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Title:
Comments: Introduction

The International Society for the Protection of Mustangs and Burros ([ldquo]ISPMB[rdquo]), submits the following comments to the Draft Environmental Assessment (the [ldquo]Draft EA[rdquo]) and the Draft Territory Management Plan (the [ldquo]Management Plan[rdquo]) for the Heber Wild Horse Territory (the [ldquo]Territory[rdquo]). ISPMB is a non-profit organization formed to promote animal welfare and protection, including the protection of wild horses. ISPMB is the oldest wild horse and burro organization in the United States. Along with its first president, Wild Horse Annie, ISPMB was instrumental in securing and implementing the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. [sect][sect] 1331, et seq. (the [ldquo]Wild Horse and Burro Act,[rdquo] or the [ldquo]Act[rdquo]). ISPMB was headquartered in Arizona from approximately 1993 until 2000 when it relocated its headquarters to Rapid City, South Dakota. ISPMB still has members who live in Arizona, including in or around Heber, and other members who visit the area frequently.

([ldquo]USFS[rdquo]), among others, in the District Court for the District of Arizona in 2005 (the [ldquo]2005 Litigation[rdquo]). ISPMB sought a preliminary injunction and alleged that the USFS had not conducted a census, inventory, or any other type of survey to determine how many of these approximate 300 to 400 horses were [ldquo]wild free-roaming[rdquo] horses and thus entitled to protection under the Act. ISPMB also alleged that the USFS issued a solicitation entitled [ldquo]Trespass Horse Capture and Transport[rdquo], by which the horses were to be captured and transported out of the Apache-Sitgreaves National Forests. See Exhibit 1. The solicitation provided for the round-up and capture of all horses in the Apache-Sitgreaves Forest including those in the Heber Wild Horse Territory and all mares, even those with foals.

The District Court substantiated ISPMB[rsquo]s assertions by holding:

Plaintiffs raise at least serious questions as to the legality of the defendants[rsquo] actions. Plaintiffs argue that defendants violated NEPA because the removal of wild horses will significantly affect the human environment, and defendants failed to properly consider the impact, and failed to issue an Environmental Impact Statement ([ldquo]EIS[rdquo]) or a statement of reasons as to why an EIS is unnecessary. Plaintiffs argue that defendants violated the Wild Horses Act because they attempted to remove the wild horses, failed to properly investigate the status of horses, failed to keep an inventory of the horses, failed to establish an advisory committee with regard to the horses, and failed to hold a public hearing prior to the attempt to use motorized vehicles to remove the horses. Plaintiffs argue that defendants violated the APA because they acted arbitrarily and capriciously by failing to conduct a full investigation into the effects of the removal of the horses and failing to comply with NEPA and the Wild Horses Act.

Exhibit 2. ISPMB successfully obtained the injunction. See Order Granting Injunction, dated December 13, 2005, attached hereto as Exhibit 2.

In March 2007, the parties entered into a stipulated settlement agreement (the [ldquo]Stipulated Settlement Agreement[rdquo]) and the court issued an order, dated March 21,2007 (the [ldquo]Federal Court Order[rdquo]), which adopted the terms set forth in the Stipulated Settlement Agreement. See Stipulated Settlement Agreement, attached hereto as Exhibit 3 and Federal Court Order, attached hereto as Exhibit 4. Pursuant to the Federal Court Order:

The USFS agreed that the Heber Wild Horse Territory still exists and has not been dissolved.

The USFS agreed that the wild horses are by law an integral part and component of the natural system of the public lands, as expressed by Congress in the Act.

The USFS will work with the public, including ISPMB, in the development of a written Heber Wild Horse Territory Management Strategy in accordance with the provisions of the Act.

The USFS will refrain from any gathering or removing of horses within the Heber Wild Horse Territory, as well as, on the Black Mesa and Lakeside Ranger Districts, considered the Sitgreaves National Forest, until the USFS completes, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develops a written Heber Wild Horse Territory Management Strategy.

The USFS will involve the public, including ISPMB, in scoping for the analysis.

The USFS agreed to provide ISPMB with specific notice of the document and consider its comments on the same.

The USFS agreed to continue to coordinate with the White Mountain Apache Tribe for repair and maintenance of the boundary fence.

The proposed actions of the USFS, show a practical disregard for the Territory and its wild horses, indicating that the USFS must have disavowed the Federal Court Order it entered into in the 2005 Litigation. This letter and its attachments are a response to the Draft EA for the Management Plan for the Heber Wild Horse Territory ([ldquo]Territory[rdquo]). ISPMB submits this letter and its attachments (exhibits) to be included as a part of the administrative record, and to be considered in finalizing the Draft EA and Management Plan.1 This letter is broken into six sections.

The first section addresses the shortcomings of the Draft EA under the Administrative Procedure Act ([ldquo]APA[rdquo]). More specifically, it raises issues with the Draft EA[rsquo]s repeated and continued reliance on known false assumptions, its failure to provide any meaningful response to the substantive and voluminous public comment received on March 13, 2020 regarding the use of PZP, effects of restricting the horses to the Territory on their migration, and the unreliability of the Forest Service[rsquo]s studies, and the biases of the Working Groups[rsquo] recommendations, the majority of which the Forest Service appears to have adopted, (among other issues), and its deviation from set agency standards without adequate justification. The second section addresses the need for the Forest Service to fully recognize the Heber horses as [ldquo]wild free-roaming horses[rdquo] entitled to all the benefits and protections of the Wild Horse and Burro Act and corresponding sections of the Code of Federal Register ([ldquo]CFR[rdquo]). The third section addresses why the Draft EA utterly fails to support a managed reduction, or any reduction, in the wild horse population located on or near the Territory. The fourth section explains why the current Territory alone is insufficient to sustain the wild horse population, as the Forest Service should manage the wild horses where they are currently located within the Heber Wild Horse Territory, as well as on or near the Black Mesa and Lakeside Ranger Districts, as indicated in the March 14, 2007 Stipulation entered into by the Forest Service. See Exhibit 3. The fifth section outlines additional concerns with the Draft EA and

management process more generally. The final section addresses the need for a full and complete environmental impact statement.

The Forest Service[rsquo]s Draft Environmental Assessment Fails to Meet the Requirements of the Administrative Procedure Act

The Draft EA assumes that runs against the evidence and legislative intent, and is therefore arbitrary and capricious

The Forest Service[rsquo]s faulty analysis of appropriate management levels is based entirely on the underlying assumption that the wild horses must be restrained exclusively to the Heber Wild Horse Territory and cannot access resources from outside the Territory. This assumption runs against the evidence and legislative intent and is therefore arbitrary and capricious under the APA. Indeed, The U.S. Forest Service has an obligation to manage and protect wild horses residing on any public lands, such as the Apache-Sitgreaves National Forests and not only within the Heber Wild Horse Territory. See 36 C.F.R Section 222.25 of the regulations provides protection for the wild free-roaming horses even if they were to move or migrate off of protected territories onto lands of other ownership or jurisdiction.

Judicial review of administrative decisions is made under the APA, which allows a court to set aside agency action that is arbitrary and capricious. 5 U.S.C. [sect] 706(2)(A). Under the APA, an agency action is arbitrary and capricious if the agency relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Mfrs. Assoc. v State Farm, 463 U.S. 29, 43 (1983).

Under the Wild Horse and Burro Act, the Forest Service has a duty to protect wild horses so as to preserve their [ldquo]free-roaming behavior,[rdquo] 16 U.S.C. [sect] 1331, and [ldquo][m]anagement activities affecting [wild horses] shall be undertaken with the goal of maintaining free-roaming behavior.[rdquo] 43 C.F.R. [sect] 4700.0-6(c). The legislative history of the Act indicates that Congress felt strongly about allowing the wild horses to roam freely. The preamble and statement of policy for the Wild Horse and Burro Act states:

Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death, and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

Indeed, the Forest Service has already stipulated in the Federal Court Order that [ldquo]wild horses are by law an integral part and component of the natural system of the public lands[rdquo] and located within the Territory and the surrounding Black Mesa and Lakeside Ranger Districts.

Congress forbid the Bureau of Land Management from fencing the wild horses into an allotted territory. See 117 Cong. Rec. 22,669[ndash]672, 34,771[ndash]775 (1971). Similarly, the Senate Report states: [ldquo]The Committee wishes to emphasize that the management of the wild free-roaming horses and burros be kept to a minimum . . . to deter the possibility of [lsquo]zoolike[rsquo] developments.[rdquo] S.Rep. No. 92-242, 92nd Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 2149, 2151-52. Over the last 50 years, this tenet has been bolstered by our courts. See, e.g., Fallini v. Hodel, 783 F.2d 1343, 1346 (9th Cir. 1986) (Landowner could not compel the Bureau of Land Management to prevent wild horses from straying onto private lands because Congress intended the horses to be free-roaming).

In the Draft EA, the Forest Service erroneously concludes that the Territory may only sustain 104 horses. In making this determination, the Forest Service calculated the amount of forage that grows in the Heber Wild Horse Territory, allocated half of that forage to the horses, then divided that by the amount of forage the average horse consumes per day. This entire faulty analysis is based on the known false assumption that the Heber wild horses cannot and do not leave the Territory and cannot access any resources from outside the Territory. This assumption runs against the language of the Act, which charges the Forest Service with the duty to preserve the [ldquo]free-roaming behavior[rdquo] of the wild horses. It also runs against the legislative history of the Act, which indicates that Congress was strongly opposed to restricting wild horses to their allotted territory. This assumption

runs against the governing CFRs and case law, which maintains that horses are free to roam neighboring territories, whether they are publicly or privately owned. It also runs counter to the evidence and facts known to the Forest Service since at least its stipulated agreement in March 2007 to protect wild horses on the Black Mesa and Lakeside Ranger Districts, if not for decades. This incomplete and biased analysis seems directed to support a preconceived conclusion to reduce the wild horse population, rather than an unbiased, scientific study meant to properly address the resourced on the forests. The Forest Service must [ldquo]manage wild free roaming horses and burros in a manner that is designated to achieve and maintain a thriving natural ecological balance on the public lands.[rdquo] 16 U.S.C. Section 1333(a). This cannot be accomplished by ignoring the plain truth and obvious facts.

Attached are two maps that were prepared by Robert Hutchinson, who has lived in Overgaard, Arizona for over 30 years. These maps outline the territory in which the Heber Wild Horses may roam. See Exhibit 5. In fact, the population density of the Heber Wild Horses is likely far higher outside of the Heber Wild Horse Territory than within it. That remains unknown since the Forest Service refuses to actually manage the wild horses, has not conducted a census, inventory, or any other type of survey to determine how many wild horses are present on the Forest and where they are located, and continues to deny its obligation under the Wild Horse and Burro Act in favor of allocating resources to non-federally protected uses. Thus, as the Forest Service[rsquo]s entire analysis is based on a false assumption that runs against the evidence and legislative intent, it is arbitrary and capricious.

The Draft EA fails to provide meaningful response to public comment and is therefore arbitrary and capricious

The Forest Service fails to provide meaningful responses to public comments on the Proposed Action Document, which violates the arbitrary and capricious standard of review under the APA and the National Environmental Policy Act ([ldquo]NEPA[rdquo]). The requirement that agency action cannot be arbitrary and capricious includes a requirement that the agency meaningfully respond to all relevant and significant public comments. See Forelaws on Board v. Johnson, 743 F.2d 677, 685 (9th Cir. 1984) (Agency[rsquo]s failure to consider the wealth of public comments on environmental issues violated [ldquo]arbitrary and capricious[rdquo] standard of review required by the APA and NEPA).

NEPA imposes procedural requirements to ensure that government agencies take a [ldquo]hard look[rdquo] at how their management decisions will affect the environment. See Oregon Nat. Desert Assn. v. United States Bureau of Land Mgmt., 625 F.3d 1092, 1099-1100 (9th Cir. 2010). As part of its procedural duties, the agency is required to [ldquo]articulate, publicly and in detail, the reasons for and likely effects of those management decisions, and to allow public comment on that articulation.[rdquo] Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002). Once an agency solicits public comment, it must consider and respond to all substantive comments by one or more of the following means:

Modify alternatives including the proposed action

Develop and evaluate alternatives not previously given serious consideration by the agency

Supplement, improve, or modify its analyses

Make factual corrections

Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency[rsquo]s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

40 C.F.R. [sect] 1503.4(a) (2012). When an agency submits proposed changes for public comment and then

offers no meaningful response to those comments, the agency renders the NEPA procedural requirements meaningless and the environmental assessment an exercise in form over substance. See id.; W. Watersheds Project v. Kraavenbrink, 632 F.3d 472, 492-93 (9th Cir. 2011) (NEPA requires the agency to assess, consider, and provide meaningful response to relevant comments); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977) ([ldquo]The relevant questions under the NEPA are whether such comments are made available to decision- makers, whether the differences of opinion are readily apparent, and whether they receive good faith attention from decision-makers.[rdquo]).

Here, ISPMB submitted a 38-page letter outlining ISPMB[rsquo]s substantive comments to the Proposed Action Document. These comments included the following

Problems with the composition of the working group,

Issues with the ethnographic study,

The agency[rsquo]s continued use of unreliable data,

The potential for disruption to the horses[rsquo] migration patterns,

The impacts of PZP on the horse family structure and on individual behaviors, and

The availability of winter forage and warm climates for the horses left in the territory.

In support of its comments, ISPMB submitted 2,275 pages of evidence including, but not limited to, relevant scientific studies, expert reports, peer-reviewed publications, news articles, case law, photographs, deposition testimony, and affidavits.

In response, the Forest Service released its [ldquo]Summary of Scoping Disposition Process[rdquo] spreadsheet (the [ldquo]Spreadsheet[rdquo]). The Spreadsheet makes broad assertions on how the Forest Service incorporated public comments in creating its Draft EA and Management Plan. For example, in response to ISPMB[rsquo]s letter and 2,275 pages of attachments, the Spreadsheet indicates only that the Forest Service considered [ldquo]Attachments from Mr. Gillman.[rdquo] It would be impossible to regard this as meaningful response to ISPMB[rsquo]s comments. The Forest Service failed to offer any explanation for its decision not to implement any of ISPMB[rsquo]s comments. The Forest Service failed to offer sources or authorities to negate ISPMB[rsquo]s comments, both of which are required by

40 C.F.R. [sect] 1503.4(a). Thus, the Draft EA is arbitrary and capricious in violation of the APA and NEPA.

The Draft EA deviates from set standards without adequate justification, and is therefore arbitrary and capricious

The Forest Service deviates from the Bureau of Land Management Handbook without any rational explanation, which renders its findings arbitrary and capricious. The requirement that agency action cannot be arbitrary and capricious includes a requirement that the agency act consistently with agency practice, guidelines, and policies. An [ldquo]unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.[rdquo] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (quoting National Cable & Telecomms. Ass[rsquo]n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)). Agency action that is inconsistent with its handbook, without a valid explanation for the deviation, is also [ldquo]an indication of arbitrary and capricious behavior.[rdquo] League of Wilderness Def[rsquo]rs v, U.S. Forest Service, Civ. No. 00-464-KI (D. Or. 2005).

When an agency deviates from its own guidelines, the courts will consider the agency[rsquo]s explanation for the

deviation in determining whether the action was in fact arbitrary and capricious. See Lake Mohave Boat Owners Ass[rsquo]n v. National Park Service, 138 F.3d 759, 763 (9th Cir. 1998). Deviations from set standards provide a basis for rejecting an agency[rsquo]s decision where [ldquo]the agency provides no explanation at all for a change in policy, or when its explanation is so unclear or contradictory that we are left in doubt as to the reason for the change in direction.[rdquo] Morales- Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007); see also, Lands Council v. Martin, 529 F.3d 484, 493 (9th Cir. 2008) (applying Morales-Izquierdo to hold that the Forest Service provided

a [ldquo]rational explanation[rdquo] for its change in policy that did not leave the court [ldquo]in doubt as to the reason for the change in direction.[rdquo]).

In the Proposed Appropriate Management Level Determination, the Forest Service states that it follows [ldquo]the multi-tiered analysis process described in the Bureau of Land Management Wild Horses and Burros Management Handbook H-4700-1[rdquo] (the [ldquo]BLM Handbook[rdquo]). The Forest Service goes on to strictly apply the BLM Handbook for most of its analysis. However, the Forest Service chooses to deviate from the BLM Handbook in two areas [ndash] arguably the two most pivotal sections of the analysis [ndash] where the handbook would not produce the results the Forest Service wants.

Deviation #1: appropriate management level determination

The first deviation appears in the tier 2 analysis. The BLM Handbook[rsquo]s tier 2 analysis is designed to calculate the appropriate management level (the number of horses that can live in the area without causing deterioration to the environment). The BLM Handbook states that, if land health standards are being met for the area (as they are here), [ldquo]the appropriate management level is set by considering the number of horses using the area during the evaluation year.[rdquo] See H-4700- 1, Chapter 4 (4.2.1). However, the Forest Service deviates from the BLM Handbook, and instead decides to calculate the appropriate management levels based on [ldquo]average available forage production.[rdquo] It concludes that the appropriate management level is 104 horses based on available forage in the Territory, not actual range conditions.

The Forest Service provides no explanation for its deviation from the handbook. Instead, it says without any scientific support of factual basis that its deviation is actually better for the

horses. It claims that the appropriate management level under the BLM Handbook would actually be less, 51 horses, because that is the number of wild horses in the Heber Wild Horse Territory. However, as stated in ISPMB[rsquo]s response to the scoping document, there is no accurate count on the number of wild horses in the Territory. The Forest Service cannot simply rely on its inaccurate and unsubstantiated count of 51 horses to justify deviating from the BLM Handbook. Because the Forest Service deviated from its own guidelines and offered no explanation outside of its false assertion that it is doing the wild horses a favor, its determination of appropriate management levels is arbitrary and capricious.

Deviation #2: genetic diversity requirements

The second deviation appears in the tier 3 analysis. The BLM Handbook[rsquo]s tier 3 analysis dictates the appropriate herd sizes to maintain genetically diverse horse populations. The BLM Handbook says that there must be a minimum herd size of 150 to 200 horses to maintain genetic diversity and herd fitness, and to avoid inbreeding depression in wild horse populations. See H- 4700-1, Chapter 4 (4.4.6.3). However, the Forest Service decided to disregard the BLM Handbook and keep the appropriate management level at 104 horses.

The Forest Service provides no explanation for its deviation from the BLM Handbook. Instead, the Forest Service makes vague promises to ensure genetic diversity by implementing some type of management action sometime in the future, without offering any specifics. Because the Forest Service deviated from existing federal guidelines

on maintaining genetic diversity and offered no explanation outside of its plan to possibly handle this in the future, its determination of appropriate management levels is arbitrary and capricious.

The Forest Service Must Recognize the Heber Herd[rsquo]s Status as [ldquo]Wild Horses.[rdquo]

The significance of the horses[rsquo] status as [ldquo]Wild Free-Roaming Horses.[rdquo]

The Wild Horse and Burro Act defines [ldquo]wild free-roaming horses and burros[rdquo] (referred to herein as [ldquo]wild horses[rdquo]) as [ldquo]all unbranded and unclaimed horses and burros on public lands of the United States.[rdquo] 16 U.S.C. [sect] 1332. 36 C.F.R. 222.63 provides special protection for horses that did not fall initially within the protection of the Wild Horse and Burro Act if they are subsequently introduced into a protected territory [ldquo]by accident, negligence or willful disregard of private ownership[rdquo] and which become intermingled with wild free-roaming horses. [ldquo]Wild free-roaming horse[rdquo] is a legal status. See e.g. 16 U.S.C. [sect] 1333(d) (section titled [ldquo]Loss of status as a wild free- roaming horses and burros[rdquo]). This status is important for at least the following reasons:

The status gives the federal government jurisdiction over the horses. 16 U.S.C. [sect] 1333.

Management principles under the Wild Horse Act must be applied. Id.

The horses cannot be removed or sold without proper authorization.

It is a criminal act to maliciously kill or harass the horses. 16 U.S.C. [sect] 1338

It is a criminal act to process the hoses into commercial products (such as selling them for meat processing). Id.

The Draft EA states, [ldquo]following a large wildland fire in 2002, horses began to be observed.[rdquo] However, acknowledged historians for the Territory trace the history of the wild horses directly back to the journeys of the Jesuit Priest, Father Eusebio Kino, in his explorations of the area for new mission sites during the late 17th and early l8th centuries. See Jinx Pyle, Narrative of History of Wild Horses on the Mogollon Rim (Aug. 2005), attached hereto as Exhibit 6. Books on the area, including the famous account of the Hashknife Ranch by Stella Hughes, verify the continued existence of the horses on the Rim and of their great value to the ranchers who often caught a few and made them prized ranch horses. See Stella Hughes, Hashknife Cowboy; Recollections of Mack Hughes (1996), attached hereto as Exhibit 7; see also Joan Baeza, Horses of Arizona,2 Arizona Highways 65 (Feb. 1988), attached hereto as Exhibit 8; Bob Thomas, The Astonishing Double Life of Frontier Rancher Cecil Creswell, Tl Arizona Highways 10 (Oct. 1995), attached hereto as Exhibit 9; The Holbrook Argus, Vol. XII No. 26 (Oct. 1, 1907), attached hereto as Exhibit 10; Will

C. Barnes, University of Arizona Bulletin, Vol., VI, No. 1, General Bulletin No.2 Arizona Place Names (Jan. l, 1935) (excerpt) ([ldquo]Bronco Mountain[rdquo]), ([ldquo]Dry Lake[rdquo]), ([ldquo]Wild Horse Lake[rdquo]), attached hereto as Exhibit 11. Spanish horse experts, who have visited the area, verify the remarkable resemblance of many of the herds to the Andalusian, the Spanish Barb, and the Spanish Colonial horse, ridden by Spanish soldiers who visited the area with Jesuit priests, explorers and settlers. See Jinx Pyle, Narrative of History of Wild Horses on the Mogollon Rim (Aug.2005), Exhibit 6.

The USFS has historically concocted reasons to diminish the existence and importance of the wild horses and the Territory. For one, it has made an (erroneous) assumption that the wild horses present in the Territory before the Rodeo-Chediski Fire originated from the Fort Apache Indian Reservation or were abandoned. This assumption is contradicted by local accounts regarding the wild horses. Local families remember wild horses in the area from the 1930s to the present. See Letter to Zieroth, dated August 25, 2005, attached hereto as Exhibit 12; see also Affidavits of various Heber area residents (conclusively demonstrating the historic presence of the

unbranded, unclaimed (wild) horses on public lands associated with the Apache-Sitgreaves Forests for well over 30 years prior to the Rodeo-Chediski fire), attached hereto as Exhibit 13; see also Photographs of horses in the area taken in the fall of 2006 (conclusively showing the lack of any branding), attached hereto as Exhibit 14.

Additionally, wild horse behavior expert, Mary Ann Simonds, has opined that the horses have inhabited the Mogollon Rim where the Territory is located since at least the early 1900s and most likely since 1699. See Mary Ann Simonds, Determination of Whether Horses Inhabiting the USFS Heber Wild Horse Territory are [ldquo]Wild Free-Roaming Horses[rdquo], dated March 5,2007, at 8, attached hereto as Exhibit 15. Simonds concluded, among other things, that:

At least two or more distinct bands of wild horses exist in the Territory.

One group, with a dominant buckskin stallion, numbered from 15-30 horses. Another group, with a dominant black/bay stallion, numbered approximately 15-30 horses.

Field observations from October 2006 support these findings, as fresh manure and hoof prints were observed throughout the area and especially near water sources.

Id. at 2. Simonds recommended that investigations into the behavioral ecology of the wild horses be conducted to develop baseline data and determine the best management practices in order to preserve the wild horses that represent the [ldquo]living symbols of the historic and pioneer spirit of the West.[rdquo] Id. at 3.

Notwithstanding, the USFS continues to rely on unproven claims regarding the alleged diminishing of wild horses in the Territory. Significantly, when put to the test under the fire of litigation, the USFS was utterly unable to support these rumors. See Order Granting Injunction, Exhibit 2. The Plan contains only cursory information regarding the population of wild horses in the Territory. Nor is there any indication therein regarding how the USFS determined the population of wild horses at any time since the United States Congress established the Territory.

There is no scientific study or facts to indicate that only two mares remained in the 1990s or that the stud for the herd was sterile. The USFS has done absolutely nothing to prove these rumors. In 1971, there were at least seven horses occupying the Territory, but likely many more. See Forest Service Memo to Regional Forester, attached hereto as Exhibit 16. It is not known how the USFS estimated the population of the horses. See Deposition of Bumpus, taken Oct. 13, 2006 ([ldquo]Bumpus Dep.[rdquo]) at 36:23-37:25, attached hereto as Exhibit 17; Hughes Deposition, taken Oct. 5, 2006 ([ldquo]Hughes Dep.[rdquo]) at 66:4-22, attached hereto as Exhibit 18. This appears to be nothing more than a guess based upon a single fly-by. In 1974, the USFS speculated that [ldquo]the stud [for the herd] may be sterile as no colts have been seen for several years, and there is no indication of unauthorized removal.[rdquo] See Forest Service Memo to Regional Forester, attached hereto as Exhibit 16. The USFS never took any action to test this unverified assumption. Based on incomplete and marginal surveys, from 1974 to 1978, the population of the herd appeared to decrease from seven to three. In 1980, however, the population increased to eight head which suggests, contrary to the USFS[rsquo]s suspicion in 1974, that the stud was not sterile. See Documented Wild Horse Population Numbers, Heber Wild Horse Territory, Apache-Sitgreaves National Forests, attached hereto as Exhibit 19. The wild horse population reportedly dropped to five head in 1982 but increased to seven head in 1984 before holding steady at five head between 1986 and 1991. Id. In 1992 the population was listed as zero. Id. However, the USFS indicated as late as 1993, that there were two mares left in the herd. See Territory Withdrawal Recommendation, attached hereto as Exhibit 20.

The USFS has consistently disregarded the Act[rsquo]s requirement to maintain a current inventory of wild horses. See 16 U.S.C. [sect] 1333(b). Indeed, a census was never conducted to

accurately estimate the wild horse population in the Territory - let alone the A-S Forest. See Wild and Free Roaming Horses and Burros on Public Lands Report (estimating the wild horse population in the Territory to be 5 head, but indicating the estimate was not based on a census), attached hereto as Exhibit 21; See also Klein Deposition, taken Oct. 13 ,2006 ([ldquo]Klein Dep.[rdquo]) at l9:14-21:17 (indicating that a census was not conducted to determine whether there were only two horses left), attached hereto as Exhibit 22; Zieroth Deposition, taken Sept. 25,2006 ([ldquo]Zieroth Dep.[rdquo]) at 28:23-30:21 (indicating that she was unaware of any inventories after 1993), attached hereto as Exhibit 23. In addition, it is not clear whether foals or losses from deaths were always included in the estimates of the number of horses. See Forest Service letter to Denver Public Library (noting the population estimate as of December 1973 did not include the 1974 foal crop or death losses), attached hereto as Exhibit 24. USFS employees do not know how the population numbers listed in the historical documents were obtained. Hughes Dep. at 65:13-70:22, Exhibit 18; Bumpus Dep. at 37:10-39:11, 65:22-66:20, Exhibit 17.

Little is known about the [ldquo]inventory[rdquo] in 1993 which indicated that there were two horses remaining in the Territory. Klein Dep. at 19:14-21:17, Exhibit 22. The USFS continued to report the wild horse population as zero in 2004 even though it never conducted a recent census. See Zieroth Dep. at 28:23-30:21, 49:5-50:10, Exhibit 23; Klein Dep. at 35:2-23, Exhibit 22; Hughes Dep. at 26:4-22, Exhibit 18; Bumpus Dep. at 40:2-42:2, 65:22-66:20, Exhibit 17; See also Order Granting Injunction at p.4 (finding the evidentiary value of the of the USFS[rsquo]s documentation of zero horses to have de minimus value, because USFS failed to explain how the figures were derived), Exhibit 2.

Notably, USFS Black Mesa Ranger District Ranger Kathleen Klein testified that she only came to the realization that the Territory had not been disbanded after the 2005 Litigation was filed. She provided that it was at that time that she actually reviewed the provisions of the Act. Klein Dep. at 46:3-23, Exhibit 22. She also testified that the USFS then recognized that Forest Supervisor Bedell either had not withdrawn the territory or he was not able to do so. See Klein Dep. at 51:1-52:24, Exhibit 22, This documentation (along with additional evidence) was provided to the USFS in the 2005 Litigation. Accordingly, the USFS has copies of these documents and knowledge of this information.

Ms. Klein acknowledged that it was USFS practice to discount the existence of the Territory and of the wild horses. Klein Dep. at 52, Exhibit 22. Despite prior court orders and legally binding agreements to the contrary, the Plan continues this alarming practice in violation of the Act. This must be corrected.

The exact source of the current population of horses utilizing the Sitgreaves National Forest is unclear, and they may or may not have any relationship to the original population of seven horses. While the source of the current population of horses is uncertain, the Forest Service has nonetheless decided to manage horses inhabiting the territory or nearby areas as wild under the Act, unless particular horses are branded, claimed, or shown to be introduced onto the National Forest System by accident, negligence, or willful disregard of private ownership[rdquo]. It is essential that the Forest Service instead designates these horses as [ldquo]wild free-roaming horses[rdquo] or else their status is subject to future collateral attack.

Assessing criminal penalties for the ongoing horse killings.

Someone is shooting the Heber wild horses. Since October 2018, more than 30 horses have been shot and killed in the Apache-Sitgreaves Forest ([ldquo]A-S Forest[rdquo]). This is an ongoing issue. Most recently, a foal was killed in early January 2020. See Exhibit 25. No one has been apprehended.

Robert Hutchison has reported several horse killings to John Lopez, the Forest Service Investigator. Mr. Hutchison has documented the location of the horse killings on the attached map.

Stacy Sanchez witnessed people feeding wild horses; the following week, he found the horses dead with blood

coming from their mouths, noses, and anuses. Mr. Sanchez reported this incident to John Lopez, the Forest Service Investigator, who mentioned that the cause of death could be anthrax. No investigation to identify the individuals who fed the wild horses occurred. Kathie Reidhead is an amateur photographer who witnessed a man shooting at the wild horses in the Heber Territory on May 2, 2019. Her experience in attempting to report the incident is documented in the attached article. Exhibit 26 .

An individual who kills a wild horse or burro [ldquo]shall be subject to a fine of not more than $2,000, or imprisonment for not more than one year, or both. Any person so charged with such violation by the Secretary may be tried and sentenced by any United States commissioner or magistrate judge . . . .[rdquo] 16 U.S.C.A [sect] 1338. Under the Criminal Fine Improvements Act of 1987, the maximum amount of a fine for a misdemeanor offense was increased to $100,000 for an individual. 18 U.S.C. [sect][sect] 3571(b)(5), (c)(5).

Under criminal law, the prosecutor must prove every element of a crime to support a conviction. The status of these horses as [ldquo]wild free-roaming horses[rdquo] is one of the elements that the prosecutor will need to prove once the shooter or shooters are caught. The Forest Service[rsquo]s refusal to acknowledge the horses as [ldquo]wild free-roaming horses[rdquo] turns a clear path to a verdict into potential quicksand for any prosecutor. If the Forest Service is serious about prosecuting these individuals who have been shooting horses in the abdomens and leaving them to slowly suffer and die, the agency needs to give prosecutors the right tools by clearly acknowledging that the horses are [ldquo]wild free-roaming horses[rdquo] and not just to be managed as such. Without this clear legal designation, the hammer law enforcement holds could turn out to only be an inflatable carnival toy.

Asserting authority and jurisdiction

The states have authority over wildlife within their borders; however, the Wild Horse and Burro Act establishes federal jurisdiction over horses located on Federal lands at the time of the act. See Kleppe v. New Mexico, 426 U.S. 529 (1976).

Accordingly, if the Forest Service is going to claim jurisdiction over the wild horses for purposes of their management, the agency must also acknowledge their status as wild free-roaming horses. To only [ldquo]treat[rdquo] the horses as wild is to only pretend the agency has jurisdiction over them.

Just as the designation is necessary for the Forest Service to establish jurisdiction over the wild horses, the Act imposes certain obligations and directives upon the agency to manage the horses pursuant to certain management directives set forth by congress. This includes that [ldquo]All management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.[rdquo]

The horses are properly designated as [ldquo]Wild Horses[rdquo]

Definition

The Wild Horse and Burro Act defines a wild and free-roaming horse as [ldquo]all unbranded and unclaimed horses and burros on public lands of the United States.[rdquo] See also 43 CFR [sect] 4700.0- 5 ([ldquo]all unbranded and unclaimed horses and burros that use public lands as all or part of their habitat.[rdquo]). The horses roaming the A-S Forest are entitled to a presumption that they are wild and free-roaming.

Existing data

Wild horses have roamed the forest near Heber since at least the beginning of the 20th century. The Library of

Congress has newspaper articles, from the late 1800s and early 1900s that reference the existence of wild horses throughout the Heber area. Copies of these articles were included in ISPMB[rsquo]s response to the scoping document. Other books and articles written in the past century documented the Wild Horses[rsquo] existence from that time to the present day. Acknowledged historians for the Heber Wild Horse Territory have written that the horses first arrived in the area with the Jesuit Priest, Father Eusebio Kino, in his explorations of the area for new mission sites during the late 17th and early 18th centuries. See Jinx Pyle, Narrative of History of Wild Horses on the Mogollon Rim (Aug. 2005). Exhibit 6. Excerpts were also provided in ISPMB[rsquo]s response to the scoping document, but not considered.

Books on the area, including the famous account of the Hashknife Ranch by Stella Hughes, verify the continued existence of the horses on the Mogollon Rim and of their great value to the ranchers who often caught a few and made them prized ranch horses. Several of these were also attached as exhibits to ISPMB[rsquo]s response to the scoping document. ISPMB also provided a pamphlet that was prepared by a long time Heber resident, Gerri Wager, which summarized the dates from several of the historical references.

As a part of the 2005 litigation, ISPMB entered multiple affidavits into the record from several long-time Heber area residents or frequent visitors. Each attested to the presence of wild horses in the A-S Forest up to 30 years before the Rodeo Chedaskai fire, and in numbers far greater than the Forest Service has acknowledged or documented. However, the Forest Service did have some knowledge of this. A letter (obtained from the Forest Service pursuant to a FOIA request) penned by Doy Reidhead, who was hired by the Forest Service to conduct an illegal gather in the 1980s, to the agency states that the horses he was hired to remove had been in the Black Mesa and Lakeside Districts since at least 1967.

In the 2005 Litigation, ISPMB also submitted an expert report prepared by Mary Ann Simonds, which combined a review of historical records, field observation of the horses and habitat, and social research through conducting interviews to conclude that there was sufficient evidence to conclude that there were at least two or more stable groups of 15-30 wild horses in or near the Heber Wild Horse Territory. Exhibit 15. This document has also repeatedly been submitted to the Forest Service for consideration in the preparation of the Scoping Document, and it has similarly been repeatedly ignored.

In the Draft EA the Forest Service continues to challenge the horses[rsquo] status as [ldquo]wild and free-roaming[rdquo] on the basis of the same bad data that it relied upon in the draft Environmental Assessment Scoping Document and in the early 2000s when the agency was preparing to undertake a gather and fully eradicate the horses from the Forest.

The 1997 study was reviewed in a federal court of law, and the judge held that the agency[rsquo]s evidence was [ldquo]denied as moot because the evidentiary value of the table is de minimis-defendants fail to explain how these figures were derived.[rdquo] See Exhibit 2. Why the Forest Service continues to rely upon that survey, tout it on the Heber Wild Horse page of the agency[rsquo]s website, and pay homage to it in the Draft EA defies logic. Even if the Forest Service felt the need to reference the study, it should also acknowledge the study[rsquo]s utter lack of probative value. Agencies are meant to represent experts in the areas within their purview. The willful regurgitation of this study time and again degrades the agency[rsquo]s credibility and raises serious concerns about whether the agency is actually preparing a plan or blindly going through the motions.

The Forest Service also cites to an ethnographic study, wherein a number of unidentified persons were interviewed concerning the presence of the wild horses in the A-S Forest.

As stated in ISPMB[rsquo]s response to the scoping document, the study has limited scientific value for the following reasons:

There were only ten interviewees,

The selection of ten anonymous individuals prevents opportunity for follow-up or cross-examination of the contributors.

Interview of Subject A is missing several questions, but the answers suggest that the questions may have been leading, and (as acknowledged in the study) varied from the questions asked of the other participants.

The Forest Service had access to the affidavits (addressed above) and an expert report from the litigation which speak to the historical presence of wild horses in the A-S Forest, but the Ethnographic Study does not appear to utilize any of that information.

The Forest Service uses this study to make sweeping determinations about wild horse habitation in the Territory.

The conclusions from the Ethnographic Study entirely discount the value of historical documentation concerning wild horses in the A-S Forest by implying that the horses that are currently in the forest were not always wild.

In 2006, through the litigation between ISPMB and the Forest Service, dozens of signed affidavits were entered into the record. Exhibit 13. These affidavits were from individuals who have lived in the Heber area, some for their entire lives. None of these individuals were questioned or approached by the Forest Service, and the agency did not cite to these affidavits in the Ethnographic Study or the Draft EA. ISPMB provided the Forest Service with copies of the affidavits in its response to the scoping document. The Forest Service has continued to ignore this contrary evidence.

The Draft EA and related documents do not support a finding that the horse population needs to be reduced.

The Proposed Appropriate Management Level Determination (Population Proposal) relies on the same Ethnographic Study discussed above. It also references three flyover studies conducted in the 2010s, and wildlife surveys that were conducted by the Arizona Game and Fish Department in the early 2000s. That Arizona Game and Fish data shows that the population levels could have been as high as 253 horses in 2006. The double counting methodology that the Forest Service used in the flyovers provides a wide range of possible population levels. Based on this data, there may have been as many as 258 horses in the 2012 study, and as few as 270 horses in the 2017 study. This shows a potentially stable population level, which contradicts the Forests Service[rsquo]s assumptions that mass population control measures (administration of PZP, artificial management and control of horse herd age and gender composition, excess declarations followed by removal, etc.) are necessary. Much of the BLM[rsquo]s data is derived from observing heavily managed and disrupted horse herds. The Heber horses have not been managed, and they appear to have potentially reached an equilibrium within the Apache-Sitgreaves Forest. The Forest Service has also acknowledged that the horses are healthy, which does not support a finding of excess. Further, ISPMB has conducted studies on its own herds, which it has maintained through least intensive management principles [ndash] i.e. by leaving them alone. The data from ISPMB shows that horse herd reproductive rates decrease, and their populations will reach an equilibrium when they are not heavily managed. This is proven with ISPMB[rsquo]s herd as their growth rate with the best of feed conditions was under 8-9% and BLM touts 20-28%.

Further, the historical data contradicts the Forest Service[rsquo]s assertion in the Draft EA that the wild horse population doubles every four years. Even using the highest population estimates, there was just under 300 horses in the A-S Forest in 2006 based on data from Arizona Game and Fish, and in 2020, ISPMB members have counted fewer than 450 horses (again, these are the upper ranges of the possible populations). If the Forest Service[rsquo]s projections are accurate, and the horse population doubles every 4 years, then by 2010 there would have been 600 wild horses, in 2014 there would have been 1,200 wild horses, and currently in 2021 there should be over 2,400 wild horses. This is not the case.

This herd has largely been untouched since 2006 and would represent a great study group of healthy, functional horses, whose social structures have remained intact for nearly 16 years or longer since they were not removed prior to 2006. See Exhibit 27. . In the wild, one would estimate that growth would be less than ISPMB[rsquo]s population who were well nurtured and fed and watered. ISPMB believes the 1980 National Academy of Sciences states growth rate at that time was 4%. However, when the government destroys the makeup of the family, it can create [ldquo]dysfunctional[rdquo] behaviors where younger stallions begin breeding younger mares and yes, possible populations will rise.

To remove any of these horses who are living in harmony with their landscape in the Apache-Sitgreaves Forest would be a travesty. This herd deserves to be studied further in the area where the horses now roam. The horses are not impacting their habitat and therefore, they are not in excess which is the only reason to remove wild horses. Although the definition of excess is not detailed in this report, it is defined by the 1971 law that the Agencies must determine who is causing damage to the habitat including livestock or any other animal using the habitat area and only those animals causing damage to the habitat must be removed.

A. The Value of the Heber Wild Horse Herd and A-S Forest for Scientific Research and Observations from the ISPMB Herds.

When the 1971 Act passed in Congress without one dissenting vote, ISPMB and our first president, Wild Horse Annie, wanted the management of the animals to fall under the National Park Service whose mission it is to manage for natural and cultural resources. It was felt at that

time, wild horses and burros were not native to this continent and therefore would not fall under the mission of the Park Service.

In ISPMB[rsquo]s analysis of the BLM[rsquo]s program, it became quite evident that management of wild horses and burros was not based on understanding the animals as wildlife species but more an attempt to manage them as if they were domestic livestock.

This is understandable in view of the fact that the BLM was primarily a [ldquo]livestock[rdquo] agency prior to the 1971 Wild Horses and Burros Act, managing the land for livestock, mainly cattle.

In fact, when the BLM was known as the Grazing Service in 1939, they had ordered the killing of hundreds of thousands of wild horses and burros during that decade and their exploitation of wild horses and burros continued for nearly thirty years.

The Public Rangelands Improvement Act of 1978 directed in part that the Bureau of Land Management (BLM) and the National Academy of Sciences (NAS) contract for performance of a research study on wild horses and burros. The report was in partial compliance with the Act and represented the final report on Phase I containing current knowledge and recommended research on wild horses and burros. (1980 [ldquo]Wild and Free Roaming Horses and Burros: Current Knowledge and Recommended Research[rdquo] published by the U.S. Department of Commerce, National Technical Information Service.) Phase I recommended 18 research projects, some of which would require 7 to 10 years of study for valid results.

Phase II was published in October 1982 and synthesized the results of completed research on wild horses and burros. With the final report to Congress due on January 1, 1983, the NAS committee identified five of the 18 projects as having priority for immediate study.

Further the NAS final report called for a [ldquo]long-term equid research program[rdquo] and an [ldquo]expanded in-house scientific staff[rdquo] to provide a solid foundation of scientific data on which to base management decisions. However, the Agencies (Dept. of Agriculture and the Interior Department) felt that no further research

would be needed partly due to financial constraints. Quoting the Report to Congress June 1984, [ldquo]the most pressing question concerning further research for the Agencies is whether the benefits of increased knowledge and efficiency will justify the cost.[rdquo]

Now in the fiftieth year since the Wild Horses and Burros Act was signed into law (1971),one glaring study of the eighteen proposed has never been completed. This is study number sixteen titled [ldquo]Conceptual Development of Public Rangeland Management Models.[rdquo] This study was to be the final study after compilation of the other seventeen studies and was to serve as the [ldquo]model[rdquo] in which to manage wild horses and burros.

Had this study been completed, management of wild horses and burros would have been at the [ldquo]minimal feasible level[rdquo] as required in the Wild Horses and Burros Act and far fewer animals would be in holding pastures today. Habitat monitoring to determine excess wild horses and burros, as required by the Act, would have created a healthier ecosystem and finally, the actual costs to complete these studies in 1983 would have been millions upon millions of dollars cheaper than the costs incurred through the mismanagement of the program today by the Agencies.

In light of the absence of a [ldquo]model[rdquo] management program by the Agencies and the controversies created by such, ISPMB set out to begin our own studies of wild horse herds in 1999. The organization has completed observations on four different herds over eighteen years including two herds that received the (Environmental Protection Agency) EPA approved pesticide anti- fertility drug known as PZP (Porcine Zona Pellucida Vaccine).

The following report details the information gathered by ISPMB through observations and ISPMB[rsquo]s quest in understanding the true nature of wild horses. ISPMB[rsquo]s goal has been to develop the best [ldquo]model[rdquo] for managing wild horse herds on public lands. Please note that the two herds ISPMB used, (Gila Herd and White Sands Herd), that created the baseline for our studies had lived together without being disturbed for up to 50 years and continued through the 17 years that they were in possession of the organization.

ISPMB presents this document today as testimony to advocate for the protection and preservation of the Heber Wild Horses on the Apache-Sitgreaves Forest near Heber, Arizona. There is nowhere left on public lands any herd that has not been disturbed, disrupted, captured, families torn apart with the exception of the Heber Wild horses. Due to litigation and the Forest Service[rsquo]s slow response in developing a Territory Plan as required by litigation, the horses have had at least, if not more than, fifteen years of respite from capture, and removal and allowed to live their lives as the 1971 Wild Horses and Burros Act required with [ldquo]minimal feasible management.[rdquo]

Recently, the Forest Service did a count of the Heber wild horses stating there were 450 animals that roam on at least 300,000 acres of forest land. The initial count after the Rodeo- Chediski Fire on June 18th, 2002 and its containment on July 7, 2002 there were approximately 300 wild horses according to the Forest Service.

What has come to light since the recent census of the Heber wild horses is the growth rate based on fifteen-years of allowing the horses to self-regulate their numbers. This rate is approximately 3% which is near what the National Academy of Sciences 1980 Report projected (7%).

This new information has extraordinary implications and correlates with ISPMB[rsquo]s studies of its two herds that were untouched for nearly seventeen years with growth rates under 10%. Since BLM states that wild horses double every four years and growth rates are 20% yearly, this herd would represent what happens to herds when they are not disrupted every four years by capture, disruption of family bands, and would create a management plan which would be to the benefit and future preservation of all wild horses in our country. This new management prescription would reduce millions upon millions of tax-payers dollars spent on removals, holding

centers where wild horses languish, veterinarian costs, administrative costs etc. and most importantly would create healthy herds with highly evolved social structures.

Section 10 of the Act states, [ldquo]The Secretaries are authorized and directed to undertake those studies of the habits of wild free-roaming horses and burros that they may deem necessary in order to carry out the provision of the Act[rdquo]

ISPMB recommends that the Heber Wild Horse herd be studied by a university consisting of the following scientists such as behaviorists, wild horse ecologists, habitat specialists and other recommended scientists selected by the Forest Service and ISPMB. This study would complete one of the most important studies never undertaken by these federal agencies, long overdue, and which was recommended by the National Academy of Sciences in 1980 as noted above.

ISPMB[rsquo]s Herd Information:

White Sands Herd:

ISPMB started with 70 wild horses in 1999.

In 2016, the final count of wild horses was 273 horses representing 17 years of growth

Growth rate of 8.33% Gila Herd:

ISPMB started with 31 wild horses in 2000

In 2016 the final count was 137 wild horses representing 16 years of growth

Growth rate 9.73%

It was noted that these two stable populations of wild horses had family band stallions over the age of ten. These ages correlate with Dr. Denniston[rsquo]s 1974 study of the Red Desert Wild Horses in Wyoming whose youngest band stallion was twelve-years of age.

The maturity of the family bands and the wisdom and education process handed down from generation to generation to band members leads to females foaling for the first-time at ages 4-5 years and stallions commanding family bands at a very mature age often over ten-years.

Several observations of the Gila herd yielded information not seen by universities such as Princeton in their studies of wild equids. The observation was witnessed by two people and relates to the above information:

A young filly in her first estrus as a yearling left her family band galloping up a hill to a band of young bachelor stallions. This piqued the interest of the young bachelors and she could have easily been bred at this age having a foal at two years of age.

An extraordinary event happened when a family band stallion left his band and immediately went over to the filly and reprimanded her and sent her down the hill where she stopped and did not go to her natal band.

Another band stallion at the bottom of the hill again reprimanded this filly and she was pushed into her natal band. This filly never got pregnant until she was four-years of age. This led ISPMB to understand that this particular herd worked together for the good of the entire members of the herd. Another observation cemented this observation:

This herd was isolated in pasture and subject to coyotes and a rare mountain lion.

What was noted was their reaction to ISPMB[rsquo]s two dogs that jumped out of the truck to join the observers of this herd.

These horses were never exposed to any dogs which appear similar to coyote packs.

What happened was again extraordinary and put the life of these two dogs in jeopardy.

The entire herd gathered and moved quickly to stampede the dogs.

The dogs ran out of the pasture but came back again before they could be contained in the truck and the horses again gathered and stampeded with the intent to kill the dogs.

These two instances along with many other observations leads ISPMB to believe that leaving the bands intact with wise band stallions and wise mares leads to a stabilization of growth and maintains highly evolved social structures which can protect wild horses for eons of time.

Other observations of interest are the following:

Family band stallions and their mares stay together for the lifetime of the stallion. The units are very well bonded and show strong inseparable relationships.

When young colts show any sexual advances or are non-compliant with the family band stallion, the band stallion will remove them from the family band. Hence, the beginning of bachelor bands. Often, the ages are between two and three years of age. However, some young colts will remain with the family for up to five years if they show no sexual prowess.

There is tremendous respect of the family bands which is commanded through the education of band members. This comes from the wisdom of the elders.

This respect is honored by the bachelor bands who live in harmony with the family bands.

Observed was a bachelor stallion moving into a family band whose band stallion was becoming extremely elderly. There was no fighting between the stallions. When the elder stallion passed, the band was taken over by the bachelor stallion who was already nearly ten years of age. This smooth transition was another extraordinary observation and took place over one-year.

The draft EA and related documents do not support the proposed plan for the Territory

The territory should be expanded to include the full historical range of the wild horses at the time the Act was passed.

There is significant evidence that shows that the wild horses in the Heber area occupied a far greater portion of the Apache Sitgreaves Forest when the Act was passed than just the Territory. Accordingly, the Heber Wild Horse territory should be expanded to encompass the horses[rsquo] entire historical range at the time the Wild Horse and Burro Act was passed.

The presence of the Heber wild horses on a larger territory is evidenced, in part, by contemporaneous reports of [ldquo]trespass[rdquo] horses that were removed from neighboring allotments to the Territory. The attached 1974

Range Inspection Report covered 50 percent of the Buckskin, Gentry, Mud Tank and Heber Allotments. Those allotments/pastures encompassed 134,795 acres. The report identifies that there were several black or buckskin [ldquo]trespass[rdquo] horses within the allotments, and Number 11 says they rounded up some of the horses and sold them at public auction. The reports claim these are from the Apache reservation but does not detail how the horses were identified as such (the tribe often will notch livestock ears rather than use brands). Exhibit 28.

Also attached is the 1989 Range Management Plan for the Buckskin, Gentry and Heber- Mud Tank Allotments. Exhibit 29. Page 2, paragraph D states that they have an annual problem with [ldquo]trespass horses[rdquo] on the Gentry and Buckskin Allotments (pastures). Only 40.9 percent of the Gentry pasture is inside the Heber Wild Horse Territory ([ldquo]HWHT[rdquo]), and the Buckskin allotment in 1974 and 1989 is actually well east of the HWHT (around the area now called Phoenix Park, east of Forest Road 51). Again, the plan does not specify how the horses were identified as [ldquo]trespass[rdquo] horses.

This proves that horses were found on other parts of the forest outside the area they designated the HWHT in late 1973/early 1974. They call them [ldquo]trespass[rdquo] horses, but they have never shown how they identified them as [ldquo]trespass[rdquo] versus protected wild horses. In fact, any horse in one of their cattle pastures was considered a [ldquo]trespass[rdquo] horse.

There is also a gentleman who owns property adjacent to the Pierce Ranch that recalls rounding up Buckskin and black horses in the early 1970s.

The Territory is not suitable for sustaining the wild horses on its own.

Significant portions of the topography of the existing Territory is not suitable for the horses. A significant portion of the territory is located within a canyon with steep walls that would prevent the horses from moving East to West, and cattle grazing allotment fence lines prevent the wild horses from moving North and South within the Territory. Members of ISPMB have hiked the fence lines of each of the allotments in the Territory and noted that the gates of each of the fenced areas are closed, even though the cattle are not currently present. There are also sheer cliffs in the Territory which horses could not climb. Horses have been locked out of the [ldquo]proposed[rdquo] territory.

The area was hiked last month, and the gates are still locked, and cattle have not been present since the fall.

The EA references 20 [ldquo]dependable[rdquo] water sources within the Territory and claims that they are accessible by the horses. In light of the existing fencing and canyon walls, it is not clear that the horses are able to access each of these water sources. The Forest Service should conduct an in- person study where it physically accesses each of theses water sources to determine if the horses can actually access them. ISPMB[rsquo]s members have done just that and believe there are several water sources that the horses cannot reach.

Further, the EA water chart says that the agency checked for water sources in July 2014 and found ample creeks and streams. Late June/early July is when the monsoon season usually begins, which would bring rainfall and result in the runoff that the Forest Service likely observed. The agency should conduct a review during one of the drier months of the year, such as October [ndash] May.

Below is an excerpt from one local who has exhaustively examined the Territory:

I have been hiking and photographing the area for 3 solid days now in the northern half of the Territory, 6 hours each day. There is some very good grazing area, but it[rsquo]s been completely blocked off from the horses. The

Territory is inside a canyon, which prevents the horses from going east/west in much of this deep canyon, lined with sheer rock walls and rocky hills fit for mountain goats, but not horses. I have been following the fence lines both east and west from the cattle guards on Forest Road 86 which runs through the canyon from Heber to the 300 road/forest boundary to see if there are any openings for the horses to travel north/south within the territory. All gates so far are closed, although the last cattle were removed on Sept. 13, 2020. One fence line doesn[rsquo]t even have a gate on the east side of the road. I will be walking the fence line on the west side today. Where the Gibson Ranch is situated, there is a bottleneck to where I don[rsquo]t even believe the horses can pass through there to get from the north half of the territory to the south half of the territory. I[rsquo]m taking photos and video. There is also a very large area

that off-roaders have turned into a [ldquo]playground[rdquo]. An area about the size of two football fields, I would say. Off-roaders are tearing up this forest!

Something else I wanted to mention to you that I believe is important is I have never seen a single one of our iconic buckskins on the [ldquo]Territory[rdquo]. They are further east. The Plan calls for starting east and moving west with their gather. All of our iconic buckskins would be gone. In the last two years, I have observed and documented these horses for over 3,000 hours. I have over 10,000 videos and thousands of photos. Some are posted on YouTube and on Facebook under [ldquo]Friends of the Heber Wild Horses[rdquo]. I know the mare that was the last mare with Old Buck before he was shot and killed. He is the most iconic buckskin of all. The mare was pregnant, and I follow her foal, possibly Old Buck[rsquo]s last foal. Although not a buckskin, if the mare was impregnated by Old Buck, the foal carries his genes. The mare was named [ldquo]Hope[rdquo]. The foal is [ldquo]Justice[rdquo]. Our iconic buckskins like Legend, Dirk, Hairdo, Maximus and Cisco would all be removed with their plan. We also have some young buckskin studs that are just coming into their own and are acquiring their own bands. One particular stunning young buckskin is Thor. He is fierce! We have to fight for our buckskins! I saw 3 bands of wild horses on the Territory yesterday and 1 bachelor. There is a draw north of the Gibson Ranch where they can come in from the east into that pasture. They can not go any further west from there due to the terrain. The stallions for the 3 bands are bays, and I can only recall one buckskin mare. I[rsquo]d have to look back at the video.

The horses should not be restrained to the Territory.

The wild horses should not be restricted to the Territory. The horses are an established part of the ecosystem in the Black Mesa Ranger district and throughout the Apache-Sitgreaves National Forest. To rigidly restrict them to an area that they currently avoid (and are fenced out of) would be disruptive to the horses, grazing allotment holders, and the surrounding areas. To be clear, even if the livestock allotments predate the territory, the allotments are not property rights (See Oregon Nat. Desert Ass'n v. Singleton, 75 F. Supp. 2d 1139, 1152 (D. Or. 1999)), they can and should be revoked or limited within the HWHT as necessary to best protect the Heber Wild Horses and their welfare. Additionally, while the Multiple Use Sustained Yield Act does provide for multiple uses of public property, not every acre of the forest must be used for multiple uses. For example, an

active service mine cannot also be used as a wilderness area. The Wild Horse and Burro Act requires that the Territory is to be principally set aside for the wild horses and their welfare. A 50/50 split with cattle grazing and other wildlife is not [ldquo]principally[rdquo] used for the horses[rsquo] welfare when the Forest Service argues that the wild horse population will be too small to maintain a genetically diverse population.

Further, it is not clear why the Forest Service believes it is appropriate to constrain the wild horses within the Heber Wild Horse Territory. The horses should be permitted to freely ingress and egress from the Territory.

Additional concerns with the Proposed Territory Management Plan.

A comparison of the references made to riparian areas between the Heber Wild Horse Territory Plan documents

and the Heber Allotment Plan documents (cattle grazing) is absolutely astonishing. Domestic livestock (cattle) are clearly prioritized over wild horses, which, according to the 1971 Act and 36 CFR, are to be considered as a natural component of the public lands and are to be managed at a minimally feasible level. The Forest Service clearly views the horses as an invasive species and considers cattle as the natural component of our public lands. It is outrageous and a clear violation of both the letter and the intent of the 1971 Act/law. Cattle are given priority over the very health of the forest.

However, federal regulations give horses priority over cattle. 43 CFR [sect] 4710.5 states that public lands can be closed to grazing in order to support wild horse populations. Pursuant to the Act, the Heber Wild Horse Territory was designated as a [ldquo]sanctuary[rdquo] for the protection and preservation of wild horses. l6 U.S.C. [sect] 1333(a). Moreover, even designated ranges managed under a multiple use concept are to be [ldquo]devoted principally[rdquo] to wild horses. 16 U.S.C, [sect] 1332(c). The Forest Service[rsquo]s failure to analyze the consequences of livestock grazing on the wild horses is particularly glaring. In forest planning, [ldquo]the suitability and potential capability of National Forest System lands for producing forage for grazing animals and for providing habitat for management indicator species shall be determined.[rdquo] See 1982 Planning Rule 5 [sect] 219.20. Specifically,

Lands suitable for grazing and browsing shall be identified and their condition and trend shall be determined. The present and potential supply of forage for livestock, wild and free-roaming horses and buros [sic], and the capability of these lands to produce suitable food and cover for selected wildlife species shall be estimated. Lands in less than satisfactory condition shall be identified and appropriate action planned for their restoration.

Id. at [sect] 219.20(a) The Forest Service must consider, among other things, [ldquo]possible conflict or beneficial interactions among livestock, wild free-roaming horses and burros and wild animal populations, and [...] direction for rehabilitation of ranges in unsatisfactory condition. . .[rdquo] Id. at [sect] 219.20(b) (emphasis added).

Yet throughout the proposed Heber Wild Horse Territory Plan documents, there is reference to damage caused by wild horses. Any perceived damage where horses are considered by biased individuals to be a contributing factor, the horses are to be removed. It[rsquo]s a Queen of Hearts approach to managing our wild horses, it[rsquo]s an [ldquo]Off with their heads[rdquo] approach. It[rsquo]s no wonder, since the Forest Service has for decades had the policy of [ldquo]ridding the range of wild horses.[rdquo] The current Plan is just an extension of that policy.

Since its inception, the Forest Service has catered to cattle growers. As a matter of fact, the Forest Service and cattle growers are often one and the same. The individual who held the grazing permit to the Black Canyon Allotment worked for the Forest Service for 33 years, including when

the Forest Service delineated what is known today as the Heber Wild Horse Territory and established that the herd size was only 7 horses. No wonder the Territory is so poorly delineated that it is impossible that this was the true [ldquo]territorial habitat limits[rdquo] of our wild horses in 1973/74. It was a scheme to get rid of our wild horses and subvert the law.

If one looks at the Heber Allotment Plan documents (cattle grazing), they would believe that cattle apparently don[rsquo]t cause any damage to riparian areas, and, if anything should arise, the action is to [ldquo]monitor[rdquo] the situation. There is no reference at all to removing domestic cattle from our public lands.

Further, there is nothing to support a finding of [ldquo]excess[rdquo] because the ecosystem is healthy with the horses. [ldquo]A determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. Animal Protection Institute of America, 117 IBLA 3, 5 (November 20, 1990) (citing to Animal Protection Institute of American, 109 IBLA 112, 120 (1989)) Exhibit 30. Horse manure can help with seed casting,

See Exhibit 31. And even their foot steps can improve certain soil conditions. See Exhibit 32. Further, the draft EA materials repetitiously state that population control of the horses will be necessary to protect the riparian areas. However, the draft EA materials also acknowledge that the riparian areas in the range that the horses currently occupy [ldquo]are in or are trending toward proper functioning condition.[rdquo] The cattle, in contrast, are heavy users within riparian areas. See Exhibit 33.

An EIS is necessary.

The Forest Service continues to mitigate the importance of the Heber Wild Horse Herd ([ldquo]HWHH[rdquo]) and the agency[rsquo]s role in the HWHH[rsquo]s management because the agency (1) continues to pursue an environmental assessment in spite of substantial evidence that an Environmental Impact Statement ([ldquo]EIS[rdquo]) is necessary, and (2) has taken repeated steps that, at a minimum, suggest that the Forest Service has already determined how it will manage the HWHH.

Historically the Forest Service has minimized the significance of the HWHH. Indeed, the Forest Service employees who should have been managing the HWHH District Rangers did not even know that a wild horse territory existed when deposed in 2005. Klein Dep. at 46:3-23, Exhibit The agency has repeatedly relied on incomplete records to make significant decisions, including a decision to eradicate the horses from the forest, purportedly at multiple points in time.2 Roughly a decade later, in the Apache-Sitgreaves Land Management Plan issued in 2015 ([ldquo]LMP[rdquo]), the Forest Service made reference to removing wild horses if their numbers exceeded the population set forth in the still non-existent wild horse management plan, suggesting that the required [ldquo]no action[rdquo] option in any NEPA document had already been discarded. The LMP also identified the Heber Wild Horse Territory as [ldquo]suitable[rdquo] for every possible use imaginable, including livestock grazing; energy corridor and other energy development; communications sites; timber, production and tree cutting; motorized travel, including new designated motorized areas;

and mechanized recreation. See Land Management Plan at pp. 133-40. In short, the LMP contemplated nearly every use of the Heber Wild Horse Territory except as a sanctuary for the protection and preservation of wild horses, as required in the Act. See 16 U.S.C. 1333(a). This was only eight years after entering into the Settlement Agreement with my client in 2007, in which the Forest Service stipulated that:

The Heber Wild Horse Territory still exists and has not been dissolved.

The wild horses are by law an integral part and component of the natural system of the public lands, as expressed by Congress in the Act.

The USFS will work with the public, including ISPMB, in the development of a written Heber Wild Horse Territory Management Strategy in accordance with the provisions of the Act.

The gathers were halted, pursuant to injunction and then the Stipulated Settlement Agreement, and the LMP was corrected after ISPMB appealed the final LMP and worked with the Forest Service to amend the plan. However, the Forest Service still has not shown a commitment to backing a decision regarding the HWHH with reliable data or recognizing the significance of the Heber Wild Horse Management Plan.

As raised previously by ISPMB, the scoping document for the Management Plan shows that the Forest Service is still relying on old, impeachable data, an Ethnographic Study and the Working Group[rsquo]s recommendations to support proposals for highly invasive management strategies. In its response to the scoping document, ISPMB underscored why each of these sources were unreliable as a basis for the Heber Wild Horse Management Plan.

NEPA and the Need for an Environmental Impact Statement

An EIS is required when a proposed action [ldquo]Is likely to have significant effects and is therefore appropriate for an environmental impact statement.[rdquo] 40 C.F.R. [sect] 1501.3(a)(3). Further, [ldquo][i]n considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources. . .[rdquo] 40 C.F.R. [sect] 1501.3(b)(a). Significantly, NEPA mandates that the Forest Service take a [ldquo]hard look[rdquo] at the direct, indirect, and cumulative impacts on wild horses posed by any proposed project or activity within the Apache-Sitgreaves National Forests.

The Management Plan is highly controversial. The HWHH is a popular subject for the news media in Arizona because of their wide-ranging appeal throughout the region. Community meetings in the Heber area on the wild horses are generally well attended. The A-S Forest land is used for multiple purposes, including for grazing, recreation, a habitat for wildlife, the preservation of wild horses, and now timber production, with the roll out of the Four Forest Restoration Initiative. Each of these uses implicates a different set of needs, and each is represented by vocal advocates. The wild horse management plan will play a significant role in how the Forest Service balances each of these interests. In response to the scoping period, the Forest Service received a voluminous amount of public comments submitted as a part of the scoping process, including over 2,200 pages from ISPMB alone. ISPMB raised issues with several of the management strategies included in the scoping document. The scale of the cull that would be required to put the Management Plan contemplated in the Scoping Document into effect would be staggering and would undoubtedly lead to an outcry from concerned citizens, and potential litigation.

The effects of the management plan presented in the scoping document are highly uncertain. In past correspondences, and in ISPMB[rsquo]s response to the scoping document, ISPMB has laid out the federal requirements for when an EIS is necessary. There are a number of items at issue in the management plan, including whether and how to use population management strategies, whether to restrict the Heber Wild Horses to the Heber Wild Horse Territory, and whether and how many of the horses should be removed from the A-S Forest. The Scoping Document contemplates a series of high impact management strategies Indeed, the scoping document suggests a herd size that would require that nearly 5 times as many horses would be removed as are left in the A-S Forest. One alternative would restrict the horses to the precise bounds of the Heber Horse territory. This territory is crisscrossed with cattle allotments and associated fencing. Restricting the horses to this area will also increase competition for resources between the cattle and horses. These are just a few examples of the numerous decisions that will be determined as a part of the management plan.

Pursuant to the Forest Service Handbook, an EIS is necessary

Section 21 of the Forest Service[rsquo]s NEPA handbook, Factors to Consider, specifies that the Forest Service do the following when considering a proposed action:

Determine under its procedures supplementing these regulations (described in [sect] 1507.3) whether the proposal is one which:

Normally requires an environmental impact statement, or

Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment ([sect] 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by [sect] 1508.9 (a)(1).

A wild horse management plan of this magnitude does normally require an EIS. Consider the EIS prepared by the Bureau of Land Management, [ldquo]Draft RMP Amendment and EIS for Wild Horse Management in the Rock Springs and Rawlins Field Offices, Wyoming, DOI-BLM-WY- D040-2011-0001-RMP-EIS.[rdquo] That range management plan incorporates numerous wild horse management strategies that have significant impacts on the land usage for the Rock Springs and Rawlins Field Offices. It is analogous to the impact that the Heber Wild Horse Management Plan will have on the Territory and the surrounding areas. Numerous other planning documents, including the LMP will be impacted by the wild hose management plan, and it is appropriate and imperative that the Forest Service fully review the environmental impacts of this decision.

Conclusion

The Draft EA and proposed Actions categorically fail to recognize the role and significance that Congress, among others, has placed upon the wild horses associated the Heber Wild Horse Territory. The Forest Service continues to fail to meet obligations it has under federal acts such as the Wild Free-Roaming Horses and Burros Act and NEPA, including protecting and managing the wild horses and keeping current inventories of the same. The Draft EA makes references to unsubstantiated claims of the number of horses remaining on the Territory although a federal court has held these and similar unsupported claims to be of no evidentiary value.

Simply put, the Forest Service does not know what is in the A-S Forest. The most recent survey is years old. There is no evidence to support a finding of excess, and yet the agency proposes a significant population decrease. There are numerous issues that the Draft EA leaves open for future review and consideration including why the horses do not use the existing Territory. The first section addresses the shortcomings of the Draft EA under the Administrative Procedure Act ([ldquo]APA[rdquo]). The Draft EA fails to provide meaningful response to public comment and deviates from set agency standards without adequate justification. Proposes to limit the Horses to the Territory without cause and does not even acknowledge that the horses truly are [ldquo]wild and free roaming, yet the agency asserts jurisdiction over them.

ISPMB urges the Forest Service to rise to the occasion, to take the time to draft an EIS, conduct meaningful studies, using good data, and draft a management plan that is thoughtfully designed to sustain the wild horse population in the A-S Forest. Thus far the Agency appears to completely ignore public comments and cites to studies of other horses in other parts of the country or unqualified studies to support its plan, in violation of the APA, NEPA, and the Act.

Footnotes:

1 ISPMB also submitted comments on March 13, 2020, in response to the Scoping Document and thousands of pages of attachments, for inclusion in the record. The USFS should review though comments in addition to those submitted with this letter, as it appears they have been thus far disregarded.

2In a letter dated March 10, 1994 to Steve Bragg from Kate Klein, she provides [ldquo][w]e have observed unauthorized horses in the Phoenix Park unit this spring. You will try to capture them, if you can, in hopes to eliminate the few horses that are left this year, which is about eight head.[rdquo] See Letter from Klein to Bragg, dated Mar. 10, 1994. Exhibit 34

Exhibits 1-34 Submitted As Separate Comments Due to File Size Restraints