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Interior Board of Land Appeals
Office of Hearings and Appeals
U.S Department of the Interior
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RE: Notice of Appeal, Statement of Reasons and Petition for Stay of (1) Decision Record for the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas Wild Horse Gather Plan dated June 7, 2010; (2) Environmental Assessment DOI-BLM-NV-N020-0014-EA; and (3) Finding of No Significant Impact.

**NOTICE OF APPEAL, STATEMENT OF REASONS,
AND PETITION FOR STAY**

Pursuant to 43 C.F.R. § 4.21, the challenged decision is hereby stayed, and the decision will not be effective until the Interior Board of Land Appeals grants or denies this petition for stay.

Appellants In Defense of Animals and Craig Downer file this Notice of Appeal, Statement of Reasons, and Petition for Stay concerning the final decision of the BLM to gather wild horses on the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas ("HMA") dated June 7, 2010, as well as the Finding of No Significant Impact issued on the same day, and the Environmental Assessment upon which BLM relies in undergirding its final decision. This Appeal is pursuant to all applicable authority, including the Wild Free-Roaming Horses and Burros Act ("Wild Horse Act" or "Act"), 16 U.S.C. § 1331 *et seq.*, Federal Land Policy Management Act ("FLMPA"), 43 U.S.C. § 1701 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and implementing regulations of the Bureau of Land Management ("BLM") and Department of Interior, including 43 C.F.R. § 4700 *et seq.* Pursuant to 43 C.F.R. § 4.21, Appellants also petition for stay of the challenged decision pending final determination on appeal.

Appellants base this Appeal on the procedural and substantive failures and flaws of the Final Decision, and the associated Environmental Assessment and Finding of No Significant Impact, including: (1) violation of the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), and Elko Resource Management Plan ("Elko RMP") by adopting a

removal decision that is inconsistent with the governing land use plan; (2) violation of the Wild Horse Act by authorizing the removal of nearly 1,200 wild horses that are not “excess animals” under the Act; and (3) violation of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) by failing to take a “hard look” at the ecological consequences of the wild horse roundup and removal on soils, weeds, and neighboring wild horse herd management areas.

STATEMENT OF STANDING

Appellant IN DEFENSE OF ANIMALS (“IDA”) is a California non-profit corporation established in 1983, headquartered in San Rafael, California. IDA is dedicated to the mission of ending animal exploitation, cruelty, and abuse by protecting and advocating for the rights, welfare, and habitats of animals, as well as to raise their status beyond mere property, commodities, or things.

IDA has a long-standing interest in protecting and preserving the wild horses across the American West, and is concerned with, and active in seeking, to protect these horses from harm, abuse, and commercial exploitation. IDA, its constituents, staff, and supporters have been active in monitoring the conditions of the public lands and wild horse populations in the American West, including specifically within the Owyhee, Little Humboldt, and Rock Creek Herd Management Areas. IDA, its constituents, staff, and supporters also actively monitor and comment on BLM’s removal and roundup actions in the interior West, including on the areas at issue in this litigation. In addition to filing comments on BLM’s actions relating to wild horses, IDA also sends out alerts to its thousands of constituents and supporters, which have generated tens of thousands of public comments on BLM’s wild horse roundups, gathers and other actions.

IDA, as an organization and on behalf of its staff, constituents, and supporters is also one of the leading conservation and advocacy groups fighting to protect wild free-roaming horse populations in the American West. The roundup and removal of wild free-roaming horses is of great concern to IDA, its staff, constituents, and supporters, and the preservation and protection of wild free-roaming horse populations are very important to IDA and its staff, constituents, and supporters.

IDA staff, constituents, and supporters work, live and/or recreate throughout the American West, areas which are currently occupied by wild free-roaming horse populations. IDA’s staff, constituents, and supporters derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from this ecosystem on a regular and continuing basis, and intend to do so frequently in the immediate future, including within the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas at issue in this litigation.

The aesthetic, recreational, scientific, inspirational, educational, and other benefits have been and will continue to be adversely affected and irreparably injured if BLM moves forward with its roundup and removal of wild free-roaming horses in the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas. These are actual, concrete injuries caused by BLM's failure to comply with mandatory duties under the FLPMA, the Wild Horse Act, and the APA. The injuries would be redressed by the relief sought.

Appellant Craig Downer is a fourth-generation native Nevadan and wildlife ecologist interested in wild horses. As the attached declaration explains in detail, Downer observes, studies, photographs, and follows wild horse herds in his personal time, and he derives enormous recreational, aesthetic, spiritual, and emotional satisfaction and benefits through these activities. Downer has been observing wild horses and habitat within the Owyhee, Rock Creek, and Little Humboldt HMAs since the 1980s, and his most recent visits were completed in June 2010. He fully intends to continue to visit these areas in the immediate future.

BACKGROUND

Elko RMP and 2003 Wild Horse Amendment

The public lands managed by the Elko Field Office of the Bureau of Land Management are located in northeastern Nevada, and covers almost 6,000,000 acres of lands primarily within Elko County, Nevada, with smaller portions in Lander and Eureka counties.

In March 1987, BLM approved and adopted the Elko RMP, which directs all land management decisions within the public lands subject to the RMP. The Elko RMP, as amended, remains the applicable land use plan guiding the management of the public lands in the Elko Field Office. Through the Elko RMP, BLM made land use and resource decisions that affected the public land in the Elko Field Office. For example, the Elko RMP adopted specific land use decisions regarding wilderness, livestock grazing, minerals, wildlife, and wild horses.

As to wild horses, the Elko designated four wild horse herd areas¹, and required BLM to manage wild horse populations and habitat within these herd areas. BLM also adopted a series of requirements for managing wild horse populations, including a prohibition on using helicopters to assist in wild horse gathers from six week before through six weeks after "peak foaling season."

¹ A herd area is an area of public land identified as being habitat used by wild horses and burros at the time of the passage of the Wild Free-Roaming Horse and Burro Act.

In 2003, BLM amended the RMP by adopting a new Wild Horse Amendment. This amendment designated certain herd management areas² within the broader herd areas established under the 1987 Elko RMP. More specifically, the amendment designated 126,753 acres of the Rock Creek herd area as an HMA, thereby eliminating nearly 60,000 acres of habitat managed for wild horses. The 2003 RMP Amendment also designated only 17,151 acres out of the 63,937-acres Little Humboldt Herd Area as an HMA, thereby eliminating over 2/3 of the area managed for wild horses. The 2003 RMP designated much of the entire Owyhee Herd Area as the Owyhee HMA.

The 2003 RMP Amendment did not establish appropriate management levels, or “AMLs,” for these HMAs, however. On the Rock Creek HMA, BLM noted that an “AML needs to be established.” As for the Little Humboldt HMA, BLM claimed that this AML was established through a private stipulated settlement agreement. Upon information and belief, this stipulated settlement agreement was entered into between the livestock permittees on the Little Humboldt Allotment and BLM, and this agreement was never subject to public notice, review, or comments. And, BLM claimed that the AML for the Owyhee HMA was established by an April 2002 Final Multiple Use Decision.

The 2003 RMP Amendment stated that BLM would “[e]stablish or re-evaluate the AMLs for wild horses, to include the population range within which the herd size will be allowed to fluctuate, based on monitoring and as part of completing allotment-specific evaluations and/or herd-specific Population Management Plans.” In the intervening years, BLM has not prepared any Population Management Plan on any of the HMAs at issue here.

Owyhee Herd Management Area

The Owyhee Herd Management Area (“HMA”) is located in northwestern Elko County, approximately 90 air-miles from Elko, Nevada. The Little Owyhee HMA lies immediately east of the Owyhee HMA, and the Rock Creek and Snowstorm Mountains HMAs are immediately south of the Owyhee HMA. *See* Exh. 1 (map of HMAs). The Owyhee HMA is located in the Owyhee desert, which is characterized by a high rolling plateau underlain by basalt flows, which are cut by deep, vertically walled canyons. Elevation within the HMA ranges from about 5,100 to 5,600 feet.

According to BLM, BLM established the Appropriate Management Level (“AML”) for the Owyhee HMA in a 2002 Owyhee Final Multiple Use Decision.

² A herd management area is an area within Herd Areas where long-term management of wild horses can be sustained.

The borders of the Owyhee HMA are nearly identical with the boundaries of the Owyhee grazing allotment. Two (2) Wilderness Study Areas are located within the Owyhee HMA – the Owyhee Canyon WSA and the South Fork Owyhee WSA. Further, nearly 250 species of vertebrate wildlife occur within the Owyhee HMA, and the South Fork Owyhee River and associated canyonlands provide outstanding habitat for a wide variety of wildlife, including several threatened, endangered, candidate, and Nevada BLM sensitive species, such as: bald eagle, Columbia spotted frog, golden eagle, ferruginous hawk, Swainson's hawk, osprey, white pelican, white-faced ibis, pale Townsend's big-eared Bat, western sage grouse, redband trout, badger, pygmy rabbit, yellow-bellied marmot, red-tailed hawk, American kestrel, Prairie falcon, sage thrasher, Loggerhead shrike, Brewer's sparrow, and northern harrier.

BLM has documented overuse by livestock within the Owyhee allotment dating back to the mid-1990s and before. For example, in 2000, BLM prepared an Allotment Evaluation for the Owyhee Allotment, the purpose of which was to determine whether or not present grazing management in the Owyhee Allotment was achieving or making significant progress toward achieving the Fundamentals of Rangeland Health standards and multiple use objectives of the allotment. The Owyhee Evaluation concluded that as a result of livestock grazing within the Owyhee Allotment, the Standards and Guidelines for (1) soils, (2) riparian and wetland systems, and (3) habitats were being violated throughout the Owyhee Allotment. BLM specifically found that "[l]ivestock grazing management practices are one of the causal factors contributing to the non-attainment of [all three standards]."

The Owyhee Evaluation further concluded that BLM was failing to manage the Owyhee Allotment consistent with the requirements identified in the Elko RMP, and other management documents. Specifically, BLM concluded that it was failing to meet its management obligations for (1) the maintenance and improvement of all crucial pronghorn antelope and California bighorn sheep habitat; (2) the protection and enhancement of crucial sage grouse strutting or nesting habitat; (3) the improvement and maintenance of meadow and riparian areas for mule deer, pronghorn antelope, and sage grouse; and (4) the utilization levels in meadows and riparian areas.

BLM concluded that livestock grazing within the Owyhee Allotment was causing non-attainment of the identified multiple use objectives. During its evaluation period – i.e., 1981-2000 – the average actual livestock use within the Owyhee Allotment was 18,262 Animal Unit Months ("AUMs"), where an AUM is defined by BLM as the estimated amount of forage consumed by one cow (with calf) for one month, or by five sheep for one month.

Despite the depauperate conditions across the Owyhee allotment, BLM sought to actually increase livestock AUMs by over 60% to 29,903 AUMs, as well as a host of other wildland and riparian developments (e.g., pipelines, fences, and spring/seep developments). Through a Final

Multiple Use Decision dated April 19, 2002, BLM issued a decision on the Owyhee Allotment increasing livestock grazing, and authorizing a number of other activities designed to protect and increase livestock grazing on the allotment. On August 18, 2004, the Federal District Court for the District of Nevada reversed and remanded BLM's Final Multiple Use Decision on the Owyhee Allotment, and ordered BLM to prepare a Final Environmental Impact Statement and associated grazing decisions for the Owyhee allotment (and others). *Western Watersheds Project v. Oke*, CV-N-03-0197 (D. Nev.).

Rock Creek Herd Management Area

The Rock Creek Herd Management Area is location in northwestern Elko County, approximately 80 air-miles from Elko, Nevada. The HMA is located within the Columbia Plateau and the Great Basin regions, and the area is immediately south of the Owyhee Desert area. The HMA is characterized by a high, rolling plateau underlain by basal flows and alluvial mantels. Elevations in the HMA range from 5,100 feet to 7,750 feet in the Tuscarora Mountains.

BLM claims that the AML for the Rock Creek HMA was established in the 2003 RMP Amendment, discussed *supra*. According to its own terms, the 2003 RMP Amendment did **not** establish an AML for the Rock Creek HMA; instead, the amendment clearly stated that an "AML needs to be established." Upon information and belief, BLM has yet to establish an AML on the Rock Creek HMA.

The boundaries of the Rock Creek HMA are nearly co-extensive with boundaries of the Squaw Valley and Spanish Ranch grazing allotments, with the only difference that the HMA does not extend into the eastern portions of the Squaw Valley grazing allotment. The importance and ecological values of this area are well known, and BLM has acknowledged that this area provides "some of the most valuable stream and riparian habitat in the Elko District." More specifically, BLM acknowledges that the Squaw Valley Allotment includes more than 25 miles of stream habitat for the Lahontan cutthroat trout ("LCT"), a threatened species protected under the Endangered Species Act; and is "an integral component of the Recovery Plan for LCT." And the Spanish Ranch Allotment contains over 35 miles of occupied habitat for the Interior redband trout, a Nevada BLM sensitive species. Redband trout are located in three streams across the Spanish Ranch Allotment, although one population has recently been extirpated.

The two allotments also provide important habitat for sage grouse, another Nevada BLM sensitive species, including 44 separate sage grouse leks (or mating grounds). BLM has further determined that these two allotments provide habitat for peregrine falcon and bald eagle, and at least 15 other Nevada BLM sensitive mammals and birds, as well as habitat for three sensitive plant species, including Meadows Pussytoes, Grimy Ivesia, and Packard's Stickleaf.

BLM's own documentary evidence establishes that nearly all riparian areas across the Rock Springs HMA are in dismal condition. Of the 16 streams surveyed by BLM within the Squaw Valley and Spanish Ranch Allotments, 10 (63%) are in poor condition, 2 (13%) are in fair condition, and 0 (0%) are in good condition, and not one stream has a positive trend of improving stream conditions. Other riparian areas – including seeps, springs, and wet meadows, were similarly in terrible shape. Although BLM failed to collect and analyze any baseline data examining the conditions of these lentic areas prior to issuing the Herd roundup at issue here, BLM's most recent analysis shows that many springs and seeps in the Spanish Ranch and Squaw Valley Allotments are failing to meet the minimum conditions of healthy and thriving riparian areas.

Wildfires have also impacted the public lands within the Rock Creek HMA. In fact, since 2003 – when BLM claims it established the AML for the Rock Creek HMA – wildfires have burned over 95% of the HMA, totaling several hundred thousand acres of public lands.

In June 2004, BLM issued a Final Multiple Use Decision, formally adopting inflated livestock grazing levels, and authorizing a new grazing scheme and a series of range developments on the Squaw Valley and Spanish Ranch grazing allotments. This FMUD was reversed and remanded by the Office of Hearings and Appeals, after a two-week trial on the merits. *See Western Watersheds Project v. BLM*, 010-NV-2004-01 (March 1, 2006). Since the decision was reversed, BLM has failed to issue a new Final Multiple Use Decision on the Squaw Valley and Spanish Ranch grazing allotments.

Little Humboldt Herd Management Area

The Little Humboldt HMA is located in northwestern Elko County, approximately 90 air miles northwest of Elko, Nevada. The HMA is located south of the Owyhee Desert, and lies within the Columbia Plateau and Great Basin regions. *See* Exh. 1. The area within the HMA is characterized by a high, rolling plateau underlain by basal flows and alluvial mantel, and the elevation within the HMA ranges from 5,700 feet to 7,400 ft in the mountains. The vegetation within the HMA is generally sage-steppe, consisting of Wyoming big sagebrush, Sandberg bluegrass, squirreltail, bluebunch wheatgrass, and Indian ricegrass.

BLM asserts that the AML was established for the Little Humboldt HMA in 2002 through a private agreement – presumably between the BLM and private livestock interests authorized to graze the public lands with the HMA.

In 2006, the Winters Fire burned over 90% of the Little Humboldt HMA. *See* EA, Map 4. Since that time, BLM has failed to collect any data – including data on the condition of the uplands, riparian areas, wildlife habitat and other range data to determine the current condition of

the public lands within the Little Humboldt HMA. Nor has BLM re-examined the AML to determine whether the AML still achieve and maintains a thriving natural ecological balance within the HMA.

BLM's Proposed Wild Horse Roundup and Removal

On June 7, 2010, BLM issued a final Environmental Assessment, Finding of No Significant Impact and Decision Record authorizing the removal of the majority of wild free-roaming horses in the Owyhee, Rock Creek, and Little Humboldt HMAs; and concluding that this wild horse roundup and removal will not have a significant impact on the environment.

According to these documents, BLM estimates that there are approximately 1,548 wild free-roaming horses in these HMAs – as well as outside and adjacent to the Rock Creek HMA. BLM plans to roundup all wild horses within these areas, apply fertility controls to 399 wild horses and release them back to the HMAs, and remove nearly 1,200 wild free-roaming horses from the public lands.

BLM plans to use the so-called “helicopter drive trapping method,” in which BLM employs helicopters and off-road vehicles to roundup wild horses into so-called “trap sites,” and then transfer via trailer the horses deemed for removal to “short term holding facilities.” From the short-term facilities, BLM will move the wild horses to “long term holding facilities” for adoption or holding indefinitely.

BLM never identifies where – or how many – trap sites and short-term holding facilities it intends to construct; nor does BLM identify how many helicopters, off-road vehicles, and trailers the roundup and removal will require. BLM does assert that the trap sites and holding facilities will be located in previously disturbed sites, where possible. BLM provides no basis for this determination, however.

In its June 7, 2010 Decision Record, BLM did not assert that it was issuing this decision effective immediately, or on date certain. Instead, BLM issued this decision under its traditional administrative decisionmaking authority, and specifically made this decision subject to the Department of Interior’s stay provision – i.e., 43 C.F.R. § 4.21. On June 29, 2010, the undersigned counsel contacted BLM’s lead horse staffer in Nevada – Alan Shepard – to ensure that BLM would comply with the automatic stay provision of 43 C.F.R. § 4.21. In response to the undersigned’s question “if an appeal and petition or stay is timely filed, then the decision and roundup is automatically stayed,” Shepard responded, “Yes, I believe so.” Later that day, Shepard called back to retract his conclusion, and he then claimed that the decision was actually issued as a Full Force and Effect Decision due to be implemented on July 9, 2010. Later that

day, BLM issued a so-called clarification/amendment of the June 7, 2010 decision claiming the legal authority to implement the decision immediately.

STATEMENT OF REASONS

BLM violated the Federal Land Policy Management Act (“FLMPA”), 43 U.S.C. § 1701 *et seq.*, Wild Free-Roaming Horses and Burros Act (“Wild Horse Act” or “Act”), 16 U.S.C. § 1331 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and implementing regulations of the Bureau of Land Management (“BLM”) and Department of Interior, including 43 C.F.R. § 4700 *et seq.*, in multiple respects through its issuance of the Decision Record, Finding of No Significant Impact, and the June 7, 2010 Environmental Assessment.

I. BLM’S REMOVAL OF WILD FREE-ROAMING HORSES VIOLATES FLPMA AND THE ELKO RMP.

The removal of wild horses using the helicopter drive-trapping method on the Owyhee, Rock Creek and Little Humboldt Herd Management Areas is inconsistent with the requirements of the Elko Resource Management Plan, and, thus violates the Federal Land Policy and Management Act.

A. Requirements of the Federal Land Policy and Management Act.

FLPMA is the basic “organic act” for management of the public lands under BLM’s administration. Under FLPMA, BLM must develop land use plans (“LUPs”) for the public lands under its control. *See* 43 U.S.C. § 1712. FLPMA further requires that all resource management decisions “shall conform to the approved [land use] plan.” 43 C.F.R. § 1610.5-3(a) (emphasis added). To conform to a land use plan, a resource management decision “shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan.” 43 C.F.R. § 1601.0-5.

Further, BLM “shall take appropriate measures . . . to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved [land use] plan” *See* 43 C.F.R. § 1610.5-3(b). If a proposed action is not clearly consistent with the land use plan, BLM must either rescind the proposed action or amend the plan, complying with NEPA and allowing for public participation. *See* 43 C.F.R. §§ 1610.5-3, 1610.5-5. *See also Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1128 (9th Cir. 2007) (holding that BLM project components “are inconsistent with the Plan and, consequently, violate FLPMA”); *National Parks and Conservation Ass’n v. FAA*, 998 F.2d 1523, 1526 (10th Cir. 1993) (nonconforming land use required RMP amendment).

IBLA has repeatedly held that this “consistency” requirement reflects a mandatory duty to fully and strictly comply with the governing land management plans. *See, e.g. Jenott Mining Corp.*, 134 IBLA 191, 194 (1995); *Uintah Mountain Club*, 112 IBLA 287, 291 (1990); *Marvin Hutchings v. BLM*, 116 IBLA 55, 62 (1990); *Southern Utah Wilderness Alliance*, 111 IBLA 207, 210-211 (1989).

B. BLM’s Round-Up Violates the Elko RMP.

BLM’s wild horse gather violates FLPMA’s “consistency” requirement by authorizing and undertaking actions in the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas that are inconsistent with appropriate land use plans and other management objectives. *See* 43 C.F.R. § 1610.5-3(a). As noted above, FLPMA requires that all resource management decisions “shall conform to the approved [land use] plan.” 43 C.F.R. § 1610.5-3(a).

BLM wild horse round-up fails this seminal requirement. The Elko RMP precludes the “use of helicopters on roundups . . . six weeks before and after the peak foaling period.” Elko RMP at 2-34. In its recent EA, BLM notes that the “peak foaling season [on the Owyhee, Rock Creek, and Little Humboldt HMAs] [is] March 1 through June 30.” EA at 23.

BLM’s definition of “peak foaling season” is consistent with other BLM conclusions in the recent past. For example, in the BLM field offices neighboring the Elko Field Office, BLM acknowledged that peak foaling season was March 1-June 30. Shoshone Complex Wild Horse Gather Environmental Assessment NV062-EA07-104, Battle Mountain, NV District. BLM reached this same conclusion in the neighboring Tonopah District of BLM, where BLM concluded that “[g]athers would not be conducted during peak foaling season which is March 1 to June 30 to reduce the chance of injury or stress to pregnant mares or mares with young foals.” Stone Cabin Complex EA (NV-065-EA-07-028), Tonopah Field Station, NV. BLM reached this same conclusion in the Silver Peak and Paymaster HMAs Environmental Assessment, when BLM acknowledged that “peak foaling season” ran from March 1 to June 30. Silver Peak and Paymaster HMAs EA (NV-065-EA-06-149), Tonopah Field Station, NV.

BLM reached this same conclusion in the Boise District of the BLM (immediately north of the Elko Field Office), when BLM recognized that the “peak foaling season is between March 1 and June 30 within all of the Owyhee Resource HMAs.” Owyhee RMP, EA #ID130-2006-EA-3065. These same conclusions apply equally in HMA and herds in the Vale District of Oregon, where BLM concluded that peak foaling season is March 1 through June 30. Cold Springs Herd Management Area Wild Horse Gather Plan Environmental Assessment (DOI-BLM-V040-2010-025), Vale District/Malheur Field Office, 2010.

BLM made similar conclusions regarding horse roundups in Colorado, too. For example, in the West Douglas Herd Area in central Colorado, BLM “recognized [peak foaling season] as between the first of March and June 15th of any given year.” Amendment to the White River RMP Environmental Assessment (CO-WRFO-03-050-EA). The same period for peak foaling applies to the Sand Wash HMA in the Little Snake Field Office and the Piceance-East Douglas HMA in the White River Field Office, both in Colorado. CO-100-2008-50-EA and CO-110-2006-030-EA (peak foaling season “recognized between March 1 and June 30”).

BLM’s conclusions here are supported by the published, peer-reviewed scientific literature, too. In the chapter entitled, *THE BEHAVIOURAL ECOLOGY OF FERAL HORSES*, authors Lee Boyd and Ronald Keiper conclude that

[r]eproduction in feral horses is strongly seasonal. In the Northern Hemisphere the breeding season extends from March through August, peaking in May and June (Tyler, 1972; Feist & McCullough, 1975; Hall & Kirkpatrick, 1975; Welsh, 1975; Salter, 1978; Boyd, 1980; Nelson, 1980; Berger, 1986; Kirkpatrick & Turner, 1986; Lucas et al., 1991; Goodloe et al., 2000).

THE DOMESTIC HORSE: THE ORIGINS, DEVELOPMENT, AND MANAGEMENT OF ITS BEHAVIOUR. Edited by D. S. Mills, Sue M. McDonnell (Cambridge University Press 2005), page 74.

Thus, according to the Elko RMP, BLM is prohibited from authorizing or permitting a wild horse roundup using a helicopter from the middle of January through the middle of August. Despite this prohibition, BLM has authorized a removal action using the helicopter drive-trapping method on or around July 7 – just days after the peak foaling period. Using helicopters to round-up wild free-roaming horses – as well as recently-born foals – may cause direct adverse impacts to foals and new mothers. Indeed, the potential harm and injuries to both newly-born foals and recent mothers is the reason the Elko RMP bans the use of helicopters to round-up and remove wild free-roaming horses six weeks before, during and six-weeks after peak foaling period.

BLM’s violation could not be more clear: in authorizing the round-up and removal of wild free-roaming horses using the helicopter drive-trapping method within days of the end of the peak foaling season, BLM has violated the provisions of the Elko RMP. Thus, BLM is violating FLPMA, and the wild horse roundup must be set aside as inconsistent with the Elko RMP and FLPMA. *See Oregon Natural Resources Council Fund*, 492 F.3d at 1128.

II. BLM VIOLATED THE WILD FREE-ROAMING HORSES AND BURROS ACT.

BLM's round-up decision violates the Wild Horse Act by authorizing the culling of nearly 1,200 wild horses from the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas that are not "excess horses" under the Wild Horse Act.

A. Requirements of the Wild Horse Act

The Wild Horse Act is designed to "to insure the preservation and protection of the few remaining wild free-roaming horses and burros in order to enhance and enrich the dreams and enjoyment of future generations of Americans." H.R. Rep. No. 92-681 (1971), *as reprinted in* U.S.C.C.A.N. 2159, 2161. Through the Wild Horse Act, Congress found and declared that, "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene." 16 U.S.C. § 1331. By its plain language, the Wild Horse Act mandates that wild horses are to be "protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of public lands." 16 U.S.C. § 1331.

The Wild Horse Act directs the Secretary of the Interior (the "Secretary") to "protect and manage wild free-roaming horses and burros as components of the public lands The Secretary shall manage horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a). All management activities shall be at the minimal feasible level . . . in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. *Id.*

The Act further requires BLM to "maintain a current inventory of wild free-roaming horses and burros on given areas of public lands," so that BLM can "make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals." 16 U.S.C. § 1333(b)(1). Upon determining that "an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, [the Secretary] shall immediately remove excess animals from the range so as to achieve appropriate management levels. *Id.* at (b)(2). The Wild Horse Act defines "excess animals" as wild free-roaming horses and burros "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f). In other words, excess animals are only those animals above the level necessary to "maintain a thriving natural ecological balance." *Id.* See also *Dahl v. Clark*, 600

F.Supp 585, 592 (D. Nev. 1984) (interpreting AML to mean the “optimum number” of wild horses which results in a thriving natural ecological balance and avoids a deterioration of the range); *Animal Protection Institute of America*, 109 IBLA 112 (June 7, 1989) (noting that the term AML is “synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration”). BLM identifies this level as the “appropriate management level” or “AML.” Thus, “excess animals” are only those wild horses and burros that exceed the appropriate management level. 16 U.S.C. §§ 1333(b)(1), 1332(f).

B. The Roundup and Removal of the Rock Creek Herd is Unlawful.

BLM’s decision to round-up horses in the Rock Creek Herd Management Area violates the Wild Horse Act because BLM has failed to establish an appropriate management level for this HMA. Thus, BLM is without authority to round up these horses, as they are not “excess animals” under the Wild Horse Act.

As noted above, BLM lacks the statutory authority to remove non-excess wild horses, and “BLM’s removal authority is limited to those wild free-roaming horses and burros that it determines to be “excess animals” within the meaning of the Wild Horse Act. *Colorado Wild Horse and Burro Coalition v. Salazar*, 639 F.Supp.2d 87, 96 (D.D.C. 2009) (*Salazar*) (reversing and remanding BLM decision to roundup horses not deemed “excess animals”). The term “excess animals” has a specific statutory meaning, and it means wild horses above a legally-determined “appropriate management level.” 16 U.S.C. §§ 1333(b)(1), 1332(f).

In this case, in the Environmental Assessment, BLM claims that the “AML for the Rock Creek HMA was established as a population range of 150-250 wild horses by the Elko Resource Management Plan (RMP) Wild Horse Amendment in 2003.” EA at p. 18. This is not accurate, and BLM did **not** establish an AML for the Rock Creek HMA in the 2003 RMP amendment.

In fact, in the 2003 RMP Amendment, one of BLM’s “short and long term management actions” was to “[e]stablish or re-evaluate the AML’s for wild horses” in the four Herd Management Areas at issue – including the Little Humboldt, Rock Creek, Owyhee and Diamond Hills North HMAs.” RMP Amendment at 3. Indeed, in the RMP Amendment, BLM even admitted that an “AML needs to be established” for the Rock Creek HMA. *Id.* at Table 2. Thus, it is counter factual for BLM to now claim that the RMP Amendment “established” an AML for the Rock Creek HMA.

As *Salazar* and the plain language of the Wild Horse Act establish, in the absence of an AML, BLM cannot establish that the wild horses within the Rock Creek HMA are “excess horses,” and, thus, BLM is without authority to remove any horses from the Rock Creek HMA. Courts and this Board have not hesitated to reverse round-ups that are inconsistent with the Wild

Horse Act. In *Salazar*, plaintiffs challenged a BLM round-up in the West Douglas Herd Area in Colorado, arguing that BLM lacked authority to cull this herd because it had not determined that the wild horses were “excess animals” under the Wild Horse Act. 639 F.Supp.2d 87. Initially, BLM claimed that it did, in fact, determine that the wild horses were “excess animals” – an impossibility since there was no suggestion that BLM had determined the AML for the area – but, BLM ultimately conceded that it failed to determine that these wild horses were “excess animals.”

The district court reversed and remanded the round-up, and held that a “prerequisite to removal under the Wild Horse Act is that BLM first determine that an overpopulations exists and that the wild free-roaming horses and burros slated for removal are “excess animals.” *Id.* at 98.

The Board, too, has consistently reversed proposed wild horse removals based on nonexistent or inadequate AMLs. For example, the Board has repeatedly set aside a BLM decision to remove wild horses from an HMA where the removal is not predicated on a determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range. *See, e.g., Animal Protection Instit. of America*, 109 IBLA 112 (June 7, 1989); *Craig C. Downer*, 111 IBLA 332 (October 31, 1989); *Animal Protection Instit. of America*, 116 IBLA 239 (October 16, 1990). In these cases, BLM based its “excess animal” determination supporting its removal on an AML established for administrative convenience, rather than based on protecting and restoring the natural ecological balance of the public lands. *See id.*

The facts of this case present an even more compelling case of arbitrary decision-making than in *Salazar* and the IBLA cases. In those cases, there was no suggestion that BLM was purposefully misrepresenting the record to undergird its decision to remove wild horses. Here, however, BLM supports its decision to remove 425 wild free-roaming horses in the Rock Creek HMA by inaccurately claiming that the 2003 Elko RMP Amendment “established” an AML for the Rock Creek HMA. EA at 18. The truth is that the RMP amendments specifically refused to adopt an AML, and, instead, noted that an “AML needs to be established” for the Rock Creek HMA. RMP Amendment at 3.

It is no coincidence that BLM’s blatant misrepresentation of the record supports its desire to remove wild free-roaming horses from their traditional habitat within the Rock Creek Herd Management Areas, and side-step its obligations under the Wild Horse Act to “achieve and maintain a thriving natural ecological balance on the public lands.”

This Board should follow its own precedent, and well as the cases discussed *supra*, and hold that BLM’s proposed culling of the wild free-roaming horses in the Rock Creek Herd Management Area violates the Wild Horse Act because BLM has yet to establish an effective

AML, and, thus, these horses are not properly classified as “excess animals.” For this reason, BLM’s decision should be reversed and remanded.

C. BLM Cannot Legally Round Up and Remove Wild Horses from the Little Humboldt HMA.

BLM’s decision to roundup and remove wild horses from the Little Humboldt HMA also violates the Wild Horse Act because the decision is based on an AML that was established based not on restoring the range to a thriving natural ecological balance and protecting the range from deterioration, but instead the AML was established through an agreement between the livestock permittees and BLM. Because the AML on the Little Humboldt HMA is based on administrative convenience, rather than sound scientific principles, BLM cannot establish that the wild free-roaming horses within the Little Humboldt HMA are “excess animals” under the Wild Horse Act.

IBLA has repeatedly rejected BLM’s efforts to support a wild free-roaming horse roundup by relying on an inadequate AML. For example, in *Animal Protection Institute of America*, appellants challenged a BLM decision to remove wild free-roaming horses from a HMA in Nevada. Appellants claimed that BLM was precluded from removing these wild horses because the AMLs supporting BLM’s decision was based on “administrative reasons,” and not on maintaining a “thriving ecological balance.” 109 IBLA at 118. IBLA agreed, and reversed and remanded the wild horse gather, holding that “we conclude that section 3(b) of the [Wild Horse] Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving ecological balance and avoids a deterioration of the range.” *Id.* at 119.

IBLA has since re-affirmed this holding many times. For example, in *Animal Protection Institute of America*, 116 IBLA 239 (October 16, 1990), appellants challenged a wild horse removal decision based on an AML that BLM “established for administrative convenience, rather than based on a determination of the optimum number of wild horses which would maintain the range in a thriving natural ecological balance and avoid deterioration of the range.” 116 IBLA at 243. IBLA again reversed and remanded the wild horse removal decision, holding that a determination that removal of wild horses is warranted must be based on scientific research and analysis, including monitoring data, studies of grazing utilization, trend and range condition, actual use, and climatic factors. *Id.* See also *Animal Protection Institute of America*, 124 IBLA 231, 235 (October 28, 1992) (and cases cited).

BLM’s similarly erred here when it based its decision to remove wild free-roaming horses from the Little Humboldt HMA on the AML for this herd management area. In its EA, BLM claims that the “AML for the Little Humboldt HMA was established as a population range of 48-

80 through the Little Humboldt Allotment Evaluation and Stipulation to Modify Decision and Dismiss Appeal dated 6/24/2002.” EA at 19. This claim is again inaccurate, and further undermines BLM’s proposed round-up here.

First, BLM cannot establish an AML based on a private stipulation between the livestock permittees and BLM. Instead, as the cases above hold, the Wild Horse Act requires that BLM establish AMLs based on maintaining a “thriving ecological balance,” which includes scientific research and analysis, monitoring data, studies of grazing utilization, trend and range condition, actual use, and climatic factors. Moreover, BLM fails to provide even basic information regarding this stipulation, including a copy of this stipulation, the scientific and ecological underpinnings of this stipulation, nor does BLM even identify the parties to this stipulation.

Under the cases above, BLM cannot support its wild horse removal decision here by relying on an AML that was established for administrative convenience – in this case, the convenience to BLM’s counsel in settling an unnamed administrative appeal.

Moreover, BLM’s claim that the Little Humboldt AML is 48-80 is inconsistent with BLM’s own 2003 Elko RMP Amendment and final Environmental Assessment. In its RMP Amendment EA – which post-dated the stipulation by 13 months – BLM claims that its “preliminary data” indicated that the wild horse AML for the Little Humboldt HMA is 80. BLM fails to explain how a private stipulation (likely between the ranchers and BLM, and likely without any public notice and participation) entered into in June 2002 can reduce a “preliminary” AML identified in the RMP Amendment dated July 2003.

It is again plain that BLM is simply manipulating inconvenient facts to support its decision to removal wild free-roaming horses for the Humboldt Herd Management Area. IBLA must affirm its prior decisions holding that an AML established for administrative convenience cannot support the removal of wild free-roaming horses on our public lands.

III. THE ROUND-UP VIOLATES NEPA.

NEPA requires all federal agencies to undertake a thorough and public analysis of the environmental consequences of proposed federal actions, including a detailed examination of the direct, indirect, and cumulative impacts of a proposed decision. Such analysis must include consideration of a reasonable range of alternatives to a proposed action, and means to mitigate adverse impacts.

BLM violated NEPA in issuing the Decision Record, FONSI, and EA; such NEPA violations include, but are not limited to:

- failing to take a “hard look” at the ecological consequences of the horse roundup, including by failing to collect any recent data on the current conditions of the public lands within the affected herd management areas – including areas affected by the recent wildfires; and
- failing to take a “hard look” at impacts of the roundup and removal of neighboring HMAs.

A. Requirements of the National Environmental Policy Act

At its most basic level, NEPA requires that the decisionmaker, as well as the public, be fully informed—i.e., “that environmental information is available to public officials and citizens before decisions are made and before action is taken.” 40 C.F.R. § 1500.1(b). NEPA ensures that the agency “will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). See also *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (agency analysis must be “fully informed and well-considered”). NEPA’s twin aims are to ensure that BLM “consider[s] every significant aspect of the environmental impact of a proposed action” and that BLM “inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002)); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

NEPA requires that an EIS be prepared for all major Federal actions that “may significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 336. See also *Foundation for North American Wild Sheep v. United States Dep’t of Agric.*, 681 F.2d 1172, 1177-78 (9th Cir. 1982). An agency may first prepare an EA to determine whether the action may have a significant effect on the environment. 40 C.F.R. § 1501.4. In the EA, an agency must “consider every significant aspect of the environmental impact of a proposed action.” *Ore. Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008) (citing *Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)). This includes studying the direct and indirect effects and cumulative impacts of the action. See 40 C.F.R. §§ 1508.7, 1508.8.

If the EA establishes that the action “may have a significant effect upon the . . . environment, an EIS must be prepared.” *National Parks and Conservation Ass’n v. Babbitt (“NPCA”)*, 241 F.3d 722, 730 (9th Cir. 2001); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). If the EA establishes that there will be no significant impact on the environment, the agency must issue a FONSI accompanied by a

“convincing statement of reasons’ to explain why a project’s impacts are insignificant.” *NPCA* 241 F.3d at 730, *citing Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). *See also* 40 C.F.R. §§ 1501.4, 1508.9.

Essentially, the agency must show that it has taken a “hard look” at the environmental impacts of the proposed action. *Blue Mtns.*, 161 F.3d at 1211. *See also NPCA*, 241 F.3d at 730; *Wetlands Action Network v. U.S. Army Corps of Eng.*, 222 F.3d 1105, 1114 (9th Cir. 2000) (reviewing agency’s decision to prepare EA rather than EIS).

An agency must prepare an EIS if the environmental effects of a proposed action are highly uncertain. *See Blue Mtns.*, 161 F.3d at 1213. Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, *see id.* at 1213-14 (lack of supporting data and cursory treatment of environmental effects in EA does not support refusal to produce EIS); or where the collection of such data may prevent “speculation on potential . . . effects. The purpose of [the environmental analysis] is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.” *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988).

B. BLM’s Failed to Take a “Hard Look” At Impacts of Roundup and Removal on Soils and Weeds.

BLM’s EA and FONSI are inadequate under NEPA. To comply with NEPA, the agency must show that it has taken a “hard look” at the environmental impacts of the proposed action. *See Blue Mtns.*, 161 F.3d at 1211. The EA and FONSI, however, evince only a cursory review of only some relevant environmental concerns factors – not a “hard look.”

First, BLM has failed to collect even the most basic data on the current conditions of the public lands within the Owyhee, Rock Creek and Little Humboldt HMAs, and, thus, cannot demonstrate that it complied with NEPA’s “hard look” requirement. BLM has no information on the soils within these HMAs, except to note that the soils at issue here vary in “depth, texture, erosion potential,” and other characteristics. EA at 31. BLM even admits that a “specific analysis of soil quality for this project has not been completed, and instead BLM “assumed that a wide variety of soil quality conditions exist.” *Id.*

BLM’s “assumption” here is particularly problematic because BLM already acknowledged that the proposed action “would likely take place on soils . . . that have been heavily impacts by fire and weed infestation,” and that the proposed action will likely increase weed invasions and loss of soil. EA at 32. Instead of investigating the likely impacts of its roundup and removal activities – which, again, includes using helicopters, off-road vehicles, and so-called goose neck trailers to transport wild horses off the public lands – BLM simply relies on

“anecdotal data.” *Id.* NEPA forbids such uninformed decisionmaking, however. *See Center for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003) (NEPA “prohibits uninformed – rather than unwise – agency action”), *citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

BLM also lacks basic information on noxious and other invasive weeds throughout the HMAs, although BLM admits that current vegetation communities have been altered by the recent wildfires. EA at 41. BLM’s voluntary ignorance regarding the presence and location of weeds is especially surprising here, because it claims that the roundup and removal would “avoid” areas with noxious and non-native weeds. EA at 5. Absent baseline information on the presence and location of weeds, however, BLM cannot establish that it will avoid weeds during the roundup and removal, thereby exacerbating the spread of cheatgrass, non-native and noxious weeds across the landscape.

In failing to examine the ecological impacts of the horse roundup and removal on the soils and weeds across and the HMA, BLM has violated NEPA’s requirement that federal agencies take a “hard look” at the ecological implications of its actions. *See Friends of the Clearwater*, 222 F.3d at 557, *quoting Marsh*, 490 U.S. at 374. Moreover, BLM’s refusal to collect up-to-date range data also precludes it from understanding the so-called environmental baseline – i.e., the current condition of the natural resources subject to the agency’s proposed action. The Ninth Circuit has explained that “[w]ithout establishing the baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” *Half Moon Bay Fishermen’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

In conclusion, BLM violated NEPA in failing to take a hard look at the ecological consequences of the proposed wild horse roundup and removal on the soils and weeds within the Owyhee, Rock Creek and Little Humboldt Herd Management Areas.

C. BLM Failed to Take A Hard Look at Impacts of Roundup and Removal on Neighboring HMAs.

BLM also violated NEPA when it ignored the impacts of the roundup and removal on HMAs adjacent to the Owyhee, Rock Creek and Little Humboldt HMAs. Under NEPA, BLM is required to take a “hard look” at all the environmental impacts of its proposed action, and it cannot arbitrarily define the so-called impact area to ignore known and potential impacts.

In its EA, BLM has simply refused to examine the impacts of its roundup and removal on the wild horses in the neighboring Snowstorm and Little Owyhee HMAs. *See* Exh. 1. The facts here show that the Little Owyhee HMA is immediately west of the Owyhee HMA, and BLM

admits that the Little Owyhee and Owyhee herds intermix, and migrate between and among the HMAs. EA at 17 (noting that the May 2010 census of the Owyhee HMA counted 116 horses from the Little Owyhee HMA).

BLM even acknowledged that the Owyhee, Rock Creek and Little Humboldt HMAs, and the neighboring Snowstorm Mountain and Little Owyhee HMAs are “all connected,” and “[m]ovement does occur between these HMAs.” EA at 21. *See also* EA at 113 (response to comment 65 and 66). Yet, BLM failed to examine the impacts of its roundup and removal on these neighboring horse herds, and BLM offer no reasoned explanation of its refusal to consider these impacts. *Id.*

Instead, BLM justifies its refusal to examine these impacts by asserting that “time constraints, budget, and district priorities” justified its refusal to comply with NEPA’s hard look requirement. But BLM cites to no authority – nor can it – allowing it to manipulate its NEPA analysis to ignore known impacts, simply because it didn’t have the time or money to complete adequate NEPA analysis. Indeed, courts have routinely rejected agency complaints that budgetary shortfalls justify the agency’s failure to comply with mandatory statutory requirements. *See Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (rejecting lack of agency funding as an excuse for non-compliance with statutory mandate); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir.1999) (same). As explained by one court, “[b]udgetary constraints, far from being exceptional, are an everyday reality.” *Center for Biological Diversity*, 304 F. Supp. 2d at 1179. To the extent the [agency] feels aggrieved by Congress failure to allocate proper resources in which to comply with [its] statutory duty, Congress, not the courts, is the proper governmental body to provide relief. *Id.* at 1179 (citations omitted).

Indeed, compliance with NEPA is not voluntary, and this Board should reverse and remand BLM’s NEPA analysis based on its refusal to examine the impacts of its roundup and removal on the neighboring horse herds and HMAs.

PETITION FOR STAY

Pursuant to 43 C.F.R. § 4.21, Appellants hereby Petitions for Stay of the challenged wild horse roundup and removal. Appellants hereby request the Board of Land Appeals in the Office of Hearing and Appeals, Office of the Secretary of the Interior, to stay this contested decision until this Appeal is resolved.

I. Appellants’ Interest Will Be Harmed If This Decision is Not Stayed

Appellants In Defense of Animals, its constituents, staff, and supporters, and Craig

Downer, who actively recreates on these portions of the public lands, will be irreparably harmed if BLM's wild horse roundup and removal is permitted to proceed as planned. The implementation of the wild horse roundup and removal will result in a violation of federal laws and regulations as documented in the Statement of Reasons (incorporated herein by reference) and the loss of the ability of Appellants – including IDA's constituents, supports, and staff – to experience the wild free-roaming wild horse herds and public lands in question. Further, if this wild horse roundup and removal is implemented, the losses to the public will be significant, and may be long-term and irreversible.

On the other hand, the relative harm to the BLM of the issuance of a Stay as requested is minimal or nonexistent. First, BLM itself will not be harmed if it is required to comply with the Wild Horse Act – which limits BLM's authority to remove “excess animals,” FLPMA and the Elko RMP. Nor can BLM seriously argue that it is somehow aggrieved by complying with the requirements of NEPA.

II. Appellants Are Likely to Succeed on the Merits of Its Appeal

For all the reasons already discussed, Appellants In Defense of Animals and Craig Downer are likely to succeed on the merits of their FLPMA, Wild Horse Act, and NEPA claims.

First, this Board has consistently held that BLM must fully and strictly comply with its mandatory duty to act in a manner consistent with the governing land use plan. *See, e.g. Jenott Mining Corp.*, 134 IBLA 191, 194 (1995); *Uintah Mountain Club*, 112 IBLA 287, 291 (1990); *Marvin Hutchings v. BLM*, 116 IBLA 55, 62 (1990); *Southern Utah Wilderness Alliance*, 111 IBLA 207, 210-211 (1989). Appellants have established that the proposed wild horse roundup and removal violates FLPMA and the Elko RMP by authorizing the use of helicopters so close to the end of “peak foaling season.”

Appellants have also shown that BLM has violated the Wild Horse Act because BLM has failed to establish an appropriate management level for this HMA; thus, BLM is without authority to round up these horses, as they are not “excess animals” under the Wild Horse Act.

Finally, Appellants have established that BLM has violated NEPA by failing to take a “hard look” at the ecological consequences of the wild horse roundup and removal on soils, weeds, and neighboring wild horse herd management areas.

III. Absent a Stay, Irreparable Harm Will Occur.

The harm flowing to the wild free-roaming horse herds, the public lands within the Owyhee, Rock Creek, and Little Humboldt HMAs, as well as the harm to the recreational and

aesthetic experiences of Appellants from BLM's planned roundup and removal is irreparable.

When considering whether equitable relief is appropriate, courts look at whether an injunction is necessary to effectuate the congressional purpose behind the statute. *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002). The purpose behind the Wild Free-Roaming Horses and Burros Act is to "insure the preservation and protection of . . . wild free-roaming horses and burros in order to enhance and enrich the dreams and enjoyment of future generations of Americans." H.R. Rep. No. 92-681 (1971), *as reprinted in* U.S.C.C.A.N. 2159, 2161. Indeed, in the Wild Horse Act, Congress found and declared that, "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene." 16 U.S.C. § 1331. By its plain language, the Wild Horse Act mandates that wild horses are to be "protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of public lands." 16 U.S.C. § 1331.

Further, NEPA's twin goals are to ensure that BLM "consider[s] every significant aspect of the environmental impact of a proposed action" and that BLM "inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153-54 (9th Cir. 2006) (citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002)). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Courts often issue injunctions prohibiting an activity from moving forward to prevent harm until the agency complies with its procedural duty under NEPA. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9th Cir. 2007).

Courts have repeatedly found that plaintiffs may be injured by actions that harm aesthetic interests or recreational enjoyment of an area. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 183 (2000) (plaintiffs may be injured by activity that lessens aesthetic and recreational value of an area); *David v. Mineta*, 302 F.3d 1104, 1115-16 (10th Cir. 2002) (irreparable harm from activity that impaired aesthetic attributes by disrupting the natural setting and feeling of park in part by increasing noise levels); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp.2d 1, 25 (D.D. C. 2009) (finding likelihood of irreparable harm where plaintiffs could not fully enjoy visits to national parks because they feel less safe in light of new rule allowing handguns in parks); *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, --F. Supp.2d--, 2009 WL 2868818, at *5-6 (D. Colo. 2009) (finding irreparable injury to plaintiffs' interest in solitude, quiet, and natural beauty from drilling of oil wells); *Sierra Club v. U.S. Fish and Wildlife Service*, 235 F. Supp.2d 1109, 1125-25 (D. Or. 2002) (predator-prey study that removed cougars from area could cause injury by detracting from wilderness experience and impairing enjoyment of hunting in the presence of all wildlife species).

Likewise, viewing and appreciating wildlife in nature is a cognizable interest that may be harmed from activities that disrupt or injure the wildlife. See e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (stating that “the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest”); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (recognizing aesthetic injury from activity that interfered with plaintiffs’ ability to enjoy viewing shore birds in their natural habitat); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) (injury from diminished opportunity to view bison in Yellowstone and from emotional distress caused by watching bison be killed); *Fund for Animals v. Norton*, 281 F. Supp.2d 209, 220-22 (D.D.C. 2003) (finding irreparable harm to aesthetic interests when activity impaired ability to view, interact with, study, and appreciate swans, and citing other cases finding harm due to interference with observing animals).

Moving forward with the planned roundup and removal on the Owyhee, Rock Creek, and Little Humboldt HMAs will adversely affect the organizational interests of IDA, its constituents, staff, and supporters. IDA is one of the leading organizations working to protect wild horses on the public lands in the West, and its interests will be harmed by the roundup and removal of nearly 1,200 wild free-roaming horses in these areas.

The roundup and removal of these wild free-roaming horses will also irreparably impair IDA’s constituents, supporters, and staff’s aesthetic, recreational, scientific, inspirational, educational, and other benefits they derive from the wild free-roaming horse populations in the Owyhee, Rock Creek, and Little Humboldt Herd Management Areas. In the absence of strong, sustainable horse populations, these areas will be of lesser recreational and aesthetic value to IDA’s constituents, staff and supporters, and the roundup and removal of the wild horses will cause IDA’s constituents, staff and supporters to use and recreate on these areas less frequently.

Moreover, the roundup and removals will irreparable harm Craig Downer’s aesthetic and recreational interests in observing the horses in these three HMAs, and will lessen his enjoyment of these areas by removing nearly 1,200 horses – none of which are “excess horses” the Wild Horse Act. Downer has been visiting the public lands within these HMAs since the early 1980s, and, in his declaration, he states that he will be forced to use these areas less in the future based on the near absence of wild horse herds across vast swaths of these federal lands.

Finally, the likely harm flowing to the wild horses – including foals, mares, and new dams (mothers) from using helicopters so near to the end of the peak foaling season also constitutes irreparable harm. As discussed in the Downer declaration, the “planned July roundup would cause inordinate suffering and death, especially for the newborn colts and fillies and be exacerbated by intense summer heat and dryness, with temperatures often reaching into the 90’s F., and even exceeding 100 degrees.” Downer Decl.

Downer – a recognized wild horse expert and author of two books and several scholarly articles on wild horses in the American west – also warns of irreparable harm to new foals, because,

At the beginning of July, horse babies are still being born. Many foals are just days or barely a week or so old. If the bands are driven by helicopter over steep and rocky terrain in the intense heat of summer, many of these newborns will become unintended casualties of the gather. For this reason, August 15th is usually proposed as the earliest date for helicopter roundups.

Downer Decl.

Indeed, BLM even acknowledges these likely adverse impacts, and that is why it is the Elko RMP prohibits the use of helicopters so near the end of peak foaling season. Elko RMP at 2-34. In fact, in the various environmental assessments noted above, BLM has repeatedly warned of the adverse impacts of using a helicopter to gather wild horses so close to peak foaling season.

BLM has also acknowledged the dangers, particularly to young foals, of roundups held during the hot months of summer in the recent litigation regarding the Calico complex roundup. On page 56 of the Calico EA, BLM warns of the dangers associated with summer roundups:

During summer months, foals are typically small, and average 4 months old. Newborn foals are often gathered, and many foals are too young to wean. By fall and winter, most foals are of good body size and sufficient age, and can easily be weaned. Fall and winter time-frames are much less stressful to foals than summer gathers. Not only are young foals in summer months more prone to dehydration and complications from heat stress, the handling, sorting and transport is a stress to the young animals and increases the chance for them to be rejected by their mothers. By gathering wild horses during the winter, stress associated with summer gathers can be avoided. (emphasis added)

For these reasons, Appellants have easily established that irreparable harm will flow from the BLM's planned roundup and removal activities in the Owyhee, Rock Creek and Owyhee HMAs. Accordingly, this Board should stay the decision pending a ruling on the merits of this appeal.

IV. Public Interest Favors the Granting of the Stay

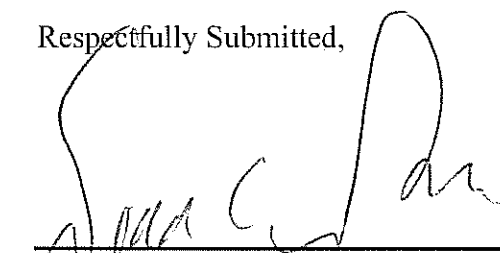
The public interest favors granting the Stay. As noted above, Congress has expressed the will of the American people when it “insure[d] the preservation and protection of the . . . wild free-roaming horses and burros in order to enhance and enrich the dreams and enjoyment of future generations of Americans.” H.R. Rep. No. 92-681 (1971), *as reprinted in* U.S.C.C.A.N. 2159, 2161. As Appellants have demonstrated, the wild free-roaming horses in the Owyhee, Rock Creek and Little Humboldt HMAs are not “excess animals,” and, thus, protection and preservation of these herds is consistent with the goals of the Wild Horse Act.

Moreover, the public interest in having federal agencies comply with the law – in this case the Wild Horse Act, FLPMA, and NEPA – is paramount, and in itself justifies a stay of BLM’s roundup and removal.

Appellants therefore believe the granting of a Stay in this matter serves the interest of the health of the public lands within the Owyhee, Rock Creek and Little Humboldt Herd Management Areas, the wild free-roaming horses within these HMAs – and the neighboring Snowstorm and Little Owyhee HMAs, as well as the ecosystems, native biota and recreational experience on the public lands within the these HMAs.

Dated this 8th Day of July, 2010

Respectfully Submitted,



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