

# ATTACHMENT A



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RE: DGPWHT Middle Section

Dear Forest Supervisor Christofferson:

These comments on the Devil's Garden Plateau Wild Horse Territory Supplemental Environmental Assessment, August 2022 Scoping Documents are submitted on behalf of the American Wild Horse Campaign ("AWHC") pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, the Council on Environmental Quality's regulations that implement NEPA, 40 C.F.R. §§ 1500.1-1508.28, and the United States Forest Service's (hereafter "USFS" or the/your "agency") request for in the Interested Public Cover Letter issued with these scoping documents.

AWHC is a national nonprofit organization dedicated to protecting and preserving the American wild horse in viable free-roaming herds for generations to come, as part of our national heritage, and as prescribed by law. AWHC's efforts are supported by a coalition of over 60 historic preservation, conservation, horse advocacy, and animal welfare organizations. In addition, AWHC is a longtime stakeholder in the management of the Devil's Garden/Modoc National Forest population of wild horses and participated directly in the planning of the subject proposed action. Proper notice was not provided to AWHC, as set forth in more detail in the correspondence sent concurrently with these comments. For this reason, AWHC expects that these comments will be considered, without the need for formal adversarial proceedings.

### **COMMENTS**

As noted throughout these comments, these scoping documents do not provide sufficient evidence to justify the associated proposed actions. Much of the data and analysis is severely outdated, irrelevant, or substantially incomplete. For these reasons, AWHC urges the USFS to

further inform its proposed actions through an Environmental Impact Statement that provides for actual, reason-based analysis of its proposed actions, and otherwise amend the scope of its review of these scoping documents.

**A. The USFS has failed to determine an AML range for the subject area and therefore cannot legally make a determination of “excess horses” as required by the WHA to institute removal.**

The USFS is subject to the regulations of the Wild Free-Roaming Horses and Burros Act (WHA), as required by the Territory Management Plan (TMP) of August 2013 and acknowledged in the subject Devil’s Garden Plateau Wild Horse Territory Supplemental Environmental Assessment scoping documents. PROPOSED ACTION For PUBLIC SCOPING, Devil’s Garden Plateau Wild Horse Territory Supplemental Environmental Assessment, August 2022 (hereafter referred to as “Document B”) DGPWHT MidSec B Proposed Action Scoping Document.pdf, at 2. Additionally, 36 CFR § 222.60 (a), directs The Chief of USFS (hereafter “Chief”) to “*protect*, manage, and control wild free-roaming horses and burros on lands of the National Forest System” and to “maintain vigilance for the *welfare* of wild free-roaming horses and burros that wander from the National Forest System.” (emphasis added).

Pursuant to 36 CFR § 222.61(a)(4), the Chief is directed to “[a]nalyze each wild horse and burro territory and, based on analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, as determined by condition on each territory.” The regulation goes on to direct the Chief to “[m]aintain a current inventory of wild free-roaming horses and burros on each territory to determine whether and where excess animals exists.” 36 CFR § 222.61(a)(5). Acknowledging that these two directives as prerequisites for further action, 36 CFR § 222.61(a)(6) directs the Chief to “[b]ased on paragraphs (a) (4) and (5) of this section, determine appropriate management levels, whether action should be taken to remove excess animals and what actions are appropriate to achieve the removal or destruction of excess animals.”

Because the USFS’s own purpose and need for action in Document B states that “there is a need to determine if the AML needs to be adjusted,” the USFS has not established an AML for the subject wild horses. Document B at 7. Without an established AML, the USFS cannot determine that there is in fact an “excess” of wild horses on the subject territory, nor that “action should be taken to remove excess animals.” As a result, all actions to remove horses included in this proposed action are contrary to the requirements of 36 CFR § Part 222 Subpart D and are arbitrary *per se*. Additionally, and as set forth in more detail in these comments, any proposed guidance on AML determination is based on flawed data and analysis, including a failure to determine the proposed growth rate of the subject population. AWHC therefore challenges all

proposed actions to remove wild horses from the subject territory, as they are contrary to the authority and discretion of the USFS.

**B. The Draft Appropriate Management Level Evaluation for the Middle Section of Devil’s Garden Plateau Wild Horse Territory is completely devoid of reason and provides alleged agency guidance, in spite of admitting substantially incomplete analysis, and therefore represents impermissible post-decision analysis completed to justify agency action.**

As permitted by 40 CFR§1501.5(g)(2), AWHC urges the USFS to apply 40§1502.23 to further review of this proposed agency action, as the scope demands scientific methodology and accuracy. 40§1502.23 states, in its relevant parts, that “[a]gencies shall ensure professional integrity, including scientific integrity, of the discussions and analyses in environmental document” and “make use of reliable existing data and resources.”

AWHC urges the USFS to revisit these scoping documents in light of this regulation, particularly as it relates to the Draft Appropriate Management Level Evaluation (hereafter “DAMLE”). Appendix IV. Draft Appropriate Management Level Evaluation for the Middle Section of Devil’s Garden Plateau Wild Horse Territory (hereafter “Appendix IV”), DGPWHT MidSec F Appendix IV. Draft AML Middle Section Evaluation.pdf.

The DAMLE acknowledges multiple times that further review is necessary or that the evaluation is in process. Despite these material limitations, the DAMLE provides AMLs, presumably for agency guidance. This is of course completely illogical, as the data and analysis missing is paramount to reaching a reasonable conclusion. As a result, the USFS is failing to adhere to the requirements of 36 CFR 219.3, as it is not using the best available information (even in its possession) to inform the planning process. For this reason, AWHC challenges the USFS’s reliance on the DAMLE until analysis is completed.

**a. Annual forage is arbitrarily excluded from consideration in determining AML.**

The DAMLE states, without justification, that “[w]hile annual forage may be available to support wild horse use during years with normal or above normal precipitation, it may be greatly reduced in below average precipitation years.” Appendix IV at 8. The DAMLE goes on to state that therefore “annual forage is not typically used to support or justify wild horse numbers within a WHT.” *Id.* Neither of these statements are supported by any evidence at all, including any scientific evidence or internal policies. Instead, this far-reaching and material premise is baldly and erroneously stated as factual. The absurdity of this statement is further highlighted by the fact that by the DAMLE’s own statement on the issue that “annual forage may be available to support wild horses during years with *normal* . . . precipitation.” Appendix IV at 8, (emphasis added). Therefore, reasonable analysis would conclude that *normal* annual forage should be

analyzed in determining AML, absent explicit and substantiated justification for its exclusion. The USFS has failed to provide any such justification and therefore this decision is on its face arbitrary.

**b. The exclusion of the effects of predation on the subject wild horse population is arbitrary and merits further examination.**

The DAMLE states without a scintilla of evidence that “[p]redators, including coyotes and mountain lions occur throughout the area, but appear to be having a minimal impact on wild horse populations at the present time.” Appendix IV at 11. Similarly, and relatedly, the DAMLE states that “[m]ountain lions are a protected species in California and assumed to be at optimum capacity within the WHT.” *Id.* Both statements are substantive and technical in nature yet provide absolutely no authority for their broad pronouncements.

Mountain lions and other predators have been shown to prey on wild horses, and therefore any analysis to determine AML should consider the effects of natural predation on the population of wild horses. See John Ewanyk, *Habitat Use and Prey Selection by Mountain Lions in an Altered Sagebrush Steppe Environment*, May 2020, available here: <https://digitalcommons.humboldt.edu/cgi/viewcontent.cgi?article=1430&context=etd>; attached hereto and incorporated by this reference as Exhibit 1. Engebretsen KN, Beckmann JP, Lackey CW, et al. *Recolonizing carnivores: Is cougar predation behaviorally mediated by bears?*. *Ecol Evol.* 2021;11:5331–5343, available here: <https://doi.org/10.1002/ece3.7424>, attached hereto and incorporated by this reference as Exhibit 2. In fact, AWHC learned via records obtained in response to a FOIA request, that two foals were recently killed by mountain lions in the holding pens of the subject territory.

Absent evidence of a lack of predation and statistics regarding mountain lion populations in the subject area, there is no justification for disregarding these effects or the scholarly information included with this comment. Therefore, the dismissal of these considerations at arriving at the AMLs listed in the DAMLE is arbitrary.

**c. The agency has not determined the growth rate of the subject wild horse population, and therefore is precluded from calculating Lower AML, or asserting representations based on figures contradicted by the same scoping documents.**

The DAMLE is materially inconsistent in its application of population growth rates of the wild horse population on the subject territory. As shown in “Table 4. Horses Gathered Since 2016,” two of the seven years (over 28% of the years) list “Aerial Survey” numbers “based on 20% recruitment from most-recent aerial survey minus horses removed that year.” Appendix IV at 13. However, this same DAMLE cites the 2013 EA which assumed an average annual population growth rate of 25% per year, as well as “[r]ecent ground observations indicat[ing] the growth rate may be 13 to 15%,” with a data summary still in process. *Id.* at 15. Clearly, the USFS has

been unable to determine the most accurate growth rate of the subject wild horse population, and has disclosed current contradictory evidence that it is considering.

Given the fact that Lower AML is “[t]he number of WH&B that allows the population to grow to the AML upper limit over 4-5 years, without the need for gathers to remove excess WH&B (USDI BLM 2010)” it cannot be calculated without a determination of what the growth rate of the subject population. Appendix IV at 58. Without the ability to calculate an AML Lower Limit, any agency action to remove wild horses is arbitrary, contrary to binding regulations, and poses a danger to the entire survival of the subject wild horse population. In addition, pronouncements that “recent gathers have held population growth in check” are substantially premised on an assumption of 20% recruitment rate, which is contradicted by the data disclosed in the USFS’s own monitoring, and which is still being processed at this time. Appendix IV at 14.

**d. Information regarding alleged damages to grazing permit holders is outdated, unsubstantiated, and entirely irrelevant, and should therefore be removed from further consideration.**

The DAMLE includes irrelevant and unscientific information that is apparently being considered in this analysis to determine AML range. For example, the DAMLE includes information such as “[t]he livestock permittee reports economic impacts to his operation the past 15 years due to the escalating wild horse population.” Appendix IV at 21. As an initial matter, it is not clear what aspect of determining AML this speaks to, especially given the fact that the USFS claims to have accurate figures regarding the number of wild horses on the subject territory and the most current information regarding the permittee’s “economic damages” is from approximately 11 years ago. Appendix IV at 21. Absent a showing of relevance regarding alleged “economic damages” from 26 to 11 years ago to a determination of AML in 2022, this information is completely irrelevant and should be removed from further consideration.

The DAMLE goes as far as including unsubstantiated costs reported by the unnamed livestock permittee for fence maintenance, monitoring, and replacement pasture rental for grazing. Appendix IV at 21. These costs are attributed to wild horses, without any evidence or indication of how this was determined, and ignoring the fact that a livestock permittee has a conflict of interest as it relates to wild horses. *See Devil’s Garden Preservation Group, et al., v. U.S. Forest Service*, et al. 17-cv-20185-MCE-KJN (E.D. Cal.) as referenced in Document B at 4. In addition, the inclusion of these costs in this analysis is unmerited, as a grazing permit on federal land does not create any ownership or resource right for the permit holder, and therefore none of these alleged losses should even be considered. *See* 36 CFR § 222.3 (b) stating “Grazing permits and livestock use permits convey no right, title, interest held by the United States in any lands or resources.” The arbitrary nature of the inclusion of this information is exacerbated by the fact that the information is from at least ten years ago and does not include any consideration of

grazing practices by livestock, or any of the other factors affecting range conditions or fencing at the time.

Other arbitrary considerations in this analysis include attention to the reduction in ability to use grazing allotments by the permittee in 2008, 2011, and 2012 due to wild horse use. Again, the DAMLE does not even attempt to connect these outdated and baseless statements to any justification, and just baldly assigns cause to wild horse use. In addition, in consideration of 36 CFR § 222.3 the permittee does not have a right to any use of land or resource, and therefore costs incurred to find alternate pasture is irrelevant. This objection also applies to all other instances included in this analysis where the costs to a grazing permit holder are considered, as this is beyond the authority of the agency and in no way relates to any credible and unbiased assessment of wild horse populations. *See* Appendix IV at 37, 45, and 49.

**e. The inclusion of reference to *Devil's Garden Preservation Group, et al., v. U.S. Forest Service*, et al. 17-cv-20185-MCE-KJN (E.D. Cal.) is superfluous, arbitrary, and should be removed from further analysis.**

As referenced *supra* the USFS is required to manage wild horses on the subject territory under as directed by Subpart D of 36 CFR § 222. The case *Devil's Garden Preservation Group, et al.* does not impose additional requirements beyond those included in these regulations, and therefore its inclusion in any of these scoping documents is arbitrary. Specifically, this case is cited in Document B to provide that the USFS “has agreed to make good faith effort in achieving wild horse Appropriate Management Levels on DGWHT in a reasonable period.” Document B at 8. Once again, this term adds nothing to the requirements already imposed on the USFS under the aforementioned regulations. Additionally, Document B states that “with the proposed addition of the Middle Section to DGPWHT, there is a need to propose wild horse gathers in the Middle Section to achieve AML.” *Id.* As previously noted, because the USFS has not added the Middle Section, established an AML for the territory, or established a growth rate for the subject population of horses, these regulations do not allow authority for gather operations.

This issue is particularly troubling considering that Document B states that there is a need to propose wild horse gathers, while at the same time admitting that the Middle Section is to be added through this proposed action. Meaning, the agency is directing its analysis to propose wild horse gathers, although it has not decided that the Middle Section, or the territory in general, has excess horses in need of removal. This is precisely the type of directed analysis that is impermissible for an agency to conduct to justify its baseless intentions. *See* 40 C.F.R. § 1502.2(g) stating that NEPA process “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” (emphasis added); *see also id.* § 1502.5 (requiring that NEPA review “shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made”) (emphasis added), *Forest Guardians v. U.S. Fish and Wildlife*, 611 F.3d 692, 712 (10th Cir. 2010) (however, “the comprehensive

‘hard look’ mandated by Congress and required by [NEPA] must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” (*citing* Metcalf v. Daley, 214 F.3d 1135, 1141-42 (9th Cir. 2000))).

**f. Most of the data considered in the DAMLE (Appendix IV) is at least ten years old and the agency has failed to relate outdated information to current conditions.**

Habitat assessment as conducted in the DAMLE is also arbitrary as it is heavily based on data that is approximately 10 years old. Appendix IV at 24, 32, 33, 35, 41, and 48, among others. In addition, the analysis uses isolated photos from 10 years ago to “demonstrate” the effects wild horses have on habitat conditions. *Id.* Although the DAMLE is reviewing habitat conditions for thousands of acres of land, isolated photos of miniscule areas of the territory are unreasonably used to extrapolate conditions at large. The arbitrary nature of these pronouncements is highlighted by completely unsubstantiated statements such as “[t]his was attributable to wild horse use during the fall/winter/spring of 2011-2012.” Appendix IV at 24.

Despite the inclusion of incomplete analysis based on stale and irrelevant information, the analysis contained in the DAMLE is inadequate to comply with binding regulations. 36 CFR § 222.61(4) directs the Chief to “[a]nalyze each wild horse or burro territory and, based on the analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, **as determined by conditions on each territory.**” (emphasis added) It is completely unreasonable for the USFS to proffer in this DAMLE that the scattered information from approximately 10 years ago is indicative of conditions on the subject territory. Even assuming that conditions are in fact unchanged, no proper determination is made regarding the current condition of the territory, which would be the minimal consideration that the agency is prescribed to justify further action. For example, see Appendix IV at 33 stating that “[b]ased on observations being made and recorded during this 2022 season, there does not appear to be any noticeable improvement at these sites since 2012 (analysis In Process; pers. Comm. M. Levy, WHB Specialist).” Appendix IV at 33.

Adding to the issues with the DAMLE’s analysis is a lack of data or proper analysis to make other broad substantial generalizations. For example, the DAMLE states “[i]n summary, this data indicates that utilization has exceeded the standards prescribed in the Forest Plan and the 1996 Biological Assessment.” Appendix IV at 25. It should be first noted that monitoring data is missing from the analysis for 8 of the 12 years between 2009-2021. Notwithstanding the fact that data is missing for the **majority** of the time analyzed, the most recent data provided (2020 and 2021) shows that standards for the monitored area were in fact met in both years and in two of the three categories monitored during that time. Appendix IV at 26. Therefore, the agency’s own limited information demonstrates that in the most current monitoring utilization has improved



and has in fact not exceeded standards during the majority of available recent observations. This in turn does not support the agency's conclusion, and demonstrates an arbitrary determination.

**g. The agency attributes the exceedance of herbaceous use by livestock to “annual variation within the pasture,” without affording wild horses the same consideration, exposing biased analysis favoring livestock grazing.**

The DAMLE states that herbaceous use under threshold, observed after exceedance, is indicative of livestock grazing working properly, as the agency maintains that these figures demonstrate that the exceedance at the end of the grazing season was likely due to annual variation within the pasture. Appendix IV at 43. Somehow, annual variation within the pasture is given deference regarding livestock grazing, without any such deference given anywhere else to wild horses, even in other situations described in the DAMLE where exceedance in use was followed by years in which threshold was met. Appendix IV at 43. At the very minimum, consideration should be given to annual variation within the pasture in determining whether thresholds were in fact exceeded by wild horse use, as the agency has demonstrated that this data can inform the determination of adequate forage use.

**h. The DAMLE provides arbitrary AML determinations, based on unreasonable methodology.**

In spite of this severely flawed and incomplete analysis, the DAMLE provides an AML range for the subject allotments, and even goes as far purporting an annual reproductive rate of 20%, in spite of the DAMLE itself citing contradictory information regarding reproductive rate. Appendix IV at 26. Therefore, it is beyond a doubt that this constitutes nothing more than an arbitrary determination of AML by USFS for this allotment, and all others using this inconsistent and illogical methodology.

The arbitrary nature of the conclusions contained in the DAMLE is also evident in incomplete review of available information provided in admissions such as “[b]ased on observations being made and recorded during this 2022 season, there does not appear to be any noticeable improvement at these sites since 2012 (analysis In Process; pers. Comm. M. Levy, WHB Specialist).” Appendix IV at 33. The USFS has failed to even disclose what information it is contemplating in making this, or any other baseless generalization, nor why it feels entitled to ignore this information in issuing AML guidance. Further, this specific statement relates to *thousands* of acres, which the agency alleges one person is going to assess to determine that conditions have not improved. Aside from the logistical problems in determinations based on pending analysis, and the proposed scope of review for one person, this is another example of prohibited post-decision analysis conducted to justify the agency's position. *See* 40 C.F.R. § 1502.2(g) stating that NEPA process “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” (emphasis added); *see also id.* § 1502.5 (requiring that NEPA review “shall be prepared early enough so

that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made”) (emphasis added), *Forest Guardians v. U.S. Fish and Wildlife*, 611 F.3d 692, 712 (10th Cir. 2010) (However, “the comprehensive ‘hard look’ mandated by Congress and required by [NEPA] must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” (*citing* *Metcalf v. Daley*, 214 F.3d 1135, 1141-42 (9th Cir. 2000))).

The problematic nature of this methodology is further highlighted by the lack of qualifications disclosed for the Wild Horse and Burro Specialist assigned this task. Not isolated to this particular issue, the wide discretion given to this specialist in other aspects of this proposed action merits some disclosure of qualification to be deemed reliable, or at minimum reasonable. *See* Appendix I Draft Proposed Devil’s Garden Plateau Wild Horse Territory Management Plan (hereafter “Appendix I”), DGPWHT MidSec C Appendix I TMP.pdf, “Table 6. Monitoring Plan” at 16, among others.

There are also instances where the DAMLE points to data not even present in its citation. For example, in providing that “these years which exceeded the herbaceous use threshold were 2006, 2007, 2013, 2014, 2015, and 2016 (Table 14).” Appendix IV at 35. However, Table 14 includes information only for the years 2008, 2010, 2011, and 2012. Appendix IV at 36. To make matters worse, the DAMLE goes on to state that “[t]hese years likely exceeded the threshold due to excessive wild horse use and drought.” *Id.* at 35. Not only is there absolutely no indication of how this could be attributed to wild horses, there is no consideration of these results in the context of other range conditions such as livestock grazing, acknowledged drought conditions, or if these factors are still relevant. As with much of the data included in the DAMLE the USFS admits that it only has Implementation Monitoring data for 15 of the 24 years considered, yet provides no further detail, and summarily dismisses the missing data for nine years. *Id.*

Despite all of these material and dispositive flaws, the DAMLE purports to make conclusions regarding appropriate AML for each allotment, including that the “[a]ttainment of the current AML of 48 to 86 wild horses would likely ensure that Forest Plan utilization standards are met.” Appendix IV at 37 for Black Rock Pasture, although each of the determinations suffers from the same flaws in reasoning. Telling is the fact that this conclusion is based, at least in part, on the previous conclusion that “[m]onitoring indicates some riparian areas appear to be in unsatisfactory condition due to repeated heavy to severe utilization and trampling. Forest Plan standards are not being met.” However, analysis in this same section makes clear that the USFS acknowledges that livestock grazing affects the riparian zones in the same manner as wild horses, yet the DAMLE makes no effort to determine how these effects are to be attributed. Appendix IV at 35. Adding to the nebulous nature of this data is the fact that although livestock grazing is acknowledged to affect several conditions throughout this DAMLE, the DAMLE

arbitrarily dismisses and specifically excludes any analysis of stocking rates for domestic livestock. Appendix IV at 7 and 46, among others.

In analyzing the Big Sage Allotment, the DAMLE reports that utilization standards have been exceeded within key areas “due in part to high wild horse numbers.” Appendix IV at 47. While convenient for its suggested AML designations, this assignment of use to wild horses is not supported by any data. The DAMLE continues stating that “[t]his suggests about 99% of the total locations assessed were grazed at a moderate or high utilization level attributable to wild horse use during the fall/winter/spring of 2011-2012.” *Id.* Ignoring for a moment that this data is 10 years old and does not represent required consideration of current conditions, there is no indication of how this use is attributed to wild horses, as opposed to any other species that uses forage on this allotment. Appendix IV at 46. It should also be pointed out that this is a very small range of time being considered, from a very long time ago, and constitutes three quarters of the seasons. Appendix IV at 47.

Because genetic considerations within the DAMLE were substantively identical to the information included elsewhere and commented upon elsewhere in this document, AWHC hereby incorporates those comments by reference to apply to the DAMLE.

**C. Assuming *arguendo* that the proposed actions by the USFS in these scoping documents are not arbitrary based on a failure to establish AMLs, growth rate of the subject population, or a finding of “excess horses,” there are many issues with the population control methods proposed.**

- a. Gathering horses has been demonstrated to be ineffective at reducing the total number of wild horses managed, costs taxpayers millions of dollars each year, and has not provided any method for sustainable management of wild horses and burros, and therefore the USFS should reconsider its proposal to use gathers as the primary method of population control.**

The BLM has widely utilized gather operations to manage wild horses and burros under its jurisdiction leading to a quagmire of problems and just under 64,000 horses and burros being held off range. Wild Horse and Burro Off-Range Facilities Report – September 2022 available here: [https://www.blm.gov/sites/default/files/docs/2022-09/September%202022%20Facility%20Report\\_web.pdf](https://www.blm.gov/sites/default/files/docs/2022-09/September%202022%20Facility%20Report_web.pdf), attached hereto and incorporated by this reference as Exhibit 3. There is no indication as to why the USFS is proposing to add to the number of wild horses that will be held off-range or incur the costs of this maintenance, a bill which is ultimately footed by taxpayers. Indeed, maintaining these wild horses and burros off-range is a major problem for the BLM and the public, costing taxpayers an estimated \$83 Million and representing 60% of the agency’s program expenditures for FY 2022. *Program Data: Program Expenditures*, Bureau of Land Mgmt., <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data> (FY2022) (last accessed Nov. 18, 2022). An additional

9% of the expenditures disclosed by BLM constitute placement programs that are inextricably tied to the agency's policy of focusing on gathering wild horses and burros as a means of population control. *Id.* Together with off-range holding and gather operations, these programs make up 78% of the BLM's Wild Horse and Burro Program Budget for FY 2022 and cost taxpayers an estimated \$108 Million. *Id.*

Regardless of the narrative promoted by the BLM regarding the successful placement of gathered wild horses and burros, the figures speak for themselves. As disclosed in the BLM's Off-Range Highlights for Wild Horse and Burro (WHB) Advisory Board Meeting, Phoenix, AZ, Oct. 4-6, 2022, available here: <https://www.blm.gov/sites/default/files/docs/2022-09/Off%20Range%20Highlights%20Sheet%20%28508%29.pdf>, attached hereto and incorporated by this reference as Exhibit 4. The BLM had only placed 7,320 wild horses and burros into private care in FY 22 on October 4, 2022. This represents under 12% of the number of the approximately 64,000 wild horses and burros currently being held off-range by the agency. Unbelievably, this number of placements was presented by the BLM as an indication of success, in spite of the fact that its own reporting showed an increase of 7,246 wild horses and burros being held off-range from October 21, 2021 to September 19, 2022. Wild Horse and Burro Off-Range Facilities Report – September 2022. In summary, the BLM spent over \$108 Million to place 7,320 wild horses and burros into private care, while at the same time adding 7,246 wild horses and burros to the tens of thousands already being held off-range.

Methods of placing these wild horses have led to other problems for the BLM including a pending lawsuit challenging the Adoption Incentive Program (AIP) that did little to dispose of the majority of horses held by the agency, and instead created a prohibited pipeline of wild horses and burros being auctioned for slaughter. *See* the AWHC AIP Report available here: [https://drive.google.com/file/d/1WjftMHGQbrC7Doq3j1m\\_3WIIJx83uB4/view?usp=sharing](https://drive.google.com/file/d/1WjftMHGQbrC7Doq3j1m_3WIIJx83uB4/view?usp=sharing), attached hereto and incorporated by this reference as Exhibit 5, and *American Wild Horse Campaign et al. v. Haaland, et al.*, USDC, District of Colorado, Civil Action 1:21-cv-02146-REB. In fact, as disclosed in the Off-Range Highlights for Wild Horse and Burro (WHB) Advisory Board Meeting, Phoenix, AZ, Oct. 4-6, 2022, since its launch in 2019 a mere 11,990 wild horses and burros have been adopted through the AIP. Exhibit 4. These feeble results certainly do not provide reasonable justification for the millions of taxpayer dollars the agency is spending each year on these programs, or the approximately 64,000 wild horses and burros that the agency will continue to hold off-range without the slightest indication of how it intends to resolve this issue.

Additionally, available information regarding the USFS's management of wild horses removed from the subject territory is troubling. In a June 21, 2022 report to the Wild Horse and Burro (WHB) Advisory Board, the USFS provided that it had sent 1,600 horses to BLM facilities, presumably because the agency does not have the capacity to provide long-term holding for gathered animals. If the USFS intends to hold horses in the long term, a further examination and

disclosure of plans should be made available in further proposed actions, especially in consideration of the problems the BLM is currently facing.

The USFS's Wild Horse and Burro Manual states in section 2265.51 that "[a]ll animals placed in private custody must receive a number for identification purposes" and further directs the agency to "[u]se freeze brand methods in place markings under the mane on the left side of the neck." In spite of this directive, a FOIA request by AWHC requesting information on freeze branding has not produced any results. FOIA requests by AWHC have also provided that the USFS is not inspecting "remote pickup locations" for horses it has placed into private care. Instead, the agency has accepted photos or drawings of private placement locations – demonstrating a lackadaisical and inadequate interest in ensuring the welfare of horses it is placing. This is particularly troublesome in consideration of AWHC's AIP report (Exhibit 5, attached hereto), showing the BLM's failure to ensure that horses are not sent to slaughter as prohibited by legislators.

Before proceeding with gather operations as the main method of population control for the subject population, USFS should, at minimum, address how it aims to prevent finding itself in the same predicament described *supra* and still afflicting the BLM. Additionally, the USFS should indicate how it intends to fund these programs, as it is arbitrary to propose gathers as the primary method of population control, without considering the cost of holding these wild horses and burros off-range. Barring specific exceptions, despite removal from the range, wild horses and burros held off-range are still subject to the corresponding laws and under the management of the applicable federal agency. This undermines any attempt by the agency to in fact reduce the number of animals being managed and represents an unreasonable method of complying with its directives. The danger that this program will lead to the catastrophic results observed in the BLM's comparable gather-centered measures, is particularly worrisome in consideration of how poorly the analysis of post-gather proposed actions has been examined.

**b. The USFS has failed to adhere to the order of considerations required by 36 CFR § 222.69(c).**

36 CFR § 222.69(c) sets forth the requirements of how wild horses and burros are to be relocated or removed. Specifically, the regulation directs that animals should be relocated "to other National Forest System lands which were identified as 1971 wild horse or burro territory, providing suitable habitat exists and relocation of animals will not jeopardize vegetation condition." 36 CFR § 222.69(2) In fact, compliance with 36 CFR § 222.69(c)(4) requires that the agency prioritize this type of relocation over placement of animals with private individuals, groups, or other Government agencies. At the very minimum, an analysis and explanation should

be provided regarding attempts by USFS to relocate the alleged “excess animals” it proposes to gather to other National Forest System lands, as required by 36 CFR § 222.69(c).

The failure to consider the possibility of relocation to other National Forest System lands is highlighted by the inclusion of contemplated placements of gathered animals into private care or Government agency, which are considered lower priority methods of placement under 36 CFR § 222.69(c). Appendix I at 7. Notwithstanding this improper prioritization, there are several other issues with the scoping documents treatment of this regulation.

Pursuant to 36 CFR § 222.60(c)(4) placement under private maintenance or Government agency is predicated by a finding that “there is an adoption demand.” The relevance of this requirement is highlighted by the aforementioned 64,000 animals currently being held off-range by the BLM, and as examined more closely *supra*. The very existence of the BLM’s Adoption Incentive Program, whereby it pays adopters \$1000.00 to take a gathered horse, demonstrates why consideration to demand is of paramount importance. Even with payments being issued to the adopters, the BLM admits that the AIP has only led to approximately 11,990 placements since its inception in 2019. Exhibit 4. At the very minimum, a realistic, results-based, assessment should be conducted of the adoption demand of wild horses proposed to be gathered.

The requirements of 36 CFR § 222.60(c)(4) are not limited to assessment of adoption demand, but also prescribe “assurance of humane treatment and care.” The scoping documents do not include any reasonable measures to be taken by the agency to ensure the humane treatment and care of horses that it has placed under this provision. This requirement should be a major concern for the agency considering its proposal to use gather operations and bait trapping as its two primary methods of population control. This is especially true considering that the BLM’s placement of gathered horses into private care has been riddled by examples of the BLM’s failure to ensure that these animals were humanely cared for or prevented from being impermissibly slaughtered. *See* the Exhibit 5 and *American Wild Horse Campaign et al. v. Haaland, et al.*, USDC, District of Colorado, Civil Action 1:21-cv-02146-REB.

It should also be noted that the USFS’s analysis of the effectiveness of gather operations to reduce wild horse numbers is also flawed, as these public scoping documents contain population growth numbers that are both higher and lower than the figures used in over 28% of the population analysis.

**c. The public is not able to comment on the use of fertility control that is so vaguely defined as to be meaningless.**

Appendix I states that 100% of mares 1 year and older slated for release will be treated with fertility control, without any indication of how many will receive a particular kind of fertility control. Appendix I pages 9-10. Appendix I goes on to state that “[t]hree different optional treatments for use on mares can be implemented or most current approved vaccine formulation to prevent pregnancy in the following years.” *Id.* Once again, this does not provide any indication

as to which methods are to be instituted and to what percentage of the overall population. This lack of clarity does not provide for meaningful analysis or input from the public and is contrary to the requirements set forth by the 40 CFR §1501.7.

**d. The agency needs to define its intended use of PZP and PZP-22 and should consider use of these fertility control measures before executing the contemplated gather(s).**

Appendix I proposes to treat mares with PZP native (ZonaStat-H) and PZP-22, although conspicuously it fails to disclose how many mares or what percentage of the population will receive these specific treatments. Appendix I at 10. AWHC maintains an objection to the lack of definitive action disclosed by these scoping documents, as it deprives the public from providing substantive and meaningful comment, and reserves the right to develop comments in response to further proposed agency action.

Field darting is an effective method of applying booster doses to mares and stabilizing the population. Not yet explicitly contemplated in the scoping documents is the notion that the USFS should initiate field darting in the same year that the agency applies the PZP-22 to captured and released mares. It is possible that, depending on the capture rate, the quantity of PZP-22 treated mares, as a percentage of the population's breeding-aged mares, is insufficient to achieve a significant reduction in population growth rate. If this is the case, field darting can increase the percentage of treated mares to achieve on-range management goals.

**e. Use of GonaCon is experimental in nature and requires further study so the impacts of its use on wild horses can be properly assessed**

The inclusion of GonaCon in the scoping documents is experimental in nature and therefore the impacts cannot be properly analyzed in an EA because they are unknown. The peer-reviewed article on the GonaCon study in the Theodore Roosevelt National Park, emphasizes that research on the use of GonaCon as a form of fertility control for wild horses is limited. Dan L. Baker et al., *Reimmunization Increases Contraceptive Effectiveness of Gonadotropin-Releasing Hormone Vaccine (GonaCon-Equine) in Free-Ranging Horses (Equus caballus): Limitations and Side Effects*, Plos ONE 4 (2018).

USFS has not indicated whether it plans to implement the 30-day booster protocol. If the USFS plans to follow the 30-day booster protocol, the agency still has not provided any citation to a peer-reviewed, scientific study supporting this protocol. Such scientific support must be included in the subsequent EA documents to allow for proper analysis of not only the 30-day timeframe but also the decision whether to re-boost mares. According to a report presented to the Wild Horse Advisory Board in 2021, the BLM has been operating a pilot program on the 30-day booster protocol since 2015—the data from this study must be made publicly available before the public can adequately comment on the protocol as it is used in a management context.

Additionally, such scientific support may not exist as the scoping documents state only that there have been “promising efficacy results from trials using GonaCon EQ™ vaccine,” citing Baker et al. 2018. Document B at 7. Indeed, it is dispositive that in its conclusion, Baker et al. states that “future research will begin to define the most effective revaccination schedule with GonaCon-Equine for suppressing reproductive rates in free ranging horses, the duration of effectiveness, and the return to fertility following treatment.” Baker et al., emphasis added.

Of note, records AWHC received via a Freedom of Information Act request show that 19 of the 24 mares boosted with GonaCon in 2013 as part of the Theodore Roosevelt-Baker study had, contrary to expectations, not returned to fertility as of 2020, and that reasons were unknown. This information further demonstrates that the USFS’s proposed use of GonaCon in the subject territory, and every other territory where it is being administered or considered, is experimental in nature and entirely inappropriate for use in a management context.

AWHC has addressed the issue of GonaCon previously in a September 2015 letter to BLM regarding the use of GonaCon in the “Water Canyon” project in the Antelope HMA in Nevada. GonaCon is not appropriate for field use until further research can demonstrate that it is safe, effective, and reversible so that management decisions can be properly made. It should be removed from consideration in this proposed analysis and others until an agency conducts more research that follows the guidance of the federal Office of Research Integrity that requires an Institutional Animal Care and Use Committee (IACUC) that approves protocols utilizing animals.

However, if USFS chooses to move forward with the implementation of GonaCon as a management tool in this territory, then the agency must develop clear and precise protocols, including how the agency intends to monitor the mares for future veterinary care needs or adjust treatment protocols to avoid permanent sterilization of mares. In this territory, AWHC asks the USFS to halt any plans to reboost mares after their initial treatments until more is understood about the risks of permanent sterility. At minimum, reboosting should be limited to older mares and those who have already substantially contributed to the gene pool and whose loss from the reproducing population will not negatively affect the herd’s genetic health and diversity.

**f. Use of IUDs for the management of wild horses is experimental in nature and requires further study to determine its impacts.**

The inclusion of IUDs in the scoping documents is experimental in nature and therefore the impacts cannot be properly analyzed in an EA because they are unknown. AWHC does not know of any instance in which USFS has implemented IUDs to control fertility. BLM has only completed implementation of IUDs to control fertility in only eight wild horses in *one* HMA, the Swasey HMA in Utah. *Program Data: Population Growth Suppression Treatments*, Bureau of Land Management (last accessed November 28, 2022) (8 IUDs in FY 2021), available here <https://www.blm.gov/programs/wild-horse-and-burro/about-the-program/program-data>.



However, the agency has not released any information about the IUDs' implementation, complications, or success in that HMA. Instead, USFS is relying on studies with miniscule sample sizes, as well as studies conducted under far different conditions than on-range management, to justify its proposal to treat wild mares. *See* Appendix I at 7.

In fact, Document B relies on one study that used a university facility to test the effects on a total of 20 mares (only 15 of which carried the IUD for the prescribed 20.5 month term) to justify that Y-shaped IUDs retention rates were greater than 75% for an 18-month period, and mares returned to good uterine health and reproductive capacity after removal of IUDs. Document B at 7 citing Holyoak et al. 2021. Similarly, Document B relies on a novel magnetic IUD that has been shown effective in *non-breeding domestic mares* to justify its arbitrary decision to use IUDs. *Id.* (emphasis added).

Given this background, it is clear that the use of IUDs is more like a research experiment on wild horses rather than an established management program that will safely, humanely, and effectively control their population in the subject territory.

On July 20, 2022, BLM issued a press release notifying the public that it was seeking comments on three “longer-lasting fertility control methods,” one of which is a flexible IUD known as iUPOD. Press Release, Bureau of Land Management, BLM Seeks Public Comment on Proposed Wild Horse Research (July 20, 2022); Bureau of Land Management, Wild Mare Fertility Control Research, DOI-BLM-HQ-2600-2022-0001-EA (July 20, 2022) (preliminary EA). As iUPOD must still undergo scientific study, its inclusion in proposed agency action is inappropriate as the proper protocol and anticipated effects cannot be adequately analyzed at this time. (Note: Nothing in this comment is intended to limit the scope of AWHC’s comments on other USFS or BLM issued documents or releases.)

USFS has yet to conduct a research project on wild horses in order to study and determine what impacts IUDs will have on wild horse health, welfare, and behavior. In the subject territory, the agency cannot gather scientific information on these untested methods in the absence of an affiliation with an academic institution, a scientifically sound and approved research protocol, and approval from an Institutional Animal Care and Use Committee (“IACUC”). The IACUC must also ensure the “[p]roper use of animals, including the avoidance or minimization of discomfort, distress, and pain when consistent with sound scientific practices.” 50 Fed. Reg. 20,864 (May 20, 1985). Additionally, USFS must disclose and identify any IACUC it works within the subject territory. Because the scoping documents propose to implement IUDs even though the management method has not yet been studied in wild horses, there is a strong likelihood that an IACUC could impose changes to the proposed action.

As stated in Lyman, C.C., J.M. Baldrighi, C.O. Anderson, S.S. Germaine, A.J. Kane and G. R. Holyoak. 2021. Modification of O-ring intrauterine devices (IUDs) in mares: contraception without estrus suppression. *Animal Reproduction Science*

doi:<https://doi.org/10.1016/j.anireprosci.2021.106864> “[i]t should be taken seriously that placement of any form of IUD into the uterus of a valuable mare can result in acute endometritis as evidenced by uterine fluid accumulation and edema at the site of the IUD in both the present study and as reported previously.” Lyman, et al., 2021 attached hereto and incorporated by this reference as Exhibit 6 (internal citation omitted). With this information in mind, it is also imperative that USFS prepare for the need to provide veterinary care to those mares that would be subject to this experimentation. The scoping documents are absent of any real detail or explicit protocols for observation of wild mares implanted with IUDs once returned to the range or acknowledgement of, given statements about the difficulty of approaching these horses, how it intends to recapture specific mares who may require follow up veterinary care. At the very least, should USFS pursue a study, an IACUC will insist on clearly articulated protocols for the implementation, monitoring, care, and study of IUDs in these wild mares.

Until USFS proposes a well-designed, rigorously controlled and documented scientific study conducted in conjunction with a reputable scientific institution, and then receives IACUC approval from that institution, it cannot accurately describe the proposed action or analyze its true impacts. Thus, for all of these reasons, the implementation of IUDs as a management tool must be dropped from consideration for implementation in the subject territory. However, if USFS chooses to move forward with the implementation of IUDs as a management tool in this territory, then the agency must develop clear and precise protocols, including how the agency intends to monitor the mares for future veterinary care needs. Without clear protocols, neither the agency nor the public can begin to properly analyze and consider the use of IUDs on the wild mares in the territory, and without these additions, an EA is incomplete.

**g. The agency must further define the time of its intended use of bait and water trapping, and should avoid its use during foaling season.**

According to the Appendix I, “[b]ait trapping will be used as a secondary method to reduce the populations of wild horses to achieve or maintain AML.” Appendix I at 9. Once again AWHC requests clarification as to the extent that this method is to be instituted, in order to be able to provide meaningful comment. In addition, AWHC reiterates its objections to the use of gathers to reduce horse population numbers due to poor results of the BLM’s gather program, as described in more detail *supra*.

While bait and water trapping is generally considered safer for vulnerable horses (e.g., foals, pregnant mares, and older horses), transportation after capture still holds significant risks for these horses. To avoid unnecessary risk, foaling season should still be avoided. Thus, the subsequent proposed agency action documents should state clearly what time of year trapping would occur; currently, the scoping documents do not include any such information.

**h. Skewing of Sex Ratios should not be employed by USFS as a management strategy, especially after the BLM's findings that it is ineffective, and therefore implementation is *per se* arbitrary.**

Skewing of sex ratios is not a reasonable management strategy. In fact, the Oregon BLM detailed the negative impacts of sex skewing in its 2015 Cold Springs HMA Population Management Plan (DOI-BLM-V040-2015-022)( available here:

[https://eplanning.blm.gov/public\\_projects/nepa/58698/77764/86974/DOI-BLM-ORWA-V040-2015-0022-EA\\_Final.pdf](https://eplanning.blm.gov/public_projects/nepa/58698/77764/86974/DOI-BLM-ORWA-V040-2015-0022-EA_Final.pdf) ) and 2017 Stinkingwater HMA Population Management Plan (DOI-

BLM-ORWA-B050-2017-0002-EA) (available here:

[https://eplanning.blm.gov/public\\_projects/nepa/71905/111093/136012/Draft\\_Environmental\\_Assessment\\_-\\_June\\_2017.pdf](https://eplanning.blm.gov/public_projects/nepa/71905/111093/136012/Draft_Environmental_Assessment_-_June_2017.pdf)) and rejected it out of hand:

Wild horse populations will produce roughly equal numbers of males and females over time (4700 WHB Handbook, 4.4.1). Re-establishing a 50/50, male to female, sex ratio is also expected to avoid consequences found to be caused by skewing the ratio in either direction. Sex ratio typically adjusted in such a way that 60 percent of the horses are male result in slightly reduced populations (Bartholow 2004), implying that ratios would need to be adjusted even further to account for a significant slowing of population growth. In the Pryor Mountain Wild Horse Range, Singer and Schoeneker (2000) found that increases in the number of males on this HMA lowered the breeding male age but did not alter the birth rate. In addition, bachelor males will likely continue to seek matings, thus increasing the overall level of male-male aggression (Rubenstein, 1986).

And the BLM's 2009 Beatys Butte EA (DOI-BLM-OR-L050-2009-0065-EA) DR FONSI (available here:

[https://www.blm.gov/or/districts/lakeview/plans/files/Beatys\\_Butte\\_EA\\_FONSI\\_DR.pdf](https://www.blm.gov/or/districts/lakeview/plans/files/Beatys_Butte_EA_FONSI_DR.pdf)) states:

If selection criteria leave more studs than mares, band size would be expected to decrease, competition for mares would be expected to increase, recruitment age for reproduction among mares would be expected to decline, and size and number of bachelor bands would be expected to increase.

As well as the EA for the 2010 South Steens Wild Horse Gather (DOI-BLM-OR-B060-2010-0005-EA) (available here:

<https://www.blm.gov/or/districts/burns/plans/files/SSteensGatherALLFinal.pdf>):

Skewing the sex ratio of stallions v. mares would result in a destabilization of the band (stallion, mare and foal) structure moving it from five to six animals to three animals. Social band structure will be lost resulting in combative turmoil as surplus stallions attack a band stallion trying to capture his mare. This could result in the foal being either killed or lost. The mare and foal will not be allowed to feed or

water naturally as the stallion tries to keep them away from the bachelor bands of stallions, resulting in stress to the mare during her lactation condition.

Thus, it is clear that the USFS should abandon any plan to manage for skewed sex ratios. Instead, the USFS must manage the wild horses of the subject territory within natural sex ratios.

**i. Document B includes a reference to gelding as a fertility control method, yet the agency has made no effort to propose in protocols to ensure the welfare of wild horses subjected to this invasive and potentially fatal surgery.**

Page seven (7) of Document B states that “King et al. (2022) just published findings on social behavior effects of putting geldings back onto their home Herd Management Areas,” yet the scoping documents do not even consider the welfare of the animals subjected to this surgical procedure. Any consideration of scientific literature provides that gelding has potential short-term and long-term effects to the subjected animal. *See* Robert MP, Chapuis RJJ, de Fourmestreaux C, Geffroy OJ. Complications and risk factors of castration with primary wound closure: Retrospective study in 159 horses. *Can Vet J.* 2017 May;58(5):466-471. PMID: 28487590; PMCID: PMC5394602, available here: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5394602/> and stating “Despite its routine character, more complications develop following castration than any other elective surgical procedure, some of them being life-threatening,” attached hereto and incorporated by this reference as Exhibit 7. The complications associated with gelding have been observed in the subject territory, where AWHC has learned that four 2021 colts subjected to gelding were eviscerated in one day.

Therefore, at minimum, evaluation of using these methods should include analysis and directives to ensure the welfare of horses subjected to this surgical procedure. This is especially true considering the challenges faced by wild horses compared to their domestic counterparts.

**j. Low AML is not an appropriate target for wild horse population control measures.**

Even if the USFS’s AML calculations are defined and accepted as proper, low AML is not an appropriate post-removal target population size because it hinders several factors that are vital to successful population management, including sufficient genetic diversity and reduced off-range holding populations.

To begin, low AML is an inappropriate target for a wild horse population where fertility control will be employed. When PZP is administered to a pregnant mare, it has no effect on her existing pregnancy; as a result, the PZP effectively takes only one year to impact the herd’s foaling rate. In contrast, the AML range is set in accordance with “[t]he number of WH&B that allows the population to grow to the AML upper limit over 4-5 years, without the need for gathers to remove excess WH&B (USDI BLM 2010).” Appendix IV at 58. In other words, the justification

for low AML exists only where an HMA is not being managed with fertility control. *See e.g.*, Bureau of Land Management, Cedar Mountain Herd Management Area Population Control Plan Environmental Assessment (DOI-BLM-UT-W010- 2022-0005-EA) (July 2022) (available here: [https://eplanning.blm.gov/public\\_projects/2017715/200509988/20061927/250068109/Cedar\\_Mtn\\_HMA\\_EA\\_6-2022.pdf](https://eplanning.blm.gov/public_projects/2017715/200509988/20061927/250068109/Cedar_Mtn_HMA_EA_6-2022.pdf)) at 18 (“[A] comprehensive and consistent fertility control program would prevent the dramatic population increases that the low-to-high AML range was implemented to accommodate.”). Thus, removing to low AML would be problematic in the subject territory and merely increases the number of horses that are sent into the increasingly expensive off-range holding system.

Furthermore, a larger target population will help to maintain this herd’s genetic diversity. “The maintenance of genetic diversity in a population is a function of the genetic effective population size ( $N_e$ ; Wright, 1931, 1938), which is defined as the size of an idealized population that would experience the same magnitude of random genetic drift as the population of interest (Conner and Hartl, 2004) and can be estimated with genetic or demographic data.” National Research Council, *Using Science to Improve the BLM Wild Horse and Burro Program: A Way Forward* 148–49 (2013) [hereinafter “NAS report”]. Because effective population size is a function of the population size, the ability to maintain genetic diversity also increases with population size. According to the scoping documents, this herd’s genetics were last tested in 2021, with results still being processed and not disclosed. Appendix I at 5. Ultimately, it is not clear how without results the USFS is proposing to continue its contemplated actions without this vital information.

Prior to this sampling, the hair samples were analyzed in 2016, with a finding of high proportion of rare variants that warranted continued monitoring. Appendix I at 5. In addition, these same results explicitly explained that any insight based on these results was limited by the absence of any historical data. *Id.* Given the fact that the results of the 2016 sampling were so limited and qualified, it is only reasonable that the USFS consider additional data before making any determination regarding the genetic condition of the subject horse population.

The National Academies of Sciences report recommended the collection of genetic samples from each HMA at least once every 5 years. NAS Report at 161. In spite of this direction, the scoping documents arbitrarily provide that genetic variability measures will be calculated at every other gather, meaning every 8 to 10 years, or 5 to 10 years, depending on which scoping document is referenced. Appendix I at 8 and Appendix IV at 53. The USFS should first address these conflicting disclosures and comply with the NAS reports recommendations regarding the frequency of monitoring. Regardless, removal down to low AML will significantly reduce the effective population size of the subject territory’s population, therefore decreasing USFS’s ability to maintain or achieve adequate genetic diversity.

In fact, there are significant concerns about the herd’s genetic viability even at the current AML, especially considering that this would be based on the estimated number of wild horses left on the range, whose reproductive capacity is unknown. Appendix I at 7. Federal regulation

mandates that the BLM (and in this case the USFS) manage wild horses and burros as self-sustaining herds, which the agency defines as “[t]he ability of reproducing herds of wild horses and burros to maintain themselves in a healthy condition and to produce healthy foals.” 43 C.F.R. § 4700.0-6(a) (“Wild horses and burros shall be managed as self-sustaining populations of healthy animals . . . .”); U.S. Bureau of Land Mgmt., H-4700-1, Wild Horses and Burros Management Handbook 59 (2010) [hereinafter BLM Handbook]; see *Am. Wild Horse Pres. Campaign v. Zinke*, No. 1:16-cv-00001-EJL, 2017 U.S. Dist. LEXIS 161599, at \*53–54 (D. Idaho Sept. 29, 2017). If a herd has insufficient genetic diversity, it cannot reasonably be considered healthy, and by extension, it is not self-sustaining. Ensuring genetic diversity is therefore necessary for the USFS to achieve this mandate.

Lastly, low AML is the legal minimum that USFS is required to manage on the range in any particular territory, and therefore USFS must ensure that it at least meets this requirement, once it has in fact made the prerequisite determinations. In the context of climate change, increased environmental stochasticity makes it likely that a herd removed down to low AML will dip below this statutory threshold. Thus, removal targets should always be greater than low AML to avoid contributing to the likelihood of this happening.

If USFS does not raise the AML of this territory to ensure the population’s viability, then an appropriate target in that scenario would be high AML or near-high AML where the fertility control’s interim year of growth will still keep the population close to or at high AML. This optimizes the agency’s population management efforts by diverting money away from off-range holding needs and towards on-range management strategies that benefit the health and welfare of the wild horses. Removal to low AML should be reserved for specifically outlined emergency situations, presumptively to be analyzed in the subsequent proposed agency action documents. If removal to low AML is retained in subsequent agency-issued documents, it is essential for USFS to further analyze the following:

- Impacts of drastic reduction of population size on population growth rate.
- Impacts of drastic population reduction on genetic health of the populations within the territory.
- Economic and welfare concerns related to increasing the off-range holding population of wild horses.

**D. Proposed CAWP standards are severely flawed and do not comply with the management requirements imposed on the USFS.**

As defined in scoping document Appendix II titled “Comprehensive Animal Welfare Program for Devil’s Garden Plateau Wild Horses Gathers,” a minor standard is “unlikely to affect wild

horses' health or welfare or involves an uncontrollable situation." Despite this explicit definition, several provisions of this document fail to adhere to this definition.

Page six (6) of Appendix II states "that temporary holding facilities should be maintained at a proper stocking density such that when at rest all wild horses occupy no more than half the pen area" and designates this standard as a minor. The proposition that maintaining proper density in holding does not affect the health or welfare of the animals being held is without merit. Logic dictates that without a minimum requirement for space, this standard is in fact not a standard at all. Given the discretionary language used in this alleged standard, there is no guidance on the stocking density that should be maintained to protect the animals gathered. This of course is in violation of the authority granted to the Chief to protect wild horses (36 CFR § 222.60(a)) and contrary to the directive given to the Chief to provide direct administration for the welfare of wild free-roaming horses and burros (36 CFR § 222.61(a)(2)). Relatedly, these regulations reflect the fact that the USFS has responsibility to administer its programs in a manner that comply with these directives, and therefore cannot claim that ensuring proper stocking density is something that involves an uncontrollable situation. Because this provision provides no grounds for being considered a minor standard, it should properly be classified as a major standard with mandatory directives.

Page seven (7) of Appendix II similarly contains another instance where improper designation of a minor standard is proposed. Specifically, Section B paragraph 7 states that stock trailers "should be positioned for loading or unloading such that there is no more than 12" clearance between the ground and floor of the trailer for 18" for horses" and designates this a minor standard. It should first be noted that this standard does not appear to make sense, and the responsible error in drafting should be corrected. Regardless, as with stocking density, logic dictates that if a step is too high for a horse, the animal will be more likely to fall, refuse direction, and subsequently injure itself, others, or people. Additionally, the position of stock trailers is something that the USFS or its agents should control. Once again this does not meet the requirements to be considered a minor standard, and furthermore does not comply with the non-discretionary directive imposed on the Chief as it relates to his duty to protect wild horses and provide administration for their welfare. Once again, actual standards, based on the physiology of equines and best animal husbandry practices must be developed in order to ensure that the agency is complying with its non-discretionary regulatory directives.

Page 10 of Appendix II contains two other examples of minor standards that must be considered major standards to be in compliance with the regulations requiring the Chief to protect wild horses and administer their welfare. First Section A. paragraph 3 of this page states that there "should be no deliberate driving of horses into other animals, closed gates, panels, or other equipment," and designates this a minor standard. It is completely illogical to arrive at a conclusion that driving a horse into another animal, a closed gate, panel, or other equipment will not be likely to affect the health or welfare of the animal, or the animal being crashed into. In addition, this standard governs only deliberate driving of horses, and therefore cannot be claimed

to be an uncontrollable situation. Similarly, Section A. paragraph 4 of this same page states that there “should be no deliberate slamming of gates and doors on wild horses” and designates this as a minor standard. Once again, it is unfortunate that your agency must be informed that slamming a gate or door on an animal will likely affect the animal’s health or welfare. Furthermore, this standard only covers such violence that is taken in a deliberate manner, and therefore does not contemplate an uncontrollable situation. Not only does designating these standards as minor contradict requirements of the previously discussed regulations, they are in contradiction of the first requirement of the section in which they are contained. Page 10 of Appendix II Section A. paragraph 1 prohibits “[H]itting, striking, or beating any wild horse in an abusive manner.” Deliberately slamming a gate or door on a wild horse, or driving it into another animal or object is equivalent to hitting, striking, or beating said horse.

The proposed CAWP standards grant an impressive deference to COR/LEAD when consulting with a veterinarian. As noted in Appendix II page 9, and elsewhere, the Lead COR/COR/PI is not required to give any deference to the advice of a consulting veterinarian. As noted in 36 CFR § 219.3 the responsible official shall use the best available scientific information to inform the planning process. Given this standard, it is arbitrary and wasteful to have a veterinarian consult the Lead COR/COR/PI if the officer does not have a directive to follow the direction of this expert. It is further illogical to imply that there would arise a situation where the USFS official would be more qualified than a veterinarian to make a determination of what is in the interest of protecting and managing the welfare of the subject horses, as the agency is required.

**E. The proposed actions contemplated in these scoping documents violate recent case law that examined the meaning of the term “immediate.”**

On June 28, 2022, the District Court for the District of Columbia concluded that the Bureau of Land Management (BLM) lacks the statutory authority in the Wild Horse Act to adopt ten-year, phased roundup plans. *Friends of Animals v. Culver*, No. 19-cv-3506, 2022 WL 2315537 (D.D.C. June 28, 2022). The plaintiff presented two related arguments: (1) “BLM does not have authority to issue open-ended decisions that allow it to remove wild horses and burros over the course of ten years, because these future roundups will not have occurred ‘immediately’ after the agency’s initial excess determination,” *id.* at \*5 (quoting 16 U.S.C. § 1333(b)(2)); and (2) the “potential for multiple round ups over a ten-year period violates the [Wild Horse Act’s] requirement that BLM make gather decisions on the basis of ‘current’ information,” *id.* (quoting 16 U.S.C. § 1333(b)(2)).

The court reached only the first of these arguments—relying on the plain language and common understanding of the term “immediately” contained in the Wild Horse Act that limits BLM’s authority with respect to removal of excess horses, the court found that “[t]here is no indication in the statute that ‘immediately’ does not require BLM to remove excess horses or burros ‘without delay.’” *Id.* at 7 (quoting 16 U.S.C. § 1333(b)(2)). Because “there is no statutory definition otherwise altering the plain meaning of ‘immediately,’” the court concluded that



“[a]lthough a statutory deadline may be impracticable, or even impossible, an agency’s failure to comply with a statutory deadline is necessarily unlawful.” *Id.* at 8 (quoting 16 U.S.C. § 1333(b)(2)).

Accordingly, because the court explained that “the sole question before the Court is whether BLM may lawfully direct its employees to wait ten years to ‘immediately’ remove excess horses that BLM has determined must be removed”: the court unequivocally held that “BLM may not.” *Id.* The court noted, however, that timing and facts are relevant—i.e., it clarified that “[a] phased, ten-year plan strikes the Court as far beyond the time permitted under the [Wild Horse Act], particularly where BLM has conceded that nowhere does it propose that it will need all ten years to achieve AML in the first instance.” *Id.*

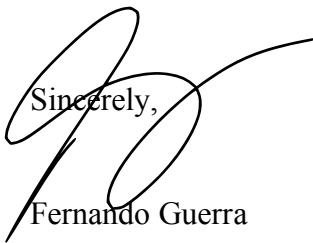
36 CFR § 222.69(a) states that “[t]he Chief, Forest Service, shall, when he determines over-population of wild horses and burros exists, and removal is required, take *immediate* necessary action to remove excess animals from that particular territory.” (emphasis added)

Notwithstanding USFS’s failure to make a determination that there are in fact “excess horses,” or that that removal is required, as noted elsewhere in these comments, the timeframe for the proposed action in these scoping documents is far beyond the 10 years deemed contrary to the requirements of the WHA and the cited regulation.

## F. CONCLUSION

In sum, AWHC strongly encourages the USFS to consider these comments, the sources cited herein and provided, and the binding authorities cited, in developing further planning documents associated with this proposed action. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fernando Guerra', written over the word 'Sincerely,'.

Fernando Guerra  
Legal Affairs Director  
American Wild Horse Campaign  
PO Box 1733, Davis, CA 95617