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RETURN TO FREEDOM

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RETURN TO FREEDOM
P.O. Box 926
Lompoc, CA 93438

Case No. 2:20-cv-11194

Plaintiff,

v.

DAVID BERNHARDT
Secretary of the United States Department
of The Interior,
1849 C Street, N.W.
Washington, DC 20240,
sued in his official capacity,

WILLIAM PENDLEY
Deputy Director, Policy and Programs,
Bureau of Land Management
1849 C Street, N.W.
Washington, D.C 20240,
sued in his official capacity,

MICHAEL GATES
Acting District Manager, West Desert District
Bureau of Land Management
Fillmore Field Office
95 East 500 North
Fillmore, UT 84631
sued in his official capacity,

Defendants.

**COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY
RELIEF**

1 1. This case asks this Court to enjoin and declare as unlawful a decision by
2 the Bureau of Land Management (“BLM”), the federal agency responsible for caring
3 for America’s wild horses, to perform dangerously invasive surgical sterilization
4 procedures, namely, spaying wild mares by ovariectomy via colpotomy. The BLM’s
5 Proposed Action of surgical sterilization represents a radical departure from the
6 bounds of science and humane treatment and should be declared unauthorized,
7 uncalled-for, and illegal.

8 2. Despite its statutory mandate to protect, manage, and control wild horse
9 populations in the United States at the “minimal feasible level,” the Department of
10 the Interior’s (“DOI”) BLM, Western Desert District Office, Fillmore Field Office
11 has decided to conduct controversial and experimental sterilization surgeries on wild
12 mares belonging to the Confusion Herd Management Area (“Confusion HMA”).

13 3. BLM has stated its intent to surgically sterilize wild horses multiple
14 times before, but has withdrawn such proposals when challenged by the public. This
15 ill-fated attempt should also be stopped, where BLM has rendered a decision to
16 surgically sterilize wild mares from the Confusion HMA despite the procedure
17 involving a direct conflict with its obligations under the Wild Free-Roaming Horses
18 and Burros Act, 16 U.S.C § 1331 *et seq.* (“Wild Horse Act”).

19 4. BLM’s current plan to conduct experimental sterilization on mares from
20 the Confusion HMA through the process of ovariectomy via colpotomy is unjustified,
21 unsupported, and unnecessary, and will cause unacceptable harassment, harm, and
22 potentially death of the very horses BLM is statutorily obligated to protect.

23 5. BLM’s decision to conduct these barbaric experimental sterilizations on
24 wild mares is arbitrary and capricious and in violation of federal law, and is especially
25 inappropriate because alternative, nonsurgical, less invasive, and less risky fertility
26 control tools are available, and already have proven successful in managing wild
27 horse populations throughout the United States.

28 6. Plaintiff Return to Freedom (“RTF”) seeks a declaration from this Court

1 that BLM’s decision to conduct mare sterilization is arbitrary, capricious, and should
2 be set aside because it violates the Administrative Procedure Act (“APA”), 5 U.S.C
3 § 702 and the Wild Free-Roaming Horses and Burros Act, 16 U.S.C § 1331 *et seq.*
4 RTF also seeks an injunction to prevent the BLM from moving forward with its mare
5 sterilization program. Additionally, RTF seeks a declaration that BLM’s failure to
6 adequately consider the environmental impacts of mare sterilization violates the
7 National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*

8 **JURISDICTION AND VENUE**

9 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
10 and 5 U.S.C § 702.

11 8. Venue is proper in the Central District of California under 28 U.S.C. §
12 1391(e)(1)(C). This civil action is brought against officers of the United States acting
13 in their official capacities, and venue is proper in this district because RTF resides in
14 this district and no real property is involved in the action. *Id.* An actual, justiciable
15 controversy exists between the parties, and the requested relief is therefore proper
16 under 28 U.S.C. § 2201, *et seq.* This Court may review Defendants’ actions and
17 order appropriate relief under the APA, the Wild Horse Act, and NEPA.

18 **PARTIES**

19 9. Founded in 1997, Plaintiff RTF is a 501(c)(3) non-profit wild horse
20 conservation organization dedicated to preserving the freedom, diversity and habitat
21 of America’s wild horses through sanctuary, education, advocacy and conservation
22 while enriching the human spirit through direct experience with the natural world.

23 10. RTF is headquartered in Lompoc, California. For more than two
24 decades RTF has been actively involved in the promotion and use of methods for
25 minimally invasive management of wild horses and burros at its sanctuary, as well
26 as seeking to apply those same methods in the wild. RTF has relocated naturally-
27 formed wild horse bands, and provided wild horses with sanctuary, while using a
28 short-term, reversible contraceptive vaccine, PZP, which has an efficacy rate of 91%

1 - 98%. One of RTF's most important missions is to preserve and protect the natural
2 behaviors of wild horses and educate the public through comment and observation
3 on natural herd behaviors.

4 11. In 2007, RTF saved the lives of four horses who were about to be
5 slaughtered at the Cavel slaughterhouse in DeKalb, Illinois. RTF brought these
6 "miracle horses" to the Lompoc sanctuary (located in this district), which became
7 their permanent home. RTF and its supporters are devoted to these and other horses
8 who have been obtained while en route to slaughter.

9 12. Throughout its history, one of RTF's primary goals has been to ensure
10 the federal agencies charged with the protection and management of wild horses
11 utilize humane, noninvasive procedures, specifically when it comes to population
12 controls.

13 13. In 2016, RTF was one of the plaintiffs in a lawsuit challenging the
14 BLM's decision to sterilize an entire herd of horses in Idaho's Saylor Creek Herd
15 Management Area. The district court granted summary judgment in part for the
16 plaintiffs, and remanded the decision back to the BLM for reconsideration in light of
17 the court's ruling. *American Wild Horse Campaign v. Zinke*, 2017 WL 4349012 (D.
18 Idaho 2017).

19 14. RTF's goals have always included the prevention of invasive
20 sterilization surgeries that are neither warranted nor authorized under governing
21 federal law. And at its California sanctuary, RTF has been involved in the use of
22 noninvasive fertility control for over two decades.

23 15. RTF supports the enactment of legislation that would end the slaughter
24 of American horses for food, and the transport of horses for slaughter. RTF and its
25 supporters remain heavily invested in ensuring that wild horses not be sent to
26 slaughter. This part of RTF's mission also depends on the use of appropriate fertility
27 control by the federal government in its guardianship of wild horses.

28 16. RTF has developed a unique, nationally respected voice on policy issues

1 by advocating for humane, science-based alternatives to wild horse management
2 rooted in its own hands-on experience with 500 wild equines including 51 burros and
3 its focus on maintaining family bands and herd groups. Return to Freedom has
4 implemented a successful fertility control program since 1999 with a 91% - 98 %
5 efficacy rate. This has proven to be safe and effective, slowing down reproduction
6 while allowing the natural behaviors of stallions and their harem bands.

7 17. RTF's sanctuary was formed as a model to explore minimally intrusive
8 natural herd management which could be viable management solutions on-the-range,
9 as alternatives to traumatic and costly wild horse roundups and the capture, removal
10 and warehousing of wild horses and burros and to prevent exactly the kind of action
11 challenged here.

12 18. Protecting America's wild horses, such as those in the Confusion HMA
13 at the center of this lawsuit, and educating the public are prime objectives of RTF's
14 mission.

15 19. In addition to national advocacy and educational programs, RTF
16 operates the American Wild Horse Sanctuary as a model for minimally intrusive
17 management solutions for wild horses that can be applied on the range. The
18 sanctuary currently houses 500 wild horses including 51 burros at four California
19 locations and focuses on keeping wild horse families and bonded social bands intact
20 at the sanctuaries.

21 20. RTF provides educational programs that attract visitors of all ages
22 including young children and families, university students, photographers, writers,
23 and others to its sanctuary locations and on western rangelands.

24 21. Through the years, RTF has expended extensive resources, and diverted
25 funds from its other programs, in order to monitor the BLM's treatment of wild
26 horses, and specifically its illegal attempts to sterilize wild horses.

27 22. For several years, RTF has utilized its precious resources to continue to
28 alert the public, to encourage the use of non-invasive sterilization techniques, and to

1 comment on the BLM’s repeated efforts to use the ovariectomy via colpotomy
2 method of sterilization challenged in this action.

3 23. RTF continues to update its supporters about the well-being of wild
4 horses taken to holding facilities and treated by BLM, and especially about the
5 potential for illegal sterilizations of wild mares and mustangs.

6 24. In November 2020, RTF contacted members of Congress in a letter from
7 its President, pointing out that the planned surgeries “will directly contradict the will
8 of Congress, result in costly litigation, and ratchet up public controversy, all at a time
9 when diverse stakeholders have found sufficient common ground to support a non-
10 lethal alternative to decades of failed BLM wild horse and burro management.”

11 25. On November 19, 2020, fifty-eight members of Congress signed on to
12 a letter sent to Defendant Bernhardt in his position as Secretary of the Department of
13 the Interior, stating their objection to the planned surgical sterilization of the
14 Confusion HMA horses.

15 26. As stated in the letter from members of Congress, the action challenged
16 in this lawsuit “marks the agency’s fifth attempt to ovariectomize wild horses despite
17 significant opposition and concerns from federal lawmakers, the American public,
18 veterinarians, and the National Academy of Sciences (NAS).”

19 27. In 2020, RTF updated its supporters on the planned roundup of wild
20 horses from the Confusion HMA, as well as the government’s plan for performing
21 ovariectomies via colpotomy on some of the captured mares. In 2020 alone RTF
22 supporters sent over 19,000 individual letters opposing the surgical sterilization of
23 wild mares to their legislators.

24 28. As an organization whose primary goals include the humane treatment
25 of wild horses, and especially the use of noninvasive fertility control methods, RTF
26 has devoted considerable resources to advocate against the exact type of invasive,
27 potentially fatal, experimental surgery threatened by the Environmental Assessment
28 (“EA”).

1 29. The funds, time, and effort dedicated to trying to stop BLM from
2 engaging in this illegal practice has caused RTF to divert and use resources that
3 would have otherwise been spent on its other programs, including adoption,
4 educational programs, and donor development to benefit the wild horses and burros
5 already in RTF's care, among other projects important to the future of the
6 organization.

7 30. BLM's plans to surgically sterilize wild mares through ovariectomy via
8 colpotomy procedures are antithetical to the mission of RTF to ensure humane
9 treatment for wild horses, and will directly harm the organization's ability to further
10 its mission.

11 31. If carried out, BLM's plan to perform these surgeries will subvert and
12 frustrate RTF's mission to protect wild horses, to provide them with the most
13 appropriate form of fertility control, and to avoid permanent and dangerous
14 procedures.

15 32. RTF provides wild horse educational programs that attract an
16 international clientele, with the classes providing students with opportunities to view
17 wild horses in the wild throughout the western U.S.

18 33. A court order declaring unlawful the BLM's plans to perform invasive
19 and unnecessary surgeries on mares captured from the Confusion HMA would
20 protect RTF's interests in the humane treatment, safety and continued health and
21 viability of wild, free-roaming herds of horses and will allow RTF to dedicate its
22 limited resources to other wild horse conservation programs that are part of its
23 mission and that will further protect wild horses still on the range.

24 34. Defendant David Bernhardt is the Secretary of the Department of the
25 Interior, the parent agency for the BLM, and is ultimately responsible for the
26 Confusion HMA and the Proposed Action of surgical sterilization. He is sued in his
27 official capacity.

28 35. Defendant William Pendley is BLM's Deputy Director for Policy and

1 Programs, exercising authority of the BLM Director, and therefore is also responsible
2 for the Confusion HMA and the Proposed Action of surgical sterilization. The BLM
3 is an agency within the United States Department of the Interior. The BLM is
4 responsible for the protection and management of wild horses under the Wild Free-
5 Roaming Horses and Burros Act of 1971 (Wild Horse Act), 16 U.S.C § 1331 *et seq.*
6 The Wild Horse Act authorizes BLM to maintain ranges on public lands as
7 sanctuaries for the protection and preservation of wild horses and burros. 16 U.S.C.
8 § 1333. He is sued in his official capacity.

9 36. Defendant Michael Gates is the Acting District Manager for the West
10 Desert District Office, Fillmore Field Office of the BLM. In Utah, BLM is charged
11 with managing the public lands and resources through the West Desert District
12 Office, Fillmore Field Office in accordance and compliance with federal laws and
13 regulations. The West Desert District, Fillmore Field Office prepared the
14 Environmental Assessment and other documentation for and authorized the Proposed
15 Action of surgical sterilization affecting wild horses from the Confusion HMA. He
16 is sued in his official capacity.

17 LEGAL FRAMEWORK

18 *ADMINISTRATIVE PROCEDURE ACT (APA)*

19 37. The APA provides for judicial review of final agency action for persons
20 adversely affected or aggrieved by the agency action. 5 U.S.C § 702.

21 38. The APA authorizes this reviewing Court to “hold unlawful and set
22 aside agency action, findings, and conclusions found to be . . . arbitrary, capricious,
23 an abuse of discretion, or otherwise not in accordance with law; . . . in excess of
24 statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without
25 observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (C), and (D).

26 39. If a federal agency such as BLM implements a new policy which
27 deviates from the status quo, the new policy is deemed arbitrary or capricious unless
28 the agency displays awareness that it has changed its policy and provides a reasoned

1 explanation for why it believes the new policy is better than its previous position.
2 *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

3 ***NATIONAL ENVIRONMENTAL POLICY ACT***

4 40. The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et*
5 *seq.*, is “intended to ensure Federal agencies consider the environmental impacts of
6 their actions in the decision-making process.” 40 C.F.R. § 1500.1(a).

7 41. In enacting NEPA, Congress “recogniz[ed] the profound impact of
8 man’s activity on the interrelations of all components of the natural environment,
9 particularly the profound influences of population growth, high-density urbanization,
10 industrial expansion, resource exploitation, and new and expanding technological
11 advances[.]” 42 U.S.C. § 4331.

12 42. In order to carry out the congressional declaration of NEPA’s policy,
13 the Federal Government is continually responsible to “fulfill the responsibilities of
14 each generation as trustee of the environment for succeeding generations; assure for
15 all Americans safe, healthful, productive, and esthetically and culturally pleasing
16 surroundings; attain the widest range of beneficial uses of the environment without .
17 . . undesirable and unintended consequences; [and] preserve important historic,
18 cultural, and natural aspects of our national heritage, and maintain, wherever
19 possible, an environment which supports diversity and variety of individual choice.”
20 42 U.S.C. § 4331(b)(1)-(4).

21 43. NEPA’s purposes encompass “[promoting] efforts which will prevent
22 or eliminate damage to the environment and biosphere and stimulate the health and
23 welfare of man” and “[establishing] a Council on Environmental Quality” (“CEQ”)
24 charged with “formulat[ing] and recommend[ing] national policies to promote the
25 improvement of the quality of the environment.” 42 U.S.C. §§ 4321, 4342.

26 44. The Department of the Interior has established “procedures for the
27 Department, and its constituent bureaus, to use for compliance with: (1) [NEPA]; and
28 (2) The [CEQ] regulations for implementing the procedural provisions of NEPA [.]”

1 43 C.F.R. § 46.10(a).

2 45. The Department's procedures supplement, and are to be used in
3 conjunction with, the CEQ regulations. 43 C.F.R. § 46.20(a).

4 46. The CEQ regulations implementing NEPA mandate that "[f]ederal
5 agencies. . . use all practicable means and measures to foster and promote the general
6 welfare, create and maintain conditions under which man and nature can exist in
7 productive harmony, and fulfill the social, economic, and other requirements of
8 present and future generations of Americans." 40 C.F.R. § 1500.1.

9 47. CEQ regulations define the term "major federal action:"

10 "Major Federal action" may include new and continuing
11 activities, including projects and programs entirely or
12 partly financed, assisted, conducted, regulated, or approved
13 by Federal agencies; new or revised agency rules,
regulations, plans, policies, or procedures; and legislative
proposals. . . .

14 40 C.F.R. § 1508.1(q)(2).

15 48. One common category of federal action is "[a]pproval of specific
16 projects, such as construction or management activities located in a defined
17 geographic area. Projects include actions approved by permit or other regulatory
18 decision as well as federal and federally assisted activities." 40 C.F.R.
19 § 1508.1(q)(3)(iv).

20 49. Where an agency is invoking a new procedure or program, such as the
21 proposed sterilization action here, NEPA review is required before that program can
22 be invoked.

23 50. An environmental "effect" is defined in CEQ regulations to encompass
24 both direct and indirect effects and impacts, including but not limited to ecological,
25 aesthetic, historic, cultural, economic, social, or health effects, whether direct,
26 indirect, or cumulative. 40 C.F.R. § 1508.1(g).

27 51. NEPA requires all federal agencies to prepare a "detailed statement"
28 regarding all "major federal actions significantly affecting the quality of the human

1 environment.” 42 U.S.C. § 4332(C). This statement is referred to as the
2 Environmental Impact Statement (“EIS”).

3 52. An EIS ensures that the agency, in reaching its decision, will have
4 available, and will carefully consider, detailed information concerning significant
5 environmental impacts; it also guarantees that the relevant information will be made
6 available to the larger audience that may also play a role in both the decision-making
7 process and the implementation of that decision. *Robertson v. Methow Valley*
8 *Citizens Council*, 490 U.S. 332, 349 (1989). NEPA ensures that important effects
9 will not be overlooked or underestimated only to be discovered after resources have
10 been committed or the die otherwise cast. *Id.*

11 53. Where the significance of environmental effects is unclear, the agency
12 may first prepare an EA, which must “provide sufficient evidence and analysis for
13 determining whether to prepare an environmental impact statement or a finding of no
14 significant impact (FONSI).” 40 C.F.R. § 1501.5.

15 54. Federal agencies must carefully consider relevant detailed information
16 concerning significant environmental impacts and share that information with the
17 public in the Environmental Assessment. NEPA procedures must ensure that federal
18 agencies have considered relevant environmental information and that the public has
19 been informed before decisions are made and before actions are taken. 40 C.F.R.
20 § 1500.1.

21 ***WILD FREE-ROAMING HORSES AND BURROS ACT***

22 55. In 1971, Congress declared that “wild free-roaming horses and burros
23 are living symbols of the historic and pioneer spirit of the West; that they contribute
24 to the diversity of life forms within the Nation and enrich the lives of the American
25 people; and that these horses and burros are fast disappearing from the American
26 scene.” 16 U.S.C. §§ 1331 *et seq.*

27 56. The Wild Horse Act provides, *inter alia*, that viable herds of wild horses
28 should remain on the lands on which they were found at the time the Wild Horse Act

1 was passed, “as an integral part of the natural system of the public lands.” *Id.* That
2 is, barring compelling reasons to the contrary, wild horses are entitled to stay in their
3 “herd area” — the “geographic area identified as having been used by a herd as its
4 habitat in 1971.” 43 C.F.R. § 4700.0-5(d).

5 57. Congress delegated to the Secretary of Agriculture and the Secretary of
6 the Interior jurisdiction over all wild free-roaming horses and burros “for the purpose
7 of management and protection.” 16 U.S.C. § 1333(a).

8 58. BLM has established “Herd Management Areas” (“HMAs”) — the
9 geographic areas defined for the maintenance of wild horse and burro herds. 43
10 C.F.R. § 4710.3-1. The Confusion HMA is one such area defined for the
11 maintenance of wild horses.

12 59. Congress requires the agencies involved to preserve and safeguard the
13 horses in a manner that causes the horses the least amount of interference. The Wild
14 Horse Act provides that “[a]ll management activities shall be at the minimal feasible
15 level . . . in order to protect the natural ecological balance of all wildlife species which
16 inhabit such lands, particularly endangered wildlife species.” *Id.*

17 60. BLM’s own regulations mirror and amplify the statutory requirement
18 that it engage in the least amount of interference with the wild horses that is
19 necessary. The regulations mandate that management of the horses “*shall* be at the
20 minimum level necessary to attain the objectives identified in approved land use
21 plans and herd management area plans.” 43 C.F.R. § 4710.4.

22 61. Two of BLM’s objectives in managing wild horses are the “protection
23 of wild horses and burros from unauthorized capture, branding, harassment or death;
24 and humane care and treatment of wild horses and burros. 43 C.F.R. § 4700.0-2.

25 62. “Wild horses and burros shall be managed as self-sustaining populations
26 of healthy animals in balance with other uses and the productive capacity of their
27 habitat.” 43 C.F.R. § 4700.0-6(a).

28 63. “Management activities affecting wild horses and burros shall be

1 undertaken with the goal of maintaining free-roaming behavior.” 43 C.F.R. § 4700.0-
2 6(c).

3 64. “The Bureau’s objective is to use the best available science, husbandry
4 and handling practices applicable for [wild horses and burros].” BLM IM 2015-151,
5 *Comprehensive Animal Welfare Program for Wild Horse and Burro Gathers* (Sept.
6 25, 2015).

7 65. Section 1333(b)(1) requires the BLM to maintain a current inventory of
8 wild horses and burros so that it can

9 make determinations as to whether and where an
10 overpopulation exists and whether action should be taken
11 to remove excess animals; determine appropriate
12 management levels of wild free-roaming horses and burros
13 on these areas of public lands; and determine whether
14 appropriate management levels should be achieved by the
15 removal or destruction of excess animals, or other options
16 (such as sterilization, or natural controls on population
17 levels).

18 16 U.S.C. §1333(b)(1).

19 66. If BLM determines, based on reliable information, that there is an
20 “overpopulation” of wild horses on public land, and only if the removal of “excess”
21 animals is *necessary*, the BLM is entitled to remove them. *Id.* § 1332(b)(2). The
22 agency can only take animals out of the herd who “*must* be removed from an area in
23 order to preserve and maintain a thriving natural ecological balance and multiple-use
24 relationship in that area.” *Id.* § 1332(f) (emphasis added).

25 67. The Wild Horse Act does not allow the federal government to use wild
26 horses as subjects in what amounts to biomedical research by the use of inappropriate
27 surgical mutilation. “Treating a wild horse or burro inhumanely” – which would
28 include using them as specimens for an experimental surgery -- is a prohibited act.
43 C.F.R. § 4770.1(f). While “sterilization” is an option for the BLM under the Wild
Horse Act, the BLM’s current program of sterilization is not contemplated by the
Act, because the nature of surgical sterilization and spaying through the methodology
of ovariectomy via colpotomy is insupportable, is not the minimal feasible

1 alternative, is inhumane, threatens the health and safety of the horses who are the
2 BLM's wards, and is arbitrary and capricious as a sterilization option.

3 FACTS GIVING RISE TO PLAINTIFF'S CLAIMS

4 *Surgical Sterilization, Spaying by Ovariectomy Via Colpotomy*

5 68. In the Wild Horse Act, Congress charged BLM with the "protection,
6 management, and control of wild free-roaming horses and burros on public lands."
7 P.L. 92-195 (Dec. 15, 1971); *see also* 16 U.S.C. § 1331 ("wild free-roaming horses
8 and burros . . . are to be considered in the area where presently found, as an integral
9 part of the natural system of the public lands").

10 69. BLM is charged with acting as the protector, on behalf of the American
11 people, of wild horses, and must ensure that the actions it takes to manage wild horses
12 actually benefit those animals, rather than benefitting only BLM or private interests.

13 70. Moreover, BLM is required to fulfill this Congressional mandate at the
14 "minimal feasible level" of management. 16 U.S.C. § 1333. Above all, BLM's
15 actions must be consistent with the authority and purpose of the Wild Horse Act.
16 Congress explicitly expressed that BLM shall protect wild horses "from capture,
17 branding, harassment or death." *Id.*; 43 C.F.R. § 4700.0-2. BLM also must manage
18 to preserve the animals' "free roaming behavior" and as "self-sustaining
19 populations." 43 C.F.R. § 4700.0-6. This legislative intent and regulatory commands
20 illustrate that preservation of the *natural* state of the herds and the individual animals
21 and ensuring that the horses are not subject to harassment or other unnecessary
22 devices are the core responsibilities of BLM under the Wild Horse Act.

23 71. On October 23, 2018, BLM Western Desert District Office, Fillmore
24 Field Office, issued a Notification of Proposed Action regarding its proposed action
25 for the Confusion HMA.

26 72. On June 26, 2020, the BLM released the Preliminary Confusion HMA
27 Wild Horse Management and Gather Plan Environmental Assessment ("EA"), DOI-
28 BLM-UT-W020-2018-015-EA.

1 73. During the following month-long public comment period, on July 24,
2 2020, RTF submitted comments on the Preliminary EA vehemently opposing
3 Alternative D of the Proposed Action, which included the removal of excess wild
4 horses to a low Appropriate Management Level (“AML”) and the implementation of
5 population growth control through surgical sterilization.

6 74. In its comments, RTF, like many other commenters, stressed the
7 dangerous and unknown risks of ovariectomies for wild horses:

8 There are no substantive studies to evaluate long term health of
9 ovariectomized mares. At the Center for Equine Health (UC
10 Davis), a herd of twenty older ovariectomized mares were
11 housed. Eighteen of them showed advanced musculoskeletal
12 deterioration, which led veterinarians on-site to wonder at the
effect of removing estrogen from the system, as an ovariectomy
does.

13 75. RTF also stressed, like other commenters, that the BLM was engaging
14 in an invasive and extreme process, whereas a well-known, accepted process would
15 be better for the horses and for population control, and emphasized:

16 that immunocontraception vaccines be the mechanism to achieve
17 population growth suppression, since there is more acceptance of
18 this method by the public; it is less technically rigorous and thus
easier to be administered by moderately trained field staff (as
19 opposed to veterinarians); and the perceived gain of fewer gathers
and a minimum feasible level of management achieved by
20 surgical sterilization is not borne out in this case.

21 76. On October 5, 2020, the BLM released the final Confusion HMA Wild
22 Horse Management and Gather Plan Environmental Assessment (“EA”), DOI-BLM-
23 UT-W020-2018-015-EA (“Final EA”), along with its final Decision Record (“DR”)
24 and Finding of No Significant Impact (“FONSI”).

25 77. BLM selected Alternative D of the Proposed Action for the Confusion
26 HMA, the same Alternative RTF opposed in its comments.

27 78. As set forth in the DR, BLM proposes “effective immediately” to
28 decrease the Confusion HMA population level to the lower of the AML range by

1 removing excess horses and implementing population suppression by sterilization
2 including ovariectomy via colpotomy.

3 79. The mares that would be subjected to this experimental surgical
4 sterilization will be or have been gathered from the Confusion HMA. Under the EA,
5 they will be rounded up, gathered and removed from the range, and segregated before
6 being transported to a private but unidentified veterinarian's facility to undergo the
7 surgical sterilization process. The sterilized mares would be returned to the
8 Confusion HMA post-surgery.

9 80. The Final EA sets out BLM's plan to achieve mare sterilization by
10 performing ovariectomy via colpotomy, which entails the removal of both ovaries,
11 by first making an incision in the mare's anterior-dorsolateral vaginal wall. The
12 incision is then enlarged with blunt dissection to perforate the protective layer of
13 tissue around the abdominal organs (the peritoneum) and allow the veterinarian's
14 hand to enter the abdomen of the mare. Once the veterinarian accesses the abdominal
15 cavity, s/he will blindly feel around for the ovaries, then insert a snare-like tool (a
16 chain écraseur), which is looped around the tissue the veterinarian believes to be the
17 ovaries. The snare end of the écraseur is tightened around the unseen tissue. If the
18 veterinarian has been able to grasp the ovaries and not other organs or tissue in the
19 mare's abdomen, the écraseur will then crush the support structures and sever the
20 ovaries from the mare's other organs. The ovaries are then pulled out of the mare's
21 abdomen through the vagina.

22 81. The surgical procedure is at best risky when performed on individual
23 mares in sterile, stable settings under the care of an experienced, trained, and skilled
24 veterinarian. At this point, BLM does not even have a veterinarian identified, making
25 assessment of the safety and soundness of this plan entirely speculative.

26 82. Ovariectomy is a procedure that is recommended by most scientists and
27 veterinarians for *domesticated* horses and then only as part of a laparoscopic-assisted
28 procedure, in which the experienced and trained veterinarian can visualize the ovaries

1 and other organs and structures within the vicinity of the ovaries. “Flank laparoscopy
2 is now commonly used in domestic mares due to its minimal invasiveness and full
3 observation of the operative field.” (Final EA, Appendix H, at 2 (citation omitted)).
4 Ovariectomy via flank laparoscopy is “seen as the lowest risk method in terms of
5 mortality and morbidity.” (*Id.*).

6 83. Commenting on the type of procedure planned here, in the National
7 Research Council (NRC)’s Review of the Wild Horse and Burro Program (NRC
8 2013), the NRC noted that ovariectomy via colpotomy “has been seldom applied to
9 free-ranging species.” “[T]he possibility that ovariectomy may be followed by
10 prolonged bleeding or infection makes it *inadvisable for field application.*” *Id.*
11 (Emphasis added.)

12 84. With respect to the BLM’s planned operations, the veterinarians will
13 have no ability to visualize the ovaries. The BLM and its unidentified veterinarians
14 are *not* planning a laparoscopic procedure, but a blind cutting of organs that will only
15 be palpated, and that the researchers will hope are ovaries, and not some other
16 structures that should not be cut.

17 85. BLM’s intention to orchestrate currently unknown veterinarians in the
18 blind excision of wild mares’ ovaries, with the hope that things work out, is
19 dangerous, inhumane, potentially fatal, and arbitrary and capricious.

20 86. BLM bases its decision to adopt Alternative D on one 2016 study of
21 surgical sterilization on feral mares, the Sheldon NWR Study (Collins and Kasbohm,
22 2017). (DR at 6.) That study resulted in a 2% *mortality* rate (Final EA, Appendix
23 H, at 2 (citation omitted)).

24 87. This proposed action amounts to insupportable experimentation on
25 Congressionally protected wild mares, which BLM anticipates will have fatal
26 impacts on some of the mares unfortunate enough to be targeted for the surgery.

27 88. In 2013, BLM commissioned (for a reported million dollars) a
28 comprehensive report, based on a detailed evaluation by the National Research

1 Council, part of the National Academy of Sciences (“NAS”). The report concluded
2 that “the possibility that ovariectomy may be followed by prolonged bleeding or
3 peritoneal infection makes it *inadvisable for field application*.” (Emphasis added.)
4 In other words, BLM’s decision to engage in this action has been condemned as
5 inappropriate by a neutral body that BLM hired to opine on this kind of procedure.

6 89. BLM has failed to account for the potential complications – which range
7 from excessive internal bleeding, intestinal trauma, and adhesions, to infections and
8 death – that may result from these surgical sterilization procedures. BLM has not
9 even identified what it considers acceptable versus unacceptable effects of spaying
10 these mares. Thus, no matter what complications result, and how frequently
11 complications occur, from these experimental surgeries, BLM will be free to adopt a
12 position that such complications are tolerable and acceptable, and thus BLM will be
13 free to continue such “management” plans in the Confusion HMA and to expand
14 surgical sterilization to other wild horse herds across the country.

15 90. BLM’s willingness to experiment on wild mares is a blatant violation of
16 its obligations to these horses and a breach of federal law. Rather than “living
17 symbols” roaming free, these wild horses will instead become living *specimens* upon
18 which unknown results – including painful and lethal complications – could be the
19 ultimate consequences. BLM has endorsed and agreed to fund this experimentation.

20 91. BLM provides no information about the supposed veterinarians with
21 whom BLM intends to contract to perform these surgical sterilizations and is silent
22 as to whether such individuals are experienced in ovariectomy via colpotomy or
23 standing sedation on wild horse mares.

24 92. Because the BLM has not identified the veterinarians who will be doing
25 the procedures, the public, including qualified veterinarians, has not been able to
26 review the credentials of those professionals and provide comments on their ability
27 to perform the planned procedures. Without disclosure of the training and expertise
28 of those performing the surgeries, BLM has insulated from public scrutiny a crucial

1 component of this already-risky procedure.

2 93. BLM's decision to approve surgical sterilization on wild mares without
3 adequate scientific support of its efficacy violates all principles of caution, care, and
4 protection that BLM owes the horses by law, and ignores or accepts the myriad
5 potential untoward and harmful results that could befall these mares. The problems
6 are only exacerbated by the fact that BLM is planning these procedures on wild mares
7 who will have only minimal post-operative care and observation before being
8 released back onto the range without any veterinarians, BLM, or other persons being
9 able to ensure the mares do not develop or suffer from surgical complications.

10 94. It is clear that the BLM is trying to carry this procedure out to set a new
11 precedent for its management of wild horses. The BLM has planned, and then
12 withdrawn, surgical sterilization for wild horses in the past. In 2011, BLM withdrew
13 its plans to castrate Wyoming wild horses when that was challenged. The court, in
14 dismissing the case, recognized that the sterilization procedures planned in that case
15 — just like those now promoted — are of an “extreme and irreversible nature.” *Am.*
16 *Wild Horse Preservation Campaign v. Salazar*, 800 F. Supp. 2d 270, 272-73 (D.D.C.
17 2011). Facing a potential preliminary injunction against its castration plans, BLM
18 withdrew its plans, and the case was declared moot. *Id.*

19 95. The BLM attempted twice to institute the same procedures of
20 ovariectomy via colpotomy on the more than 200 wild mares in the Warm Springs
21 Herd Management Area. Twice BLM had convinced university veterinarians to get
22 involved in the procedures. In both cases, first the University of Oregon, and then
23 Colorado State University, withdrew their involvement.

24 96. In 2016, BLM proposed a research experiment that included
25 ovariectomy via colpotomy and other sterilization methods to be tested on more than
26 200 wild mares in the Warm Springs Herd Management Area (Mare Sterilization
27
28

1 Research EA DOI-BLM-OR-B000-2015-0055-EA (May 2016)).¹

2 97. BLM's plans to sterilize the mares in 2016 were not carried out, due to
3 vocal public opposition and legal action taken against BLM's radical plans.. See
4 Stipulated Voluntary Dismissal (Sept. 9, 2016), *Front Range Equine Rescue v.*
5 *Jewell, et al.*, Case No. 1:16-cv-01521-CKK (D.D.C.) (defendants vacating decision
6 record that had approved initiation of sterilization research on wild mares to be
7 performed by Oregon State University).

8 98. In 2018, BLM again announced almost the exact same procedures
9 would occur, again in the Warm Springs Herd Management Area. (Environmental
10 Assessment, Spay Feasibility and On-Range Behavioral Outcomes DOI-BLM-
11 ORWA-B050-2018-0016-EA.)

12 99. RTF sent comments in response to the BLM's 2018 announcement,
13 stating RTF's objection to the ovariectomy via colpotomy planned procedures. RTF
14 stated clearly the availability and efficacy of immunocontraceptives that are proven
15 effective and can be delivered safely and humanely, and that would be in accord with
16 the requirements of the Wild Horse Act.

17 100. The BLM subsequently issued an "updated" Environmental Assessment
18 when the Colorado State University veterinary team withdrew its participation in the
19 program. (UPDATED Environmental Assessment, Spay Feasibility and On-Range
20 Behavioral Outcomes Assessment and Warm Springs HMA Management Plan DOI-
21 BLM-ORWA-B050-2018-0016-EA.) RTF again sent comments opposing the plan.

22 101. BLM's 2018 attempt to invoke these surgeries was again challenged in
23 court, and again the BLM dropped the program.

24 102. In 2019, RTF again commented on the BLM's 2019 proposal to evaluate
25 ovariectomy via colpotomy. (Spay Feasibility and On-Range Behavioral Outcomes
26

27
28 ¹ Available at https://eplanning.blm.gov/epl-front-office/projects/nepa/56292/75587/83698/Final_Environmental_Assessment_-_May_2016.pdf.

1 Assessment, Environmental Assessment (DOI-BLM-ORWA-B 050-2019-0013-
2 EA).)

3 103. With the challenged action here, BLM is attempting yet another illegal
4 surgical sterilization of America's wild horses.

5 104. BLM concedes that it has not prepared an Environmental Impact
6 Statement under NEPA. (FONSI at 1.) Moreover, BLM recognizes that it has not
7 performed any detailed analysis of the following:

- 8 • The complications of ovariectomy via colpotomy performed on wild
9 mares;
- 10 • The social and behavioral effect of the sterilized mares returned to the
11 herd; or,
- 12 • The Mare Sterilization Program's effect on the genetic viability of wild
13 horse herds such as the Confusion herd.

14 (FONSI at 3, DR at 6, Final EA at 34.)

15 ***The Existing Policy: PZP***

16 105. A humane and scientifically-proven alternative -- the administration of
17 Porcine Zona Pellucida (PZP) vaccine —is already used by, and available to the BLM
18 and was proposed in Alternative C of the Proposed Action at issue. PZP is an
19 effective and safe tool which is used to decrease reproduction and reduce wild
20 populations. In contrast to the experimental surgical procedure outlined in the Final
21 EA, the PZP vaccine/contraceptive's application to wild horses *has* been thoroughly
22 studied and proven effective in managing population growth and ensures wild horses'
23 ability to remain in their habitat, free from surgical excisions, harassment, and harm,
24 maintaining their free-roaming nature, and in a self-sufficient population. BLM does
25 not dispute that PZP is effective contraception for wild mares.

26 106. PZP is noninvasive.

27 107. PZP can be administered by trained volunteers or field technicians who
28 are ready, willing, and able to assist.

1 108. The use of PZP does not require the destruction of vital equine organs.

2 109. The use of PZP does not have the potential to cause hemorrhage, internal
3 injury, or death.

4 110. The use of PZP does not require that wild horses be permanently
5 removed from the range or separated from their families.

6 111. The use of PZP has less detrimental effect on wild horses than
7 permanently removing the horses' reproductive organs.

8 112. PZP has been proven effective, has very few dangers, and does not
9 threaten the lives of the horses or subject them to unnecessary surgery or surgical
10 methods that do not meet contemporary standards of care.

11 113. BLM attempts to rationalize foregoing the use of proven, effective
12 fertilization vaccinations such as PZP based on its faulty conclusion that vaccinating
13 wild horses would require more handling, treatments, and more frequent gathers or
14 removals thereby "increasing the stress and chance of injury to the horses." (DR at
15 6, Final EA at 16). BLM does not cite any support for this conclusion and fails to
16 explain how proven contraceptive vaccination techniques could be riskier or cause
17 more injury to wild horses than permanent, experimental surgical sterilizations.

18 ***Surgical Sterilizations Using Ovariectomy Via Colpotomy***

19 ***Violates BLM's Own Guidance***

20 114. BLM's *Wild Horses and Burros Management Handbook*, H-4700-1
21 (June 2010), provides that "[Land Use Plans] should also identify: [t]he HMAs to be
22 managed for non-reproducing wild horses to aid in controlling on the range
23 population numbers and the criteria for their selection" The handbook also
24 defines non-reproducing wild horses as "[a]n HMA composed, *in whole or in part,*
25 *of sterilized wild horses* (either stallions or mares) to aid in controlling on the range
26 population numbers." *Id.* The Final EA creates a herd composed "*in part, of*
27 *sterilized wild horses,*" triggering the Handbook definition. (*See, e.g.* Final EA at 12
28

1 stating how under Proposed Action Alternative D up to 50% of the mares on the rage
2 may be sterilized).

3 115. BLM has not created a Land Use Plan specifying the criteria it used to
4 determine that the Confusion HMA *should* be a “non-reproducing herd,” as that term
5 is defined in BLM’s Handbook. Such an LUP must be developed, publicly reviewed,
6 and approved before BLM can permanently alter the Confusion HMA.

7 116. BLM policy also recognizes how “[r]eproducing WH&B [wild horse
8 and burro] herd health is dependent, in part, on maintaining desirable genetic
9 diversity (avoiding inbreeding depression).” BLM H-4700-1, *Wild Horses and*
10 *Burros Management Handbook* at 21 (Jul. 7, 2010).²

11 117. BLM states that during the initial gather operation hair samples will be
12 collected on about 25 – 50 animals from the Confusion HMA to obtain a baseline to
13 “assess the genetic diversity of the herd.” In the event that genetic monitoring
14 indicates low levels of observed heterozygosity (measure of genetic diversity), BLM
15 advises that “additional wild horses could be introduced into the Confusion HMA to
16 further increase gene flow.” (Final EA at 14).

17 118. BLM seeks to sterilize up to half of the mares in the AML-readjusted
18 herd without any current genetic diversity data. (Final EA at 20). In the first year of
19 implementing Alternative D of the Proposed Action, BLM plans to remove more than
20 470 wild horses permanently from the herd, and permanently sterilize approximately
21 17 mares. (Final EA at 13). These management actions will drastically reduce the
22 diversity of the genetic pool going forward.

23 119. Defendants’ failures to collect genetic data now, before these drastic
24 “management” interventions, is what the NEPA process was designed and intended
25 to prohibit: the potential for causing significant environmental effects on the herd,
26 without knowing and sharing with the public what those impacts are before it is too
27 late.

28 ² https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_H-4700-1.pdf.

1 **CLAIMS FOR RELIEF**

2 **COUNT ONE**

3 (Violation of the Administrative Procedure Act)

4 120. Plaintiff hereby incorporates by reference all preceding paragraphs of
5 this Complaint as if fully set forth herein.

6 121. By authorizing Alternative D of the Proposed Action and surgical
7 sterilization, Defendants have abused their discretion and acted arbitrarily and
8 capriciously and not in accordance with law, in violation of the Administrative
9 Procedure Act, 5 U.S.C. §§ 706(2)(A), (C), and (D).

10 122. Each and every one of these actions and omissions has injured and
11 damaged RTF as set forth above.

12 123. Because Defendants' Proposed Action of surgical sterilization violates
13 the language and the spirit of governing law in an arbitrary and capricious manner,
14 Defendants have violated their duties under the APA. Accordingly, BLM's Proposed
15 Action of surgical sterilization should be declared unlawful and the DR, FINAL EA,
16 and FONSI should be vacated.

17 **COUNT TWO**

18 (Violation of the Wild Free-Roaming Horses and Burros Act)

19 124. Plaintiff hereby incorporates by reference all preceding paragraphs of
20 this Complaint as if fully set forth herein.

21 125. Defendants' determination to pursue surgical sterilization is
22 unnecessary given the availability of an effective, safer, reversible alternative in PZP
23 and other proven safe and humane fertility control vaccines and therefore violates the
24 Wild Horse Act's requirement that Defendants' management activities "shall be set
25 at the minimal feasible level." 16 U.S.C. §1333(a).

26 126. Defendants' decision to implement the inhumane procedures of surgical
27 sterilization violates their duties under the Wild Horse Act.

28 127. In implementing its decision to conduct surgical sterilization, the BLM

1 has determined that it prefers surgical sterilization over existing population controls
2 such as PZP and other proven safe and humane fertility control vaccines, because it
3 will make it easier for BLM to manage the wild horse population.

4 128. Defendants have violated the Administrative Procedure Act and the
5 Wild Horse Act because they have failed to adequately consider less risky
6 alternatives and the lasting and potentially dangerous impacts of surgical
7 sterilization.

8 129. Because surgical sterilization will result in highly invasive and
9 irreversible procedure, it is by definition not the “minimum feasible level” of care for
10 wild horses.

11 130. Defendants’ determination to pursue surgical sterilization additionally
12 violates the Wild Horse Act’s requirement that “free roaming horses . . . shall be
13 protected from capture and harassment” and Defendants’ own requirement that these
14 wild horses be managed in “self-sustaining populations of healthy animals.”

15 131. Each and every one of these actions and omissions has injured and
16 damaged RTF as set forth above.

17 132. Because Defendants’ Proposed Action of surgical sterilization violates
18 the language and the spirit of governing law in an arbitrary and capricious manner,
19 Defendants have violated their duties under the Wild Horse Act. Accordingly,
20 BLM’s Proposed Action of surgical sterilization should be declared unlawful and the
21 DR, FINAL EA, and FONSI should be vacated.

22 **COUNT THREE**

23 (Violation of the National Environmental Policy Act)

24 133. Plaintiff hereby incorporates by reference all preceding paragraphs of
25 this Complaint as if fully set forth herein.

26 134. By authorizing surgical sterilization without first conducting an
27 environmental review and producing an EIS according to NEPA, 42 U.S.C.
28 § 4332(C) *et seq.*, and by issuing a FONSI concluding that their actions could not

1 possibly have any significant impacts, Defendants have violated NEPA and CEQ's
2 implementing regulations, and have acted arbitrarily and capriciously, and without
3 observance of procedure required by law, in violation of the Administrative
4 Procedure Act, 5 U.S.C. §§ 706(2) *et seq.*

5 135. Neither the existing Resource Management Plan that the Confusion
6 HMA is tiered to (House Range Resource Area Final Environmental Impact
7 Statement and Proposed Resource Management Plan (House Range RMP/EIS), 1986
8 (Final EA at 3)), nor the Final EA fully analyzes or accounts for all the environmental
9 and other impacts that Defendants are forcing onto this herd, with potential
10 significant consequences, through a combination of the sterilization experiments and
11 the post-sterilization behavioral. Without a complete analysis accounting for *all*
12 potential significant impacts, the Final EA violates NEPA.

13 136. The required EIS specifically must include descriptions and analysis of
14 the following factors, and any alternatives to potentially significant environmental
15 impacts: (i) impacts of surgical sterilization, as compared to alternatives such as PZP,
16 with full cost comparisons between the Proposed Action, PZP, no action (cost of
17 environmental restoration), and others; (ii) details of the identified, qualified
18 veterinary personnel conducting the surgeries, or effects of conducting surgeries
19 without qualified personnel; and (iii) any irreversible and irretrievable commitments
20 of resources which would be involved in the surgical sterilization should it be
21 implemented. 42 U.S.C. § 4332(C).

22 137. By failing to adequately consider the impacts of surgical sterilization on
23 the human environment, and by failing to consider the relevant CEQ factors,
24 Defendants have failed to take the "hard look" at the impacts of their chosen action
25 as required by NEPA. Accordingly, Defendants' actions and omissions have violated
26 their obligations under NEPA.

27 138. Defendants' decision to proceed with the Proposed Action of surgical
28 sterilization before preparing an EIS violates both NEPA and CEQ's regulations as

1 set forth above.

2 139. Each and every one of these actions and omissions has injured and
3 damaged RTF as set forth above.

4 140. BLM's Proposed Action of surgical sterilization should be declared
5 unlawful and the DR, FINAL EA, and FONSI should be set aside.

6 **RELIEF REQUESTED**

7 Wherefore, RTF respectfully requests that this Honorable Court:

8 A. Declare that Defendants have violated the Wild Free-Roaming Horses
9 and Burros Act by authorizing the Proposed Action of surgical sterilization,

10 B. Declare that Defendants have violated the Administrative Procedure
11 Act by authorizing the Proposed Action of surgical sterilization and
12 approving the Final EA, DR, and FONSI;

13 C. Declare that Defendants have violated the National Environmental
14 Policy Act by authorizing the Proposed Action of surgical sterilization and
15 approving the Final EA, DR, and FONSI;

16 D. Enjoin Defendants from carrying out any aspect of the Proposed
17 Action of surgical sterilization or Final EA, DR, and FONSI;

18 E. Vacate the Proposed Action of surgical sterilization and the Final EA,
19 DR, and FONSI;

20 F. Award Plaintiff its costs and reasonable attorneys' fees; and,

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G. Award Plaintiff any other relief that is just and proper.

Respectfully submitted December 10, 2020

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4838-9816-7508, v. 1