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15 **UNITED STATES DISTRICT COURT**  
16 **EASTERN DISTRICT OF CALIFORNIA**

17 **IN DEFENSE OF ANIMALS;** )  
**DREAMCATCHER WILD HORSE** )  
18 **AND BURRO SANCTUARY;** )  
**BARBARA CLARKE;** )  
19 **CHAD HANSON;** )  
**LINDA HAY;** )

20 **Plaintiffs,** )

21 **vs.** )

22 **UNITED STATES DEPARTMENT OF** )  
**THE INTERIOR;** )  
**BUREAU OF LAND MANAGEMENT;** )  
23 **KEN SALAZAR, Secretary of the** )  
**United States Department of the** )  
24 **Interior;** )  
**ROBERT ABBEY, Director of the** )  
25 **Bureau of Land Management;** )  
**DAYNE BARRON, Field Manager of** )  
26 **Eagle Lake Field Office,** )

27 **Defendants.** )  
28 \_\_\_\_\_ )

**CASE NO.** \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

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I.

**INTRODUCTION**

1  
2  
3 1. This action seeks to enjoin the Bureau of Land Management’s (“BLM” or “the  
4 Agency”) planned stampede, round-up and removal of over two thousand wild and free-roaming  
5 horses and burros (collectively “wild horses” or “mustangs”) from the Twin Peaks Herd  
6 Management Area (“HMAs”) in northeast California and northwest Nevada and the BLM’s  
7 warehousing of the captured Twin Peaks wild horses in zoo-like conditions in the middle-West  
8 of the United States.

9 2. The BLM’s planned stampede, round-up, removal, and warehousing of these wild  
10 horses is dangerous, inhumane, unnecessary, ill-conceived, inadequately explained or justified,  
11 and is in direct contradiction of the Wild Free-Roaming Horses and Burros Act (“WFHBA”), 16  
12 U.S.C. §§ 1331 *et seq.*, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 501 *et seq.*, and  
13 the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*

14 3. The BLM published its Preliminary Environmental Assessment  
15 (DOI-BLM-CA-N050-2010-05-EA) (“EA”) for the Twin Peaks Herd Management Area Wild  
16 Horse and Burro Gather Plan on May 2010 (“Twin Peaks EA”). The Decision Record and  
17 Finding of No Significant Impact (“FONSI”) were issued on July 8, 2010. Together with the EA,  
18 the issuance of these documents constitutes a final decision of BLM regarding the proposed  
19 action, heretofore referred to as the “Twin Peaks Roundup.” The Decision Record indicates that  
20 the roundup will begin on or about August 9, 2010, approximately three weeks from today, and  
21 will last between 45 and 60 days.

22 4. Driven by a singular focus of eliminating wild horses from the public lands it  
23 administers on behalf of the people of the United States, the BLM has turned the requirements of  
24 the WFHBA and NEPA on their heads. WFHBA requires that the BLM manage HMAs  
25 principally to protect the health and welfare of the wild horse herds living thereon and maintain a  
26 thriving natural ecological balance on these lands, of which the continued existence of native  
27 wild horse herds is an integral part. NEPA requires that an agency properly define the purpose  
28 and need of a proposed action, take a hard look at the various options available for achieving that

1 proper purpose, in particular, its effects on the human environment, consider the comments and  
2 concerns submitted by interested parties, and make a decision that is justifiable thereon and fully  
3 explained by the agency. The BLM's planned Twin Peaks stampede, round-up, removal, and  
4 off-site warehousing of these wild horses ignores the mandates and instructions of both laws in a  
5 manner that is both arbitrary and capricious.

6 5. In essence, the BLM has engaged in a classic example of crafting a solution and  
7 then searching for a problem. In the Twin Peaks EA, the BLM does not start from an identified  
8 problem in the thriving ecological balance of the Twin Peaks HMA, then identify the wild horse  
9 herds as the cause of that problem, and then propose and justify stampeding, rounding-up and  
10 removing the wild horse herds as the proper solution for those problems. Rather, the BLM,  
11 states in the Twin Peaks EA that the "purpose of the Proposed Action is to remove excess wild  
12 horses and burros from the Twin Peaks EA." This makes no sense as statement of purpose;  
13 rather, it could only potentially be justified as solution to some identified problem and,  
14 accordingly, the purpose of the proposed action should be solution of that identified problem. By  
15 turning this process on its head, the BLM has made a mockery of the NEPA process, dressing up  
16 its preferred solution as the Proposed Action's purpose so that no other actions could be  
17 meaningfully considered. Further, as numerous comments submitted by Plaintiffs and others to  
18 the BLM explained, the data on which the BLM purported to base its decision that there are  
19 "excess" wild horses on the Twin Peaks EA is profoundly flawed and inadequate as were the data  
20 on which it purported to base its *post hoc* identification of problems which its solution  
21 (masquerading as a purpose) supposedly would solve.

22 6. The Twin Peaks Roundup proposed by the BLM would also violate clear  
23 provisions of the WFHBA in several ways going to very heart of Congress' purpose in enacting  
24 the law. BLM plans to utilize helicopters to indiscriminately chase every wild horse that the  
25 BLM can locate in the Twin Peaks HMA, stampeding them into holding pens and corralling the  
26 animals for an indeterminate amount of time. Roundups conducted in this manner are dangerous  
27 and inhumane to the animals being captured, and cause injury or death to wild horses. In a  
28

1 recently conducted roundup by the BLM in Tuscarora, Nevada at least a dozen of the 228 wild  
2 horses stampeded and rounded-up in this manner were killed as a result.

3 7. The BLM will then corral the captured wild horses in short-term holding facilities  
4 until they are sorted; a small fraction (as few as 180) will be sterilized and released back into the  
5 Twin Peaks HMA. The rest of the wild horses, at least 2000, will cease forever to be wild and  
6 free-roaming; they will be transported by tractor trailer to long-term holding facilities in the  
7 middle-West of the United States, where they will live out their lives in zoo-like conditions far  
8 from their home ranges.

9 8. This proposed action violates numerous provisions of WFHBA and runs directly  
10 contrary to Congress' purposes and intent when it passed the law.

11 9. Without swift and decisive action by this Court enjoining the BLM from  
12 conducting the Twin Peaks Roundup, the BLM's threatened unlawful, ill-conceived, and  
13 unjustified actions will cause Plaintiffs irreparable harm and likely numerous deaths to the wild  
14 horse of the Twin Peaks HMA whose health and welfare Congress, through the WFHBA, has  
15 specifically ordered the BLM to protect.

16 10. Accordingly, Plaintiffs hereby respectfully request that the Court issue an order  
17 setting aside the BLM's FONSI, and preliminarily and permanently enjoining the BLM from  
18 stampeding, rounding-up and removing the wild horse from the Twin Peaks HMA until it has  
19 completed an Environmental Impact Statement and record of decision that is in accordance with  
20 the requirements of NEPA and the WFHBA.

## 21 II.

### 22 JURISDICTION AND VENUE

23 11. This case concerns a federal question and, therefore, jurisdiction is proper under  
24 28 U.S.C. § 1331(a) (action for declaratory and injunctive relief arising under the constitution  
25 and laws of the United States).

26 12. The actions giving rise to this Complaint took place in this District, thus venue is  
27 properly vested in this court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

28 13. There exists now between the parties hereto an actual justiciable controversy.



1 free-roaming horse populations in the American West. The roundup and removal of wild  
2 free-roaming horses is of great concern to IDA, its staff, constituents, volunteers and supporters,  
3 and the preservation and protection of wild free-roaming horse populations are very important to  
4 IDA and its staff, constituents, volunteers and supporters.

5 19. IDA staff, constituents, volunteers and supporters work, live and/or recreate  
6 throughout the American West, areas which are currently occupied by wild free-roaming horse  
7 populations. IDA's staff, constituents, volunteers and supporters derive aesthetic, recreational,  
8 scientific, inspirational, educational, and other benefits from this ecosystem on a regular and  
9 continuing basis, and intend to do so frequently in the immediate future, including within the  
10 Twin Peaks HMA at issue in this action.

11 **20. DREAMCATCHER WILD HORSE AND BURRO SANCTUARY**

12 ("DreamCatcher") is a 501 (c) (3) nonprofit organization established in 2001 in order to protect a  
13 large herd (125) of mustangs from the Pryor Mountain, McCullough Peaks and Red Desert herd  
14 management areas. The co-founders of DreamCatcher, including plaintiff Barbara Clarke, had  
15 many years previous experience in wild horse issues and the short-falls of BLM policy relative to  
16 the 1971 Wild and Free-Roaming Horse and Burro Act. DreamCatcher submitted comments on  
17 the Twin Peaks EA on June 18, 2010.

18 21. The founders of DreamCatcher specifically chose the sanctuary's location to be  
19 close to the Twin Peaks HMA in Termo, California. DreamCatcher currently owns and  
20 maintains 2,000 acres for the use of the wild horses. The location was chosen in order to best  
21 serve the wild horses, provide an environment as close to natural as possible, and to be near the  
22 largest number of remaining wild horses in California. DreamCatcher is located a mere 24 miles  
23 from the Twin Peaks HMA and therefore afforded its founders, staff, and donors opportunities to  
24 view the Twin Peaks wild horses still in the wild. Currently, DreamCatcher cares for at least two  
25 horses originating from the Twin Peaks HMA.

26 22. The mission of DreamCatcher is to educate the public about wild and  
27 free-roaming horse and burro issues and provide natural habitat sanctuary for previously rounded  
28 up and adopted mustangs with the intent to prepare them for a return to their home ranges.

1 DreamCatcher also seeks to provide permanent sanctuary and humane retirement for companion  
2 horses. Its philosophy is that the general public needs to be aware that wild and free-roaming  
3 horses are living symbols of the historic advancement of modern cultures that they contribute to  
4 the diversity of life forms within the nations they roam and enrich the lives of the people of those  
5 nations. Wild and free-roaming horses and burros have a unique language that they are not  
6 indifferent to their surroundings, but interact with a wide range of physical, mental and emotional  
7 responses. DreamCatcher believes that wild and free-roaming horses and burros have a value  
8 independent of human interaction, making adoption and the use-centered philosophical basis for  
9 adoption unnatural and outside the genetic scope of the species. Wild and free-roaming horses  
10 and burros are wild by nature and law and have a multi-millennial history on the North American  
11 Continent.

12 23. DreamCatcher also believes that wild and free-roaming horses and burros should  
13 be returned and allowed to repopulate the herd areas set aside for their habitat that have been  
14 zeroed out since the 1971 Wild and Free-Roaming Act was passed. Due to unscientific herd  
15 management the majority of herds left in the wild are no longer genetically viable and will  
16 ultimately lose the ability to survive unless steps are taken to reintroduce genetic diversity.  
17 Scientific herd management techniques, environmentally sound cattle grazing limits, and  
18 ecologically friendly new growth neighborhoods and communities will ensure a lasting and  
19 healthy future for all wildlife including wild and free-roaming horses and burros.

20 24. If the once wild Twin Peaks horses and burros are sent to long-term holding  
21 facilities, it would directly contradict and degrade DreamCatcher's mission and philosophy - to  
22 repatriate wild horses back to their homes on the range. DreamCatcher's very location was  
23 chosen to be close to the Twin Peaks wild horses and burros. If they are removed in whole-sale  
24 to long-term holding facilities in the mid-West, this would diminish both DreamCatcher's  
25 situation near the Twin Peaks HMA, as well as DreamCatcher's mission to return these animals  
26 to their rightful and protected place on the range. Because of DreamCatcher's proximity to the  
27 herd areas, its donors and visitors have the expectation, belief, and confidence that wild horses  
28 will always inhabit the area and could be easily seen.

1           25.     The first two years DreamCatcher occupied its present location, wild horse  
2 sightings along Highway 395 which borders the Twin Peaks HMA, were numerous and small  
3 bands could be seen in areas where grass and water were plentiful further east of Ravendale.  
4 However, in the last few years, a change has been observed; more cattle and fewer horse  
5 sightings. In the last 3 years only one band of 6 horses along Highway 395 have been observed,  
6 and no horses in areas where water and grass were still plentiful. But the number of cattle in the  
7 areas has, per DreamCatcher's observation, increased.

8           26.     The lack of daily and ordinary wild horse sightings is alarming and impacts the  
9 business of DreamCatcher's organization in the most simple and fundamental way. Donors not  
10 able to readily view horses in the wild, who believe fewer and fewer horses survive BLM  
11 roundups or who believe an HMA has been zeroed out (cleared of all wild horses), lose financial  
12 confidence in DreamCatcher's mission. Given the extremely large number of horses the BLM  
13 currently has planned for the Twin Peaks HMA, DreamCatcher's mission and ability to maintain  
14 donor financial confidence will be bankrupt.

15           27.     **BARBARA CLARKE** is a resident of Termo, California, and the director and  
16 co-founder of DreamCatcher. Before starting DreamCatcher in 2001, Ms. Clarke served as  
17 director of the Redwings Horse Sanctuary in Carmel, California. While Director of Redwings,  
18 Ms. Clarke wrote and published numerous articles on the meaning of sanctuary in a technological  
19 society, winning the prestigious San Jose Mercury News Silver Pen award, named one of nine  
20 influential women in animal welfare by Town and County magazine, and was featured in The  
21 2002 International Animal World Encyclopedia.

22           28.     Ms. Clarke is dedicated to the operation of DreamCatcher and serves as its  
23 principal employee, and operates the sanctuary on a full-time basis. Her home is located on the  
24 grounds of the sanctuary. Ms. Clarke frequently makes trips to the Twin Peaks HMA, located  
25 only 24 miles from her home, in order to observe the wild horses in their natural habitat for the  
26 purposes of replicating range conditions within DreamCatcher's facility.

27           29.     **DR. CHAD HANSON**, who lives in Grass Valley, CA, is an ecologist who  
28 studies native wildlife species and their habitats in California. Dr. Hanson has visited the Twin

1 Peaks HMA to view wild horses and to plan future scientific studies on wild horse ecology, and  
2 he plans to visit the Twin Peaks HMA again this summer. Dr. Hanson's horse "Ty" is a wild  
3 mustang from the Twin Peaks HMA. If the vast majority of wild horses in the Twin Peaks HMA  
4 are removed as planned by Defendants, Dr. Hanson's enjoyment of viewing the mustangs on this  
5 HMA will be adversely affected, as will Dr. Hanson's ability to scientifically study the ecology  
6 of a wild and self-sustaining, healthy population of mustangs on the Twin Peaks HMA.

7 30. **LINDA HAY** is a life-long resident of Susanville, California. She has been going  
8 to Twin Peaks for the past 30 years to see, enjoy and photograph wild horses. Ms. Hay has a  
9 great affinity for wild horses and deeply believes in their protection and allowing them to remain  
10 in their homes. She has photographs spanning 30 years of the horses on the Twin Peaks range.  
11 For years she has loved wild horses, and gets great enjoyment from seeing them in their natural  
12 habitat.

13 31. Ms. Hay is devastated about the impending roundup on the Twin Peaks HMA.  
14 She remembers after previous roundups on the Twin Peaks HMA that she was unable to see  
15 many horses for years afterwards. She and her children regularly camp in Twin Peaks in order to  
16 view and observe the wild horses; she now takes her grandchildren to Twin Peaks to see the wild  
17 horses. Since her children are grown she is able to spend more time going to see the horses in  
18 recent years. She recognizes a number of the horses on an individual basis. If these horses are  
19 removed and sent to long-term holding facilities, her enjoyment of viewing the horses on the  
20 Twin Peaks HMA will be significantly diminished.

21 **IV.**

22 **DEFENDANTS**

23 32. The **UNITED STATES DEPARTMENT OF THE INTERIOR** ("DOI") is a  
24 Cabinet-level agency that manages the United States' vast natural and cultural resources.  
25 Secretary of Interior Ken Salazar heads the DOI, which encompasses eight technical bureaus,  
26 including the Bureau of Land Management. The DOI is responsible for the management and  
27 conservation of most federal land and natural resources, and the administration of programs

28

1 relating to Native Americans, Alaska Natives, and Native Hawaiians, territorial affairs, and to  
2 insular areas of the United States. It is headquartered in Washington, D.C.

3 33. **BUREAU OF LAND MANAGEMENT** (“BLM”) is a part of the DOI, and is  
4 responsible for carrying out a variety of programs for the management and conservation of  
5 resources on 253 million surface acres, as well as 700 million acres of subsurface mineral estate.  
6 Under the authority of the WFHBA, BLM is responsible for managing the wild horses and burros  
7 found on the nation’s public lands, specifically the Herd Areas set aside for the horses’ use in the  
8 Act. BLM field offices are responsible for determining where the animals are to be managed  
9 within areas where they were found as of 1971. BLM is headquartered in Washington, D.C.

10 34. **KEN SALAZAR** is the Secretary of the Department of Interior (“DOI”).  
11 Pursuant to the WFHBA, Mr. Salazar is responsible for the oversight of BLM’s management of  
12 wild horses on the Nation’s public lands, including the public lands of California.

13 35. **ROBERT ABBEY** is the Director of the BLM and is responsible for  
14 implementing management decisions for wild horses in accordance with the WFHBA.

15 36. **DAYNE BARRON** is the Field Manager for the Eagle Lake Field Office of the  
16 BLM and is responsible for managing the wild horses of the Twin Peaks HMA in compliance  
17 with the WFHBA and its implementing regulations.

18 **V.**

19 **FACTS**

20 **A. BLM’S PLANNED ROUNDUP OF THE WILD HORSES LOCATED IN THE**  
21 **TWIN PEAKS HMA**

22 **1. The EA Outlining the Twin Peaks Roundup**

23 37. The Twin Peaks HMA comprises a total of about 789,852 acres and is located on  
24 both sides of the California/Nevada border, with slightly more than half of the area within Lassen  
25 County, California, and the remainder in Washoe County, Nevada.

26 38. The Twin Peaks EA contemplates the proposed capture of 2,300 wild horses; the  
27 release of as few as 180 of those captured horses back to the range; and the removal of the  
28 remaining approximately 2,000 “excess” wild horses. The EA would also capture and remove

1 210 burros. This plan will leave behind decimated herds, with as few as 180 wild, free-roaming  
2 horses remaining within the entire 789,852 acre Twin Peaks HMA.

3 39. The Twin Peaks EA states that about 2300 wild horses exist in the Twin Peaks  
4 HMA currently, and that about 2300 will be captured, with 180 wild horses to be returned to the  
5 HMA. The EA then states that 448 wild horses will remain after the wild horses are returned.  
6 Nothing in the EA clearly indicates whether 180 or 448 wild horses would remain in the HMA  
7 under the proposed action. Nor does anything indicate whether the horses will be a selection  
8 from all the individual herds known to exist in the Twin Peaks HMA or whether they will be  
9 from only one or some of the individual herds.

10 40. The proposed gather is projected to begin August 9, 2010, and is expected to take  
11 about 30-45 days for completion, during the hottest months of the year.

12 41. Under the preliminary EA, FONSI and Decision Record, up to 80% or more of the  
13 current horse population will be permanently removed from the range, with excess horses being  
14 transported to BLM facilities for adoption, sale, or the most likely scenario, long-term holding.  
15 This long-term holding under “zoo-like” conditions divests the horses of their statutory  
16 protections and defeats Congress’ purpose of protecting them as free-roaming wild animals;  
17 moreover, it is certainly not a “minimal level of management” as contemplated by the Act.

18 **2. BLM’s Planned Roundup of Excess Horses for Capture and Removal**

19 42. According to an October 2008 Government Accountability Office (GAO) report  
20 on the Bureau of Land Management, “the BLM has not regularly reported to the public how  
21 many wild horses and burros are killed in the course of gathers.” Gathers are dangerous to the  
22 animals being captured, and cause injury or death to a number of these wild horses. The 2008  
23 GAO Report goes on to report that data collected from six of the ten states having Herd  
24 Management Areas (HMAs), from fiscal years 2005 to 2007, indicate that at least 1.2 percent of  
25 the horses removed from these states were euthanized or died during the gather process. In fact  
26 the during the most recent roundup in Nevada, which occurred just last week, over 5% of the  
27 horses subjected to the roundup died.

28

1           43.     Upon realizing that they have been caught, wild horses have been known to jump  
2 or attempt to jump the six foot panels of corrals in which they are held and/or throw themselves  
3 against the panels out of fear or in a desperate attempt to escape the restrictions on their  
4 movement imposed by the corrals. Some of these horses run head long into the barriers that  
5 restrict their escape, break their necks, and die. Others severely injure themselves in the process  
6 or are shot due to their injuries. Still other trapped wild horses suffer from what is called  
7 “capture myopathy,” a condition affecting wild animals upon capture in which they react  
8 negatively to their confinement and lack of movement. Wild horses have been recorded as dying  
9 of capture myopathy.

10           44.     BLM’s planned roundup will ultimately lead to the inhumane maiming and death  
11 of foals and young horses as well as old, sick, or lame horses. During the course of gathering the  
12 wild horses on the range, inevitably the older and enfeebled horses will be injured amidst the  
13 chaos of the chase and stampede. Such injuries will lead to the wild horses’ unnatural deaths on  
14 the range, rather than under more humane circumstances as mandated by the statute and  
15 regulations. 16 U.S.C. § 1333(b)(2)(A).

16           45.     Congress did not authorize BLM to “manage” the wild horses by corralling them  
17 for private maintenance or long-term care as non-wild, free-roaming animals off of the public  
18 lands, and such maneuvers are arbitrary, capricious, an abuse of discretion, or otherwise not in  
19 accordance with law; without observance of procedure required by the law; and in excess of  
20 statutory jurisdiction, authority, limitations, and short of statutory right. *See Colorado Wild*  
21 *Horse and Burro Coalition, Inc. v. Salazar*, 639 F. Supp. 2d 87 (D.D.C. 2009). Moreover, the  
22 statute expressly provides that BLM’s management activities shall be at the minimal feasible  
23 level. 16 U.S.C. § 1333. Removal is authorized only for animals after a determination on the  
24 range that they are excess. 16 U.S.C. § 1333(b)(2). Congress’ intention was for BLM to cull the  
25 herd at the site and remove only the excess horses. 16 U.S.C. § 1333(b)(2).

26           46.     There is no procedure in the statute or regulations for removing non-excess  
27 animals. In the context of the planned roundup at the Twin Peaks HMA, this means the roundup  
28 is illegal because it removes the horses before the determination is made as to which horses are

1 excess. To remove excess horses, BLM must go to the site on horseback, in helicopters or in  
2 motorized vehicles, make the determination and transport only the excess horses off the range.  
3 The roundup is illegal because it indiscriminately removes all horses, some of which will not be  
4 excess.

5 47. In performing an indiscriminate roundup of virtually all the horses located within  
6 the Twin Peaks HMA, BLM is ignoring the statutory framework in place addressing the  
7 management of horses deemed to be in “excess.” 16 U.S.C. § 1333(b)(2) describes methodology  
8 to be followed by BLM in its removal of excess individual horses from the range to reach AMLs.  
9 Section 1333(b)(2) specifically provides an “order and priority” for removal of excess animals  
10 “until all excess animals have been removed so as to restore a thriving natural ecological balance  
11 to the range, and protect the range from the deterioration associated with overpopulation.” *Id.* §  
12 1333(b)(2). Specifically, it first provides that BLM “shall order old, sick, or lame animals to be  
13 destroyed in the most humane manner possible.” *Id.* § 1333(b)(2)(A). Second, BLM “shall  
14 cause such number of additional excess wild free-roaming horses and burros to be humanely  
15 captured and removed for private maintenance and care for which [the Secretary] determines an  
16 adoption demand exists by qualified individuals . . . .” *Id.* § 1333(b)(2)(B). Third, and as a last  
17 resort, BLM “shall cause additional excess wild free-roaming horses and burros for which an  
18 adoption demand by qualified individuals does not exist to be destroyed in the most humane and  
19 cost efficient manner possible.” *Id.* § 1333(b)(2)(C). In § 1333(e), Congress also gave BLM  
20 authority to sell any excess animal that is more than ten years old or that has been offered  
21 unsuccessfully for adoption at least three times. *See id.* § 1333(e)(1). However, this year (2010)  
22 the Department of Interior appropriations bill which funds BLM’s programs specifically prohibits  
23 the BLM from using its funds to destroy healthy horses. Pub. L. No. 111-88, 123 Stat. 2904,  
24 2907 (2009) (the funds “shall not be available for the destruction of healthy, unadopted, wild  
25 horses and burros in the care of the Bureau of Land Management or its contractors or for the sale  
26 of wild horses and burros that results in their destruction for processing into commercial  
27 products.”).

1           48.     The statute is clear that this order must be followed during any removal action of  
2 the wild horses that may be taken by BLM. It logically follows that identification of the excess  
3 wild horses, in order to determine which category ((A) through (C)) they fall in, must take place  
4 on the range, prior to any removal action. “Removal” constitutes any action which moves the  
5 wild horses from an area where they “presently exist.” This gather will remove them from their  
6 present habitat. 16 U.S.C. § 1339 states: “Nothing in this chapter shall be construed to authorize  
7 the Secretary to relocate wild free-roaming horses or burros to areas of the public lands where  
8 they do not presently exist.”

9           49.     BLM’s “gather plan,” outlined in the Twin Peaks EA, would indiscriminately  
10 capture virtually all the horses located on the range into corrals and holding pens, subverting the  
11 policy of the statute and regulations that these wild horses be managed by BLM with the goal of  
12 “maintaining free-roaming behavior.” 43 CFR 4700.0-6(c) (“Management activities affecting  
13 wild horses and burros shall be undertaken with the goal of maintaining free-roaming  
14 behavior.”).

15           50.     Rounding the wild horses up into corrals does not maintain free-roaming behavior  
16 - and adversely affects those rounded up and then re-released. This runs contrary to the policy  
17 clearly delineated in WFHBA. Furthermore, 43 C.F.R. § 4710.4 “Constraints on management”  
18 states: “Management of wild horses and burros shall be undertaken with the objective of limiting  
19 the animals’ distribution to herd areas. Management shall be at the minimum level necessary to  
20 attain the objectives identified in approved land use plans and herd management area plans.”

21           51.     Before BLM may begin to gather the estimated two thousand wild horses as  
22 planned, it must first make the determination that each horse gathered falls in one of the three  
23 contemplated categories of “excess.” 16 U.S.C. § 1333(b)(2). While it may be more convenient  
24 for BLM to perform this proper analysis from the holding pens, the statute and regulations do not  
25 permit them to do so.

26           52.     Additionally, BLM does not have any authority to remove non-excess horses.  
27 Any action that results in rounding up a horse from its habitat on the range and which is then  
28 released back is illegal. That, in itself, makes the proposed Twin Peaks Roundup illegal. If, in

1 the gathering process, even one non-excess horse is rounded up as BLM plans, the process is  
2 illegal because non-excess horses cannot be rounded up.

3 53. It is anomalous to infer that by authorizing the custodian of the wild free-roaming  
4 horses and burros to “manage” them, Congress intended to permit the animals’ custodian to  
5 subvert the primary policy of the statute by capturing and removing from the wild the very  
6 animals that Congress sought to protect *from* being captured and removed from the wild. *See*  
7 *Colorado Wild Horse and Burro*, 639 F. Supp. 2d at 96.

8 54. The planned gather constitutes an illegal “capture” of the wild horses and is an  
9 abuse of the BLM’s management authority. BLM’s management authority is limited, in that it  
10 should be at the “minimal feasible level.” The management activities envisioned by Congress in  
11 the statute are:

- 12 • the determination as to whether an overpopulation exists and whether action  
13 should be taken to remove excess animals;
- 14 • the determination of appropriate management levels of wild free-roaming horses  
15 and burros on public lands; and
- 16 • only the removal of adoptable excess horses from the range.

17 55. The chasing of wild horses by helicopter for the purposes of capture is an  
18 inhumane method beyond the pale of “minimal feasible level” of management, does not fall  
19 under any of BLM’s authorized management activities, and should not be allowed to proceed,  
20 especially for purposes of identifying the excess horses as contemplated in 16 U.S.C §  
21 1333(b)(2). It was Congress’ intention that the herds should be culled where the horses are found  
22 and only adoptable horses to be rounded up.

23 56. The stated Congressional policy in 16 U.S.C. § 1331 is clear - “It is the policy of  
24 Congress that wild free-roaming horses and burros shall be protected from capture, branding,  
25 harassment, or death.” BLM’s planned roundup exposes the Twin Peaks wild horses and burros  
26 to all of these unfortunate consequences. The proposed illegal roundup runs counter to the  
27 minimal level of management BLM is supposed to be performing under the law.

28

1           57. The WFHBA requires that “ranges” designated to protect and conserve wild  
2 horses and burros be “devoted principally” to their welfare, not principally to the welfare of  
3 livestock. 16 U.S.C. Sec. 1332(c-d), 1333(a). The WFHBA grants no authority to the BLM to  
4 designate some other category of wild horse and burro range/area that is not devoted principally  
5 to the welfare of wild horses and burros. The Twin Peaks roundup plan would reduce wild horse  
6 and burro levels well below livestock levels, in terms of Animal Unit Months (“AUM”s), which  
7 is the measure used by the BLM to compare wild horse/burro levels to livestock levels. This  
8 would violate the WFHBA’s requirement that ranges designated for wild horses and burros, such  
9 as the Twin Peaks Herd Management Area, be devoted principally to the welfare of wild horses  
10 and burros.

11           58. BLM’s proposed action violates NEPA’s requirement that it consider both the  
12 indirect and direct impact on the captured wild horses. *See* 40 CFR 1508.8 (“‘Effects’ include:  
13 ... (b) **Indirect effects**, which are caused by the action and are later in time or farther removed in  
14 distance, but are still reasonably foreseeable.... Effects includes ecological (such as the effects  
15 on natural resources and on the components, structures, and functioning of affected ecosystems),  
16 aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”);  
17 40 CFR 1500.2 (“Federal agencies shall to the fullest extent possible: ... (e) Use the NEPA  
18 process to identify and assess the reasonable alternatives to proposed actions that will avoid or  
19 minimize adverse effects of these actions upon the quality of the human environment.”). Per the  
20 final EA (p. 46), “Indirect impacts are those impacts that occur once the excess animals are  
21 removed.” Yet, the EA contains no legitimate or adequate analysis of the indirect effects on the  
22 wild horses from the day after their capture for the rest of their lives

23           59. The EA states that animals would be transported to BLM facilities for adoption,  
24 sale, or long-term holding. But, it provides no analysis of whether - given the tens of thousands  
25 of wild horses already in short-term holding and long-term holding facilities, and the current state  
26 of our economy - “adoption” or “sale” is realistic (other than sales that result in the horse being  
27 slaughtered). Nor does it analyze the impact on the wild horses who are kept in short-term or  
28 long-term holding facilities, with no trees, canyons or other shelter.

1           60.     There can be no doubt that the wild horses are part of the human environment to  
2 be protected by the procedural safeguards of NEPA, before, during, and after their capture. And,  
3 there can be no doubt that taking thousands of wild and free horses from their natural  
4 environment and confining them in short-term or long-term holding facilities without any trees,  
5 canyons or other shelter, perhaps leading to slaughter, has a significant impact on these wild  
6 horses and environment. Yet, nowhere in the BLM's FONSI, DR, or EA, does it address the  
7 foreseeable impacts on the captured horses themselves from the moment they arrive at the  
8 short-term and then long-term holding facility that is not open to the public . This violates the  
9 spirit and letter of NEPA and is a clear, arbitrary and capricious error of law, and renders the  
10 finding of no significant impact a nullity.

11           61.     Under NEPA, proposed actions must be clearly and understandably defined and  
12 described. The Twin Peaks EA, in the description of the proposed action, states that there are  
13 about 2300 wild horses in the Twin Peaks HMA currently, about 2300 would be rounded up, and  
14 180 would be returned to the HMA-specifically, 102 males and 78 females. The EA then  
15 contradicts itself by stating that 448 wild horses would remain after completion of the proposed  
16 action. This violates NEPA's requirement that agencies clearly describe proposed actions  
17 because the public has no way to know for sure whether 180 or 448 horses would remain in the  
18 HMA. The EA, in the response to comments, fails to clarify this matter, and instead merely  
19 reiterates the same inherently contradictory information found in the main body of the EA.

20           62.     NEPA requires that agencies prepare an EIS, rather than an EA, if the proposed  
21 action would potentially cause a significant adverse effect on the environment, including wildlife  
22 species such as wild horses. Factors that trigger the need to prepare an EIS include actions that  
23 would set a precedent, actions that would cause unknown risks, controversial actions, and actions  
24 that would, in effect, implement a future program that has not yet been analyzed. The Twin  
25 Peaks roundup plan would be appear to be unprecedented because it would roundup all of the  
26 wild horses in the Twin Peaks HMA-something that appears to have never occurred before  
27 within this HMA. The proposed action would also be unprecedented in this HMA in that, for the  
28 small number of horses returned to the HMA, such horses would have a skewed sex ratio (only

1 40% female) and all females would be injected with immunocontraceptives. The risks of the  
2 combination of these three facets of the proposed action are unknown and have not been  
3 analyzed in an EIS. Moreover, the existing science raises serious concerns about the potential  
4 risks and adverse health and behavioral effects of immunocontraceptives, making the proposed  
5 action controversial. Due to these factors, an EIS was required to be prepared to fully analyze the  
6 potential impacts of this roundup.

7 63. The EA indicates the upland vegetation, which comprises most of the area of the  
8 Twin Peaks HMA, is in an acceptable condition currently, and indicates that much, if not the  
9 majority, of the riparian/lotic area is in an acceptable condition under the current levels of wild  
10 horses and burros, and livestock. The EA does not provide current data on range vegetation  
11 condition but, rather, combines and summarizes reports over the past 15 years. Defendants  
12 repeatedly refused to provide Plaintiffs with the Riparian Functional Assessments (RFAs) that  
13 the EA claimed formed the basis for the proposed action and the assertion that current wild horse  
14 levels are “excess”. Defendants also refused to provide Plaintiffs with the wild horse inventory  
15 and gather data showing how many wild horses there were, and how many were removed, in each  
16 year since the Twin Peaks HMA was established.

17 64. Defendants fail to explain or provide the methodology or hard data used to  
18 conclude that wild horses and burros, rather than livestock, are the primary source of the damage  
19 in the relatively few riparian/lotic sites, and cultural sites, that the Twin Peaks EA claims are  
20 damaged. The EA fails to provide hard data showing that the Twin Peaks HMA is not in a  
21 thriving ecological condition overall, or that the wild horse and burro AMLs must be as low as  
22 the current AMLs levels, which were set in 1998 and 2001 in order to achieve a thriving  
23 ecological condition for the range.

24 65. Defendants also refused to fully consider, in the EA, reducing livestock levels so  
25 that wild horses and burros could be maintained at higher levels than Defendants currently  
26 propose. 43 C.F.R. 450.5.

27 66. The Twin Peaks EA assumed certain foaling rates and fertility control rates (with  
28 use of the immunocontraceptive program proposed) for the purposes of its population modeling,

1 but failed to cite any primary data source to support the foaling rates and fertility control rates  
2 assumed. The EA also ignored scientific data showing that the EA’s assumed foaling rates are  
3 much higher than actual and the assumed fertility control rates are much lower than actual,  
4 leading to an inaccurate and overestimated presentation of wild horse population growth; and the  
5 EA failed to directly and explicitly respond to dissenting scientific opinion contradicting  
6 Defendants’ assumed foaling and fertility control rates.

7 67. Defendants’ failed to directly and explicitly respond to dissenting scientific data,  
8 specifically the Cooper and Larson (1996) and Nunez *et al.* (2009) studies, indicating that  
9 immunocontraceptive programs like the one proposed in the Twin Peaks EA seriously undermine  
10 the immune systems of wild horses and other large mammals and adversely affect herd behavior.

11 68. Defendants also failed to provide any data in the Twin Peaks EA to support its  
12 assertion that mountain lions, which could control wild horse and burro populations, are scarce in  
13 the Twin Peaks HMA, and failed to directly and explicitly respond to dissenting scientific  
14 opinion that low lion levels are the result of federal action to kill predators, including lions, as a  
15 service to the livestock industry.

16 **VI.**

17 **STATUTORY AND REGULATORY BACKGROUND**

18 **GIVING RISE TO PLAINTIFFS’ CAUSES OF ACTION**

19 **A. THE WILD FREE-ROAMING HORSES AND BURROS ACT**

20 69. Wild horses are a native wildlife species in western North America, including  
21 California and Nevada (Kirkpatrick and Fazio 2010). Wild horses evolved in North America,  
22 and there is no evidence that they originated anywhere else in the world (Forsten 1992). The  
23 current wild horses in western North America are “genetically equivalent” to the native horses  
24 that were driven to extinction over 7,000 years ago (Forsten 1992, Kirkpatrick and Fazio 2010).  
25 Wild horses are ecologically distinct from livestock in terms of the way they use habitat and  
26 forage. Wild horses spend the great majority of their time in upland vegetation areas, typically  
27 on higher slopes, and only briefly occupy riparian/lotic areas (average time spent at watering  
28 events is only 16 minutes), then “rapidly vacate[] the watering areas after drinking” (Ganskopp

1 and Vavra 1986). Cows, on the other hand, “spend a disproportionate amount of their feeding  
2 time in the riparian zone”, and often spend most of their time in riparian zones (Marlow and  
3 Pogacnik 1986).

4 70. Through the WFHBA, Congress found and declared that, “wild free-roaming  
5 horses and burros are living symbols of the historic and pioneer spirit of the West; that they  
6 contribute to the diversity of life forms within the Nation and enrich the lives of the American  
7 people; and that these horses and burros are fast disappearing from the American scene.” Upon  
8 finding this, Congress stated that its policy was that “wild free-roaming horses and burros *shall*  
9 *be protected from capture, branding, harassment, or death; and to accomplish this they are to be*  
10 *considered in the area where presently found*, as an integral part of the natural system of public  
11 lands.” 16 U.S.C. § 1331 (emphasis added).

12 71. BLM and the U.S. Forest Service (“USFS”) have exclusive authority under the  
13 WFHBA for the protection of wild horses and burros on the public lands administered by those  
14 agencies. 16 U.S.C. § 1332(a), (e). The WFHBA requires that BLM’s and USFS’s management  
15 activities be at “the minimal feasible level.” *Id.* According to BLM’s own regulations, BLM  
16 must protect wild horses and burros from unauthorized capture, branding, harassment, or death  
17 and provide these animals with humane care and treatment. 43 C.F.R. § 4700. The Act requires  
18 the Secretary to “protect and manage wild free-roaming horses and burros as components of the  
19 public lands . . . . The Secretary shall manage wild free-roaming horses and burros in a manner  
20 that is designed to achieve and maintain a thriving natural ecological balance on the public  
21 lands.” 16 U.S.C. § 1333(a). The Act provides that, “[t]he Secretary shall maintain a current  
22 inventory of wild free-roaming horses and burros on given areas of the public lands.” Under the  
23 Act, “appropriate management levels” or “AMLs” of wild horses are to be based on a current  
24 inventory of wild horses and on the basis of ecological balance, which cannot arbitrarily be fixed  
25 at a moment in time. This inventory is to be the basis for “determinations as to whether and  
26 where an overpopulation exists and whether action should be taken to remove excess animals;  
27 determine appropriate management levels . . . determine whether appropriate management levels  
28 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 Act also provides that, “[w]here the Secretary determines . . . that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. § 1333(b)(2). However, “Nothing in this chapter shall be construed to authorize the Secretary to relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist.” 16 U.S.C. § 1339.

72. In the Committee report accompanying the bill that became law, the Senate Committee 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 ‘zoo like’ developments.” S. Rep. 92-242, 92nd Cong., 1st Sess. 1971 at 2152. “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.” *Id.*

73. The WFHBA requires that areas established for the protection and conservation of wild horses and burros be “devoted principally”, but not exclusively, to their welfare. 16 U.S.C. Sec. 1332(c-d), 1333(a). The WFHBA contains no provision authorizing the BLM to establish areas for wild horse and burro protection and conservation that are not “devoted principally” to the welfare of wild horses and burros. The Twin Peaks Round-up would reduce wild horses and burros to levels (Animal Unit Months, or AUMs) far below livestock levels (AUM s).

## **B. NATIONAL ENVIRONMENTAL POLICY ACT**

74. Under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, any major federal action that significantly affects the quality of the human environment requires the preparation of an EIS. NEPA §102(2)(C). 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. NEPA requires that analysis be prepared prior

1 to a decision being made, requires compliance with it above all else and requires disclosure of  
2 impacts.

3 75. Agencies may decide instead of preparing an EIS, to prepare an EA first. An EA  
4 serves three purposes: 1) it assists in agency decision-making on whether to prepare an EIS or  
5 Finding of No Significant Impact (“FONSI”); 2) it independently ensures compliance with NEPA  
6 even when no EIS is required; and 3) it facilitates the preparation of an EIS if one is required. 40  
7 C.F.R. § 1508.9(a).

8 76. NEPA requires BLM to analyze in an EA alternatives which involve unresolved  
9 conflicts concerning alternative uses of available resources even when an EIS is not required.  
10 NEPA § 102(2)(C)(iii).

11 77. Although an EA is a “concise public document,” it must include a discussion of  
12 the need for the proposal, alternatives, environmental impacts of the proposed action and the  
13 alternatives and a listing of the persons and agencies consulted. 40 C.F.R. §§ 1508.9(a),  
14 1508.9(b).

15 78. An EA’s FONSI is only considered adequate if the agency took a “hard look” at  
16 the impacts of its proposed action, identified the relevant areas of environmental concern, made a  
17 convincing case that the environmental impacts of the proposed action were insignificant; and if  
18 there were significant impacts, the agency convincingly established changes that reduced the  
19 impacts to a minimum.

20 79. The Council on Environmental Quality (“CEQ”), the agency responsible for  
21 implementing NEPA, and BLM’s regulations under NEPA, requires that BLM analyze the direct,  
22 indirect and cumulative impacts on the environment under the proposed action and each  
23 alternative to determine if the impacts are significant. BLM’s regulations require that this  
24 analysis be based on the best available information and should be objective, i.e., should not  
25 reflect subjective value judgments.

26 80. An agency must take a “hard look” at the alternatives and the environmental  
27 impacts of each. An agency must consider a full range of alternatives that cover a full spectrum  
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1 of possibilities and demonstrate reasoned decision-making. It must also give a reasoned  
2 explanation for rejecting each alternative.

3 81. NEPA requires that agencies provide hard data relied upon, ensure scientific  
4 accuracy and integrity of environmental analysis (40 C.F.R. 1502.24), directly and explicitly  
5 respond to dissenting scientific opinion and data (40 C.F.R. 1502.9), and produce environmental  
6 analyses that clearly describe proposed actions. (40 CFR 1502.4(a)) An EIS must be prepared  
7 instead of an EA if there is the potential for significant adverse effects to the environment,  
8 including wild animal species, like the wild horses and burros. 42 U.S.C. 4332.

9 82. BLM regulations also require that a No-Action alternative be analyzed at the same  
10 level of detail as the proposed action.

11 **VII.**

12 **FIRST CLAIM FOR RELIEF**

13 **Violations of WFHBA, WFHBA Regulations and APA**

14 83. Plaintiffs incorporate by reference here the allegations of the proceeding  
15 paragraphs of this Complaint.

16 84. BLM's actions exceed its express statutory mandate as articulated in § 1333(b)(2).  
17 First § 1333(b)(2)(A) prohibits BLM from capturing and removing old, sick, or lame horses  
18 because these horses must be culled on the range. Second, § 1333(b)(2)(B) makes clear that the  
19 only horses that may be captured and removed from the range are excess adoptable horses.

20 85. BLM's disregard of § 1333(b)(2) is an abuse of the agency's discretionary  
21 management authority under the statute and regulations, and is illegal.

22 86. These actions must be set aside under the Administrative Procedure Act ("APA")  
23 because they are arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance  
24 with law; without observance of procedure required by law, and in excess of statutory  
25 jurisdiction, authority, limitations, and short of statutory right.

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VIII.

**SECOND CLAIM FOR RELIEF**

**Violations of WFHBA and APA**

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3  
4 87. Plaintiffs incorporate by reference here the allegations of the proceeding  
5 paragraphs of this Complaint.

6 88. BLM's slated August 9, 2010 roundup violates §§ 1331 and 1339 of the WFHBA  
7 because BLM plans to relocate thousands of healthy, non-adoptable horses to public lands where  
8 the horses do not presently exist, and did not exist in 1971 (namely Kansas, Oklahoma, and/or  
9 South Dakota).

10 89. Pursuant to 16 U.S.C. § 1331, "wild free-roaming horses and burros shall be  
11 protected from capture, branding, harassment, or death; and to accomplish this they are to be  
12 considered in the area where presently found, as an integral part of the natural system of the  
13 public lands." BLM may not relocate healthy, non-adoptable horses to lands where they do not  
14 exist. 16 U.S.C. § 1339.

15 90. BLM's proposed August 9, 2010 roundup will permanently relocate thousands of  
16 healthy, non-adoptable wild horses from the range and transfer them to long-term holding  
17 facilities on lands where the wild horses do not exist and did not exist in 1971.

18 91. It is the responsibility of BLM to manage the wild horses on the range. Wild  
19 horses may not be removed from their protected homes within the designated Herd Areas. BLM  
20 must find a place for any wild horse it deems "excess" within the Herd Areas originally  
21 designated by the WFHBA in 1971.

22 92. BLM's proposed capture of healthy, non-adoptable wild horses for relocation to  
23 long-term holding facilities on public lands where the wild horses do not exist is an abuse of  
24 BLM's discretionary management authority and is illegal, as is the relocation of such horses to  
25 non-HA short-term holding facilities en route to long-term holding facilities.

26 93. These actions must be set aside under the APA because they are arbitrary,  
27 capricious, and an abuse of discretion, or otherwise not in accordance with law; without  
28

1 observance of procedure required by law, and in excess of statutory jurisdiction, authority,  
2 limitations, and short of statutory right.

3 **IX.**

4 **THIRD CLAIM FOR RELIEF**

5 **Violations of WFHBA and APA**

6 94. Plaintiffs incorporate by reference here the allegations of the proceeding  
7 paragraphs of this Complaint.

8 95. BLM admits that the agency plans to capture and roundup non-excess  
9 non-adoptable horses from the range, only to turn around and release hundreds of them back to  
10 the range. These proposed actions violate §§ 1333(b)(2) and 1339, because non-excess,  
11 non-adoptable horses may not be rounded up from the range.

12 96. BLM's disregard of §§ 1333(b)(2) and 1339 is an abuse of the agency's  
13 discretionary management authority under the statute and regulations, and is illegal.

14 97. These actions must be set aside under the APA because they are arbitrary,  
15 capricious, and an abuse of discretion, or otherwise not in accordance with law; without  
16 observance of procedure required by law, and in excess of statutory jurisdiction, authority,  
17 limitations, and short of statutory right.

18 **X.**

19 **FOURTH CLAIM FOR RELIEF**

20 **Violation of the WFHBA and the APA**

21 98. Plaintiffs incorporate by reference here the allegations of the proceeding  
22 paragraphs of this Complaint;

23 99. Defendants' Twin Peaks Roundup violates the WFHBA, 16 U.S.C. 1333(a) by:

24 a) violating the requirement that the management of wild horse and burro  
25 herds "shall be at the minimal feasible level", due to the fact that, the Twin Peaks EA proposes  
26 extensive interference with the wild herds of horses and burros without considering other  
27 options, i.e., a reduction in livestock grazing. Management proposed by the Twin Peaks EA  
28 includes, for the first time ever on this range, rounding up 100% of wild horses in the Twin Peaks

1 HMA, and the majority of those horses would be forever removed from the range - shipped long  
2 distance to Kansas or Oklahoma. In addition, all female wild horses to be returned to the range  
3 would be treated with immunocotraceptives, the stallions to be removed from the range would be  
4 gelded (permanently rendered infertile) and the ratio of male to female horses would be  
5 unnaturally skewed so that more stallions would be on the range than mares.

6 b) violating the requirement that the management of wild horse and burro  
7 herds “shall be at the minimal feasible level”, due to the fact that the chasing of wild horses by  
8 helicopter for the purposes of capture is an inhumane method beyond the pale of “minimal  
9 feasible level” of management.

10 c) violating the requirement that areas established for wild horse and burro  
11 herd management be “devoted principally” to the welfare of wild horses and burros, due to the  
12 fact that wild horse and burro grazing levels would be reduced considerably below that of the  
13 livestock allowed in the Twin Peaks HMA.

14 100. Defendants’ decision to propose, develop, and implement the Twin Peaks  
15 Roundup while failing to comply with §1333(a) of the WFHBA is arbitrary, capricious, an abuse  
16 of discretion, or otherwise not in accordance with law, and without observance of procedure  
17 required by law, in violation of the APA 5 U.S.C. 706(2); is in excess of its statutory jurisdiction,  
18 authority, or limitations under 5 U.S.C. 706(2); and/or is agency action unlawfully withheld or  
19 unreasonably delayed under 5 U.S.C. 706(1).

20 **XI.**

21 **FIFTH CLAIM FOR RELIEF**

22 **Violations of NEPA, NEPA Regulations and APA**

23 **Failure to prepare an Environmental Impact Statement**

24 101. Plaintiffs incorporate by reference here the allegations of the proceeding  
25 paragraphs of this Complaint.

26 102. NEPA requires that preparation of an environmental impact statement when there  
27 exists the possibility of a significant environmental impact. 42 U.S.C. 4332. Potentially  
28

1 significant impacts include circumstances in which there are highly controversial effects, the  
2 effects are highly uncertain or involve unique and unknown risks and where the action may  
3 establish a precedent for future actions with significant effects or represents a decision in  
4 principle about a future consideration and whether the action threatens a violation of Federal  
5 State or local law. 40 C.F.R. 1508.27.

6 103. Defendants violated 42 U.S.C. 4332 and 40 C.F.R. 1508.27 by failing to prepare  
7 an environmental impact statement for the Twin Peaks Roundup, in light of: a) the fact that this  
8 is a first in this HMA for this type of round-up, wherein all of the wild horses in the Twin Peaks  
9 HMA will be removed, only a small percentage of the wild horses will be returned, without the  
10 ability to breed due to the application of anti-fertility drugs and at a unnatural sex ration which  
11 will disturb the behavior and destroy the culture of the herds ; b) the highly controversial effects  
12 that this type of round-up (all wild horses gathered, anti-fertility drug application and skewed  
13 unnatural sex ratio (more males than females released)) will have on the health, behavior and  
14 culture of wild horse herds in the Twin Peaks HMA; c) the unique and unknown risks associated  
15 with the wholesale application of the anti-fertility drug to all mares to be released on the range  
16 combined with the release of more male than female wild horses; d) the highly controversial  
17 effects and the unique and unknown risks of removing hundreds of horses from the range,  
18 gelding the stallions, and shipping the horses across the county to long-term holding facilities; e)  
19 the potential for this type of round-up to become the norm for all future round-ups in both the  
20 Twin Peaks HMA and all other HMA's in the West (as appears to already be happening); f) the  
21 fact that this round-up represent a "decision in principle" for the "new" management direction  
22 known as the Salazar Plan - which proposes to remove most wild horses from their HMA's,  
23 routinely apply anti-fertility drugs, ship the majority of horses to long-term holding facilities  
24 located outside of the West, create non-reproducing herds by gelding the majority of stallions -  
25 for which public comments are currently being solicited, but no environmental analysis has been  
26 prepared and no decision has been finalized; and g) the fact that this round-up likely violates  
27 provisions of the Wild Free-Roaming Horse and Burro Act (as detailed in Plaintiff's First  
28 through Fifth Claims for Relief).

1 104. Defendants’ decision to propose, develop, and implement the Twin Peaks  
2 Roundup without preparing an EIS is arbitrary, capricious, an abuse of discretion, or otherwise  
3 not in accordance with law, and without observance of procedure required by law, in violation of  
4 the APA 5 U.S.C. 706(2); is in excess of its statutory jurisdiction, authority, or limitations under  
5 5 U.S.C. 706(2); and/or is agency action unlawfully withheld or unreasonably delayed under 5  
6 U.S.C. 706(1).

7 **XII.**

8 **SIXTH CLAIM FOR RELIEF**

9 **Violations of NEPA, NEPA Regulations and APA**

10 **Failure to Consider, Explore and Objectively Evaluate a Reasonable Range of Alternatives**

11 105. Plaintiffs incorporate by reference all preceding paragraphs.

12 106. In conducting the NEPA process, whether by Environmental Impact Statement or  
13 Environmental Assessment, the agency must “study, develop, and describe appropriate  
14 alternatives to recommended courses of action in any proposal...” 42 U.S.C. §4332(E). The  
15 implementing regulations provide that this consideration of all reasonable alternatives is “the  
16 heart of” the environmental analysis. 40 CFR §1502.14.

17 107. Defendants failed to inform decisionmakers and the public of reasonable  
18 alternatives that would avoid or minimize adverse impacts or enhance the quality of the human  
19 environment and still satisfy the purpose and need for the Twin Peaks EA, and thus violated  
20 NEPA. 40 C.F.R. § 1502.14. Specifically, the BLM refused to fully consider alternatives,  
21 including for example, a reduction in livestock grazing or the site specific protection of alleged  
22 affected riparian areas, or the development of other water sources, or the relocation of some  
23 horses to below-AML HMAs. The dismissal of these alternatives was predicated on the  
24 improper narrowing of the purpose and need and a disregard for, or misinterpretation of other  
25 provisions of law with which they must comply, including the WFHB Act, the BLM’s own  
26 regulations and NEPA,

27 108. The Defendants’ failure to consider, explore and objectively evaluate a reasonable  
28 range of alternatives, is arbitrary, capricious, an abuse of discretion, or otherwise not in

1 accordance with law, and without observance of procedure required by law, in violation of the  
2 APA 5 U.S.C. 706(2); is in excess of its statutory jurisdiction, authority, or limitations under 5  
3 U.S.C. 706(2); and/or is agency action unlawfully withheld or unreasonably delayed under 5  
4 U.S.C. 706(1)

5 **XIII.**

6 **SEVENTH CLAIM FOR RELIEF**

7 **Violations of NEPA, NEPA Regulations and APA**

8 **Failure to Disclose Methodology, Present Hard Data and Ensure the Scientific**  
9 **Accuracy and Integrity of the Twin Peaks Environmental Assessment**

10 109. Plaintiffs incorporate by reference all preceding paragraphs.

11 110. The BLM is required to ensure scientific accuracy and integrity in NEPA  
12 documents, and must also clearly divulge its methodologies for key findings, and present hard  
13 data upon which those findings are based. 40 C.F.R. 1502.24.

14 111. This requirement applies equally to an EA to ensure that the BLM has adequately  
15 disclosed the environmental impacts of the proposal and the alternatives to the proposed action.  
16 40 C.F.R. § 1508.9.

17 112. The BLM's Twin Peaks EA failed to comply with this provision of NEPA by:

18 a) failing to divulge the methodology used to assess the function of the  
19 riparian areas within the HMA, specifically how they determined the level of damage they assert  
20 exists, and who or what had caused the alleged damage;

21 b) failing to divulge the methodology they will be using to perform the 2010  
22 Wild Horse and Burro inventory;

23 c) failing to present, and refusing to supply, any hard data, which they claim  
24 supports their assertion of some existing damage to certain riparian/lotic and cultural sites, and  
25 that this damage was recent and indicative of a decline, rather than a recovery, of the range, and  
26 that this alleged damage was perpetrated by wild horses and burros as opposed to cows and  
27 sheep;

28

1 d) failing to present the hard data on annual wild horse and burro inventory  
2 and gather numbers to support their assertion that herds in this area have a 20% annual increase  
3 in numbers;

4 e) failing, and refusing to provide, the data necessary to establish that wild  
5 horse and burro levels must be reduced to the 1998/2001 Appropriate Management Levels  
6 (AMLs) in order to maintain a thriving ecological balance in the Twin Peaks HMA;

7 f) failing to provide a citation to any primary data source to support the  
8 assumption in their population model regarding foaling rates, and ignoring existing data which  
9 consistently shows that actual average foaling rates are much lower than Defendants' assume;  
10 and

11 g) failing to provide a citation to any primary data source to support the  
12 assumption in their population model regarding fertility control rates, and ignoring existing data  
13 which consistently shows that actual fertility control rates are much higher than the BLM  
14 assumes;

15 113. The BLM's failure to disclose their methodology, supply hard data to support  
16 their claims and overall failure to insure the scientific accuracy and integrity of the Twin Peaks  
17 EA as required by 40 C.F.R. 1502.24 is arbitrary, capricious, an abuse of discretion, or otherwise  
18 not in accordance with law, and without observance of procedure required by law, in violation of  
19 the APA 5 U.S.C. 706(2); is in excess of its statutory jurisdiction, authority or limitations under 5  
20 U.S.C. §706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5  
21 U.S.C. §706(1).

22 **XIV.**

23 **EIGHTH CLAIM FOR RELIEF**

24 **Violations of NEPA, NEPA Regulations and APA**

25 **Failure to Respond to Dissenting Scientific Opinion**

26 114. Plaintiff incorporates by reference all preceding paragraphs.

27 115. The BLM must meaningfully respond to dissenting scientific opinion in NEPA  
28 documents. 40 C.F.R. 1502.9 (b).

1 116. The BLM has an affirmative duty to disclose and analyze scientific information  
2 counseling against the activities proposed by the agency, or that call into question the expected  
3 environmental effects of the proposed action. 40 C.F.R. §§ 1502.9(b), 1502.24. *See also*, 40  
4 C.F.R. § 1508.27(b)(4). This information must be discussed in the body of the EA

5 117. Defendants failed to do this in the Twin Peaks EA by, among other things:

6 a) failing to respond to Dr. Chad Hanson's detailed analysis showing that the  
7 Defendants' assumed foaling rates are far higher than actual foaling rates for wild horses;

8 b) failing to respond to Dr. Chad Hanson's analysis showing that the BLM's  
9 assumed fertility control rates are far lower (i.e., less effective) than they actually are;

10 c) by failing to address Cooper and Larson (2006) a peer-reviewed and  
11 published scientific study provided by Dr. Chad Hanson, which concludes that  
12 immunocontraceptive programs like the one proposed in the Twin Peaks EA "may be  
13 incompatible with the basic biological function of protection against infectious disease" - in other  
14 words may create AIDS like issues for the wild horses;

15 d) by failing to respond to the Nunez *et al.* (2009) peer-reviewed and  
16 published scientific study, provided by Dr. Chad Hanson, which found that immunocontraceptive  
17 programs like the one proposed in the Twin Peaks EA "may disrupt social ties among individuals  
18 and inhibit normal social functioning at the population level" among wild horses; and

19 e) by failing to respond to Dr. Chad Hanson's assertion that mountain lion  
20 levels are not naturally low in the Twin Peaks HMA, but, rather, are low (relative to levels that  
21 could effectively control wild horse and burro populations) due to direct killing of lions by the  
22 federal government and livestock industry.

23 118. Defendants failure to disclose and analyze scientific information counseling  
24 against the activities proposed by the agency, or that call into question the expected  
25 environmental effects of the proposed action, and failure to meaningfully respond to this  
26 dissenting scientific opinion, is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C.  
27 § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C.

28

1 §706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C.  
2 §706(1).

3 **XV.**

4 **NINTH CLAIM FOR RELIEF**

5 **Violations of NEPA, NEPA Regulations and APA**

6 **Failure to Consider Impacts and Effects**

7 119. Plaintiffs incorporate by reference here the allegations of the proceeding  
8 paragraphs of this Complaint.

9 120. NEPA requires agencies to prepare a detailed analysis of the environmental  
10 impacts and adverse environmental effects of proposed actions. 42 U.S.C. 4332(2)(C).

11 121. An Environmental Assessment shall include a brief discussion of the  
12 “environmental impacts of the proposed action and alternatives”. 40 C.F.R. 1508.9 (3)b. Effects  
13 and impacts as used in the CEQ regulations are synonomous and include both direct, indirect and  
14 cumulative effects. 40 C.F.R. 1508.8. For the purposes of the CEQ regulations effects includes  
15 “ecological (such as the effects on natural resources and on the *components*, structures and  
16 *functioning of affected ecosystems*). . .”. *Id.*, emphasis added.

17 122. Defendants violated 42 U.S.C. § 4332(2)(C) and 40 C.F.R. 1508.9 3(b) (the “hard  
18 look” requirement of NEPA) by failing to adequately analyze the direct, indirect and cumulative  
19 environmental impacts and adverse effects of the roundup on the captured horses, including, but  
20 not limited to, the health effects from the round-up; the physical and psychological effects of  
21 long distance transport and placement in an unnatural environment (i.e. Kansas plains v.  
22 Northern California high country) and being placed in captivity separated by sex and age; the  
23 physical, psychological and behavioral effects of utilizing anti-fertility drugs on the female  
24 horses to be released back onto the range, given that wild horses function in family bands with a  
25 Stallion, mare(s) and foals, and that under normal circumstances mares come into season and are  
26 bred only once per year with offspring being born in the spring; the physical, psychological and  
27 behavioral effects of returning a group of horses to the range which has an unnatural sex ratio  
28 (i.e., more stallions (108) than mares (72)) given that wild horses function in small family bands

1 with one Stallion being paired with one or more mares; and the future direct and cumulative  
2 effects of immuno contraceptive application of the population's immune system and viability.

3 123. Defendants' failure to take a hard look at the impacts and effects of the proposed  
4 action on the wild horses and burros, which are components of the range ecosystem and naturally  
5 function within that ecosystem in a particular way is arbitrary, capricious, and an abuse of  
6 discretion, or otherwise not in accordance with law; without observance of procedure required by  
7 law, APA 5 U.S.C. 706(2); is in excess of its statutory jurisdiction, authority or limitations under  
8 5 U.S.C. §706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5  
9 U.S.C. §706(1).

10 **XVI.**

11 **TENTH CLAIM FOR RELIEF**

12 **Violations of NEPA, NEPA Regulations and APA**

13 **Incomprehensibility of the Twin Peaks EA**

14 124. NEPA implementing regulations require that environmental documents, "be  
15 written in plain language and may use appropriate graphics so that decisionmakers and the public  
16 can readily understand them." 40 C.F.R. 1502.8. The Ninth Circuit has interpreted this  
17 regulation to require an EIS to be "organized and written so as to be readily understandable by  
18 governmental decisionmakers and by interested non-professional laypersons likely to be affected  
19 by actions taken under the [EIS]" *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147,  
20 1160 (9th Cir. 2006) (citations omitted).

21 125. In addition, agencies must make sure their proposal is clearly and properly  
22 defined. 40 C.F.R. 1502.4(a).

23 126. Here Defendants' Twin Peaks EA violates this NEPA requirement because it fails  
24 to articulate a comprehensible description of the proposed action, by describing a Roundup that  
25 would either result in 180 or 448 horses being returned to the Twin Peaks HMA, and then failing  
26 to clarify this conflicting description in the response to comments. In addition the EA does not  
27 make clear whether the wild horses to be released will all come from one herd within the Twin  
28

1 Peaks HMA, or whether certain numbers from all five of the distinct herds in the Twin Peaks  
2 HMA will be released.

3 127. The incomprehensibility of the EA, and the resulting inability of the public to  
4 fully understand the end results of the Twin Peaks Roundup, specifically how many horses from  
5 which herds will be released, is arbitrary, capricious, and an abuse of discretion, or otherwise not  
6 in accordance with law; without observance of procedure required by law, APA 5 U.S.C. 706(2);  
7 is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. §706(2)(A); or is  
8 agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. §706(1).

9 **XVII.**

10 **PRAYER FOR RELIEF**

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

13 A. Declare that Defendants' violated the Wild and Free-Roaming Horses and Burros  
14 Act, (WFHBA) and its implementing regulations, in preparing and approving the May 2010  
15 Environmental Assessment and July 8, 2010 Decision Record and Finding of No Significant  
16 Impact for the Twin Peaks HMA:

- 17 1. by subjecting old, sick and lame wild horses to a Roundup and removal  
18 from the range;
- 19 2. by relocating excess wild horses taken off the range to long-term holding  
20 facilities in areas where wild horses currently don't exist and did not exist  
21 in 1971, and/or relocating such horses to non-HA short-term holding  
22 facilities en route to long-term holding facilities;
- 23 3. by authorizing the removal of non-excess horses from the range;
- 24 4. by authorizing a Roundup which requires extensive interference with the  
25 wild horse and burro herds of the Twin Peaks HMA, contrary to the  
26 requirement that management "shall be at the minimum feasible level";  
27 and

1           5.     by failing to manage the Twin Peaks HMA “principally” for use by wild  
2           horses and burros.

3           B.     Declare that Defendants violated the National Environmental Policy Act, (NEPA)  
4 and its implementing regulations, in their preparation of the Twin Peaks EA:

- 5           1.     by failing to prepare an environmental impact statement to assess the  
6           impacts of this highly controversial, risky, and precedent-setting action;
- 7           2.     by failing to adequately disclose their methodology, provide hard data and  
8           ensure the scientific accuracy and integrity of the Twin Peaks EA with  
9           regard to the AMLs necessary to maintain a thriving ecological balance in  
10          the Twin Peaks HMA; the claimed damage to riparian/lotic and cultural  
11          sites; actual foaling rates of the Twin Peaks wild horse population and the  
12          effectiveness of fertility control treatments.
- 13          3.     by failing to respond to dissenting scientific opinion with regard to (a)  
14          foaling rates; (b) the adverse impacts of fertility control; (c) the actual  
15          effectiveness of fertility control drugs; and (d) killing/removal of mountain  
16          lions due to livestock.
- 17          4.     by presenting an improperly narrow purpose and need and thus failing to  
18          consider, explore and objectively evaluate a reasonable range of  
19          alternatives including, for example, an alternative that would physically  
20          protect the affected riparian areas, or reduce cattle and sheep grazing in  
21          those riparian areas, or relocate horses to below-AML HMAs.
- 22          5.     by failing to present to the public a fully comprehensible and  
23          understandable environmental assessment such that the number of wild  
24          horses in each distinct herd within the HMA that will remain on the range  
25          after the round-up is known by the public; and
- 26          6.     by failing to adequately analyze the impacts of this project on the health  
27          and behavior of the native wild horses and burros scheduled to be rounded  
28          up, and the effects of this project on those that are released and those that

1 are relocated to long-term holding facilities and/or relocating such horses  
2 to non-HA short-term holding facilities en route to long-term holding  
3 facilities.

4 C. Declare that Defendants' actions as set forth in this complaint are arbitrary,  
5 capricious, an abuse of discretion, or otherwise not in accordance with law, and without  
6 observance of procedure required by law, contrary to the Administrative Procedures Act.

7 D. Preliminarily and permanently enjoin the planned roundup, unless and until the  
8 BLM has prepared an Environmental Impact Statement pursuant to NEPA and has fully  
9 complied with the statutory prescriptions set forth in the WFHBA.

10 E. Preliminarily and permanently enjoin the transfer of the horses gathered during the  
11 planned Twin Peaks HMA roundup to long-term holding facilities outside areas where the wild  
12 horses currently exist.

13 F. Preliminarily and permanently enjoin the gelding of wild stallions.

14 G. Preliminarily and permanently enjoin the wholesale application of anti-fertility  
15 drugs.

16 H. Award Plaintiffs their reasonable fees, cost and expenses associated with this  
17 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412 or other authority; and

18 I. Grant Plaintiffs such additional and further relief as the Court deems just and  
19 equitable.

20 Dated: July 15, 2010

**COTCHETT, PITRE & McCARTHY**

**BUCHANAN INGERSOLL & ROONEY PC**

**RACHEL M. FAZIO, ATTORNEY AT LAW**

24 By:           /s/ Stuart G. Gross            
25 **STUART G. GROSS**  
26 *Counsel for Plaintiffs*

