely the kinds of impacts at issue here and alternatives to the proposed action. *See, e.g.,* U.S. Forest Service, Environmental Assessment for Pryor Mountain Wild Horse Gather (July 17, 12015), available at http://www.blm.gov/mt/st/en/info/newsroom/2015/june/blm_releases_2015.html.

Although the primary focus of this letter is on the NEPA requirement that attaches to the Forest Service's decision, we note that there are also likely violations of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, if the Forest Service decides to proceed with its proposed action. In light of the fact that the Forest Service admits that "trespass horses" have been continually present on these Forest Service lands since at least the 1930s (which is well before the 1971 Act created wild horse territories in all areas where free-roaming horses were found at that time, *see* 16 U.S.C. § 1331), and in the absence of any documentation, evidence, or other substantiation in the Forest Service's public notice that these particular horses are, in fact, owned by any specific individual or entity, the strong presumption is that these horses are wild horses subject to the protections of the Act and thus are not appropriate for impoundment as "unauthorized livestock." *See* 16 U.S.C. § 1332(b) (defining "wild free-roaming horses and burros" as "all unbranded and unclaimed horses and burros on public lands of the United States").

Accordingly, my clients request that the Forest Service seriously consider these comments in an effort that will hopefully assist the parties in avoiding litigation or other challenges to the Forest Service's decision. As highly interested parties in this decisionmaking process, and given that the removal of horses may begin as early as August 7, my clients respectfully request a response **within 24 hours of receipt of this letter** which you may send to my email address (beubanks@meyergritz.com). If you would like to set up a conference call to discuss this matter, I can make myself available at your convenience.

Sincerely,



William S. Eubanks II
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