No. 15-8033
***ORAL ARGUMENT REQUESTED***

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

AMERICAN WILD HORSE PRESERVATION CAMPAIGN, *et al.*,

*Petitioners-Appellants*,

v.

SALLY JEWELL, *et al.*,

*Respondents-Appellees*,

and

ROCK SPRINGS GRAZING ASSOCIATION and STATE OF WYOMING,

*Intervenor-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING IN CASE 2:14-cv-00152
(HONORABLE NANCY D. FREUDENTHAL)

---

# APPELLANTS' OPENING BRIEF

---

Katherine A. Meyer
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue NW
Suite 210
Washington, DC 20016
(202) 588-5206
kmeyer@meyerglitz.com

William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060
(202) 588-5049 (fax)
beubanks@meyerglitz.com

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants American Wild Horse Preservation Campaign, The Cloud Foundation, Return To Freedom, Carol Walker, and Kimerlee Curyl hereby state that they are either nongovernmental public interest organizations or individuals. None of them issues stock of any kind, nor has parent or subsidiary corporations. Pursuant to Fed. R. App. P. 25(a)(5) and Tenth Circuit Rule 25.5, the undersigned also certifies that all required privacy redactions have been made.

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES** **PAGE**

**STATUTES**

**REGULATIONS**

# GLOSSARY

| | |
|---|---|
| AML | Appropriate Management Level |
| APA | Administrative Procedure Act |
| BLM | Bureau of Land Management |
| DE | Docket Entry |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| FLPMA | Federal Land Policy and Management Act |
| HMA | Herd Management Area |
| NEPA | National Environmental Policy Act |
| RMP | Resource Management Plan |
| RSGA | Rock Springs Grazing Association |

## STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), Petitioners-Appellants American Wild Horse Preservation Campaign, The Cloud Foundation, Return to Freedom, Carol Walker, and Kimerlee Curyl ("Petitioners") represent that there are no pending cases related to this appeal. This Court has previously considered Petitioners' Rule 8(a) emergency motion for an injunction pending appeal of the district court's denial of Petitioners' motion for preliminary injunctive relief, which the Court denied on September 10, 2014, without expressing any view of the merits of Petitioners' claims. *See* Appeal No. 14-8063.[1]

## STATEMENT OF JURISDICTION

The district court had jurisdiction over this action against the Bureau of Land Management ("BLM") pursuant to 28 U.S.C. § 1331. On March 3, 2015, the district court partially granted and partially denied Petitioners' claims. *See* Docket Entry ("DE") 83 (Pet.App.76-102).[2] On May 13, 2015, the district court granted Petitioners' motion for entry of final judgment, and on May 14, 2015, entered final judgment for Respondents as to the claims forming the basis of this appeal. *See*

[1] Pursuant to FRAP 28(d), Petitioners refer to the parties using the designations adopted by the district court—"Petitioners" with respect to the Appellants and "Respondents" with respect to the Appellees.

[2] Pursuant to Tenth Circuit Rule 28.1(A), references to Petitioners' Appendix are designated by Pet.App.XXX.

DE 95 (Pet.App.103). Plaintiffs filed a timely notice of appeal on May 18, 2015. *See* DE 96 (Pet.App.104). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioners are three non-profit organizations and two individuals. Four declarants submitted standing declarations below, *see* DE 67-1 (Pet.App.53-58); DE 67-2 (Pet.App.59-65); DE 67-3 (Pet.App.66-69); DE 67-4 (Pet.App.70-75), and the district court correctly found that Petitioners' claims are not moot. *See* DE 83 at 12-14 (Pet.App.87-89).[3]

[3] Although the district court properly rejected Federal Respondents' mootness argument, Federal Respondents nevertheless continue to insist that this action is moot. As the district court held, however, this case is not moot because "a determination can be issued with real-world effect, whether it is an order to return horses [to the range] or to cure a procedural irregularity." DE 83 at 14 (Pet.App.89). BLM has not even remotely carried its burden to demonstrate that it is *impossible* for the challenged conduct to recur, *see Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000), nor has BLM adequately explained why the activity challenged here (and the statutory interpretation underlying it) is not capable of repetition but evading review due to the short duration of the challenged roundup. *See Buchheit v. Green*, 705 F.3d 1157, 1160 (10th Cir. 2012) (finding that this exception applies where "(1) the duration of the challenged action [is] too short to be fully litigated prior to its cessation or expiration; and (2) there [is a] reasonable expectation that the same complaining party will be subjected to the same action again"). Based on these facts, this case presents a live controversy.

## STATEMENT OF ISSUES

In 1862, Congress established the Wyoming Checkerboard—a pattern of land ownership consisting of alternating squares of private and public land. *See* RSGA2130 (Pet.App.238).[4] In 1971, Congress charged BLM with managing wild horses within all federally administered public lands, including the public lands within the Checkerboard, in compliance with the Wild Free-Roaming Horses and Burros Act ("Wild Horse Act"), 16 U.S.C. §§ 1331-1340. Pursuant to that statute, for 44 years BLM consistently managed wild horses on the *public* lands under Section 3 of the Wild Horse Act, and removed wild horses that strayed onto *private* lands pursuant to Section 4 of the Act.

In July 2014, in response to a landowner request to remove wild horses that had strayed from public Checkerboard lands onto adjoining private lands, BLM made the unprecedented decision to permanently remove more than 1,200 wild horses from the entire Checkerboard—including many horses located on *public* lands—without first satisfying any of the legal prerequisites that Congress enacted

[4] Citations to the administrative record in an earlier related case—*Rock Springs Grazing Association v. Salazar*, 2:11-cv-263 (D. Wyo.)—are denoted by "RSGAXXX." The parties have consented to citation to the RSGA record in this case.

as safeguards to *avoid* the unnecessary removal of any wild horses from public lands. The issues raised in this appeal are:

1. Whether BLM's first-ever permanent removal of wild horses from *public* lands pursuant to the Wild Horse Act's limited authority under Section 4 of the Act to remove horses that have "stray[ed] from public lands onto privately owned land," is consistent with the plain language of the statute, or, in the event that the statute is deemed ambiguous on this point, whether BLM's position is a permissible construction of the statute entitled to deference?

2. Whether BLM's permanent removal of wild horses from public lands that resulted in these herds falling far below their legally established appropriate management levels ("AMLs")—i.e., population minimums adopted in and implemented through the agency's binding Resource Management Plans ("RMPs")—violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1787, and was therefore arbitrary and capricious, an abuse of discretion, or not in accordance with law pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)?

## STATEMENT OF THE CASE

This appeal raises a critically important question of first impression in this Circuit concerning BLM's newly minted construction of the Wild Horse Act, which has precedential implications for wild horse management throughout the American west. As with any statutory construction question, it is necessary to first frame the "precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The question at issue here is as follows: May BLM permanently remove federally protected wild horses from *public* lands pursuant to its authority in Section 4 of the Wild Horse Act that is limited to removing wild horses that have "stray[ed] from public lands onto privately owned land," 16 U.S.C. § 1334, without complying with any of the statutory prerequisites Congress enacted in Section 3 of the Wild Horse Act, *id.* § 1333, which expressly apply to the permanent removal of any wild horses from public lands? Congress "has directly spoken to th[is] precise question," *Chevron*, 467 U.S. at 842, and the unequivocal answer is "no."

Section 3 of the Wild Horse Act is the *only* statutory provision that grants BLM *any* authority to remove wild horses from *public* land—authority triggered *only* if BLM first makes certain mandatory determinations. *See* 16 U.S.C. § 1333(b)(2). In contrast, Section 4 of the Act—upon which BLM relied here to

remove *all* of the wild horses at issue—says nothing about *public* lands. Rather, that section of the statute merely provides BLM, upon receiving a request from a landowner, with the limited authority to remove from *private* land any wild horse that has "stray[ed] *from* public lands *onto* privately owned land," *id.* § 1334 (emphasis added). Thus, because "the intent of Congress is clear, that is the end of the matter," and the Court "must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842-43—i.e., this Court must ensure that before BLM permanently removes any wild horses from *public* lands the agency first satisfies the statutory prerequisites Congress enacted specifically to safeguard against unnecessary removals of these federally protected resources. BLM cannot avoid this outcome simply because it desires to be freed from the Wild Horse Act's plain text in order to address what BLM views as an administrative inconvenience in taking actions in the combined public and private portions of the Checkerboard—i.e., a public policy argument that has no relevance in the *Chevron* framework.

Likewise, since BLM premised its decision to permanently remove from the Checkerboard more than 1,200 wild horses—at least half of which were removed from the Checkerboard's *public* lands—on BLM's willful disregard of the public land component of its action, it resulted in BLM reducing the wild horse

populations at issue far below the agency's own legally established AMLs that apply to these public lands and, in turn, contravened the governing RMPs and violated FLPMA.

Based on Petitioners' longstanding interests in observing, studying, and otherwise enjoying the wild horses that BLM permanently removed from these public lands, the district court found that it had jurisdiction over Petitioners' claims and that the Court had the ability to order BLM to return horses to the range or require BLM to comply with various statutory procedures in the event that Petitioners prevailed. *See* DE 83 at 12-14 (Pet.App.87-89). On the merits, however, the court sidestepped any analysis under *Chevron* Step 1, and deferred to BLM's statutory interpretation under *Chevron* Step 2 notwithstanding the myriad rationales Petitioners provided for why such deference was not warranted. *Id.* at 14-21 (Pet.App.89-96).

The district court predicated its ruling on a counter-textual reading of the Wild Horse Act that would authorize BLM to invoke Section 4 of the Act to remove wild horses from *public* land despite that provision applying only to BLM's authority to remove horses from *private* land under certain circumstances. By so ruling, the court also authorized BLM to avoid compliance with the statutory mandates necessary to remove horses from public land pursuant to Section 3 of the

Act, whenever BLM determines that such horses *may* at some indeterminate future time stray from public land in the Wyoming Checkerboard onto private land. The district court's novel interpretation, if adopted by this Court, would not only violate the plain language of the statute, but create an unnecessary circuit split with the Ninth Circuit. *See Fallini v. Hodel*, 783 F.2d 1343, 1346 (9th Cir. 1986) (holding that BLM has no "duty, ministerial or prescribed to prevent straying of wild horses onto private land.").

## STATEMENT OF FACTS

### A. Statutory Framework

#### *1. The Creation and Regulation of the Wyoming Checkerboard*

In 1862, Congress created the Wyoming Checkerboard to facilitate the construction of a transcontinental railroad. *See Rock Springs Grazing Ass'n v. Salazar*, 935 F. Supp. 2d 1179, 1182 (D. Wyo. 2013). Today, the Checkerboard still consists of one-mile-by-one-mile squares of federally administered *public* land alternating with one-mile-by-one-mile squares of *private* land, forming a checkerboard pattern "encompassing an area roughly 40 miles wide and 80 miles long and containing slightly more than two million acres." *Id*.

Ranchers quickly realized that by owning a small portion of private land within the Checkerboard they could assert control over large swaths of public land.

Thus, soon after Congress created the Checkerboard, ranchers began to fence in and exclude access to the public land portions of the Checkerboard in order to graze their privately owned livestock there. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 683-684 (1979) (discussing the "range wars" and noting that one "exclusionary technique was the illegal fencing of public lands" as a "product of the checkerboard pattern").

Congress responded to this illegal fencing by enacting the 1885 Unlawful Inclosures Act, 43 U.S.C. §§ 1061-1066. That law prohibits the physical enclosure of public lands and any "assertion of a right to the exclusive use and occupancy of any part of the public lands." 43 U.S.C. § 1061. Nevertheless, enterprising ranchers strategically placed fences on privately owned land in the Checkerboard in order to fence in public land for private use, which the Supreme Court held was a violation of federal law. *See Camfield v. United States*, 167 U.S. 518, 522, (1897); *see also id.* at 528 (explaining that landowners cannot "build[] a fence which . . . can only have been intended to inclose the lands of the Government"). Thus, on the Checkerboard, ranchers cannot fence in or assert a right to public land for their own private use, but they can fence in their individual parcel of private land, although few do given their interest in grazing livestock freely between the public and private land.

### *2. The Wild Horse Act And FLPMA*

In 1971—more than 100 years after creating the Checkerboard—Congress enacted the Wild Horse Act out of concern that wild horses were "disappearing from the American scene." 16 U.S.C. § 1331. Declaring that "wild horses are living symbols of the historic and pioneer spirit of the West," and "contribute to the diversity of life forms within the Nation and enrich the lives of the American people," Congress directed that wild horses "shall be protected from capture, branding, harassment, [and] death" and "be considered in the area where presently found, as an integral part of the natural system of the public lands." *Id.* To implement that mandate, Congress declared that BLM shall "protect and manage wild free-roaming horses and burros as components of the public lands," and provided that "[a]ll management activities shall be at the minimal feasible level." 16 U.S.C. § 1333(a).

Under the Act, BLM manages wild horses on public lands within herd management areas ("HMA"), which are "established for the maintenance of wild horse . . . herds," 43 C.F.R. § 4710.3-1, in the areas they used in 1971. 43 C.F.R. § 4700.0-5(d). BLM designates HMA boundaries in RMPs, which are prepared through a land-use planning process conducted pursuant to FLPMA. FLPMA's implementing regulations require BLM to maintain RMPs that are "designed to

guide and control future management actions" on public lands. *Id.* § 1601.0-2. Modifications to HMA boundaries may only be adopted through this land-use planning process, which requires extensive public involvement and compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370h. *See* 43 C.F.R. § 4710.1; AR252-53 (Pet.App.112-13) (decisions to modify "an HMA must be made through a [land use plan] amendment, revision or new RMP").[5]

The Wild Horse Act further requires BLM to manage wild horses "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a). To do so, for each HMA, BLM must: (1) maintain a current inventory of wild horses in each HMA, (2) "determine [the] appropriate management level"—i.e., the AML—of wild horses that the HMA can normally sustain, and (3) determine the method of achieving the designated AML and managing horses within it. 16 U.S.C. § 1333(b)(1); 43 C.F.R. §§ 4710.2, 4710.3-1.

An AML is "expressed as a population range within which [wild horses] can be managed for the long term" in an HMA without resulting in rangeland damage.

[5] References to BLM's administrative record in this case are denoted by "ARXXX."

AR262 (Pet.App.115). The lower limit of the AML range is "established at a number that allows the population to grow (at the annual population growth rate) to the upper limit over a 4-5 year period, without any interim gathers." *Id.* BLM establishes a binding AML for each HMA through the formal FLPMA process when developing or amending the applicable RMP. *See* AR263 (Pet.App.116).

Section 3 of the Wild Horse Act grants BLM the authority to manage and protect wild horses by permanently removing "excess" horses from public lands, but only after BLM specifically determines that: (1) "an overpopulation [of wild horses] exists on a given area of the public lands," and (2) "action is necessary to remove excess animals." 16 U.S.C. § 1333(b)(2). An "excess" wild horse is defined as one that "must be removed from an area *in order to preserve and maintain a thriving natural ecological balance . . . in that area*." 16 U.S.C. § 1332(f) (emphasis added). Once BLM makes a formal "excess determination," it may remove only those "excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2).

According to BLM's wild horse manual, "[w]ild horses or burros should generally not be removed below the AML lower limit." AR3396 (Pet.App.203); *see also* AR262 (Pet.App.115) (wild horse removals should be conducted to "maintain population size within AML"). Removal of wild horses below the

agency's legally established AML may be warranted only "in emergency situations based on limited forage, water or other circumstances." AR3397 (Pet.App.204). Before taking action to remove wild horses below AML if BLM determines that emergency circumstances exist, BLM must conduct an adequate NEPA analysis subject to public participation and provide a compelling "[r]ationale to justify a reduction below the AML lower limit." *Id.*

In contrast to Section 3's broad authority to permanently remove excess horses from *public* land in order to *protect* wild horse populations, Section 4 of the Act provides BLM with the narrow authority to remove wild horses from *private* land when "the owners of such land . . . inform [BLM]" that a wild horse has "stray[ed] *from public lands onto privately owned land*." 16 U.S.C. § 1334 (emphasis added). This narrow authority is triggered only by a "written request from the private landowner," 43 C.F.R. § 4720.2-1, at which point BLM must "arrange to have the animals removed." 16 U.S.C. § 1334

***3. NEPA***

NEPA is the nation's "basic national charter for the protection of the environment," 40 C.F.R. § 1500.1, and is "binding on all Federal agencies." 40 C.F.R. § 1500.3. NEPA requires agencies to prepare an Environmental Impact

Statement ("EIS") for major actions that may "significantly affect" the environment. 42 U.S.C § 4332(C); 40 C.F.R. § 1508.27. An agency may prepare an "Environmental Assessment" ("EA") to determine whether the environmental effects of its proposed action are "significant," thus requiring the preparation of an EIS. 40 C.F.R. § 1501.4(b). In rare instances, an agency may "categorically exclude" actions from NEPA review. *Id*. § 1508.4. A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." *Id*. BLM has adopted a categorical exclusion covering the removal of wild horses from *private* lands at the request of the landowner. *See* AR3369 (Pet.App.188). However, BLM does not have a categorical exclusion covering the removal of wild horses from *public* lands.

***4. The Taylor Grazing Act***

The Taylor Grazing Act, 43 U.S.C. §§ 315-315r, authorizes BLM to issue permits for the grazing of livestock on public lands "upon the payment . . . of reasonable fees." 43 U.S.C. § 315b. However, as the statute makes absolutely clear, "the creation of a grazing district or the issuance of a [grazing] permit . . . *shall not create any right, title, interest, or estate in or to*" public lands. *Id.* (emphasis added); *see also United States v. Fuller*, 409 U.S. 488, 494 (1973) ("The

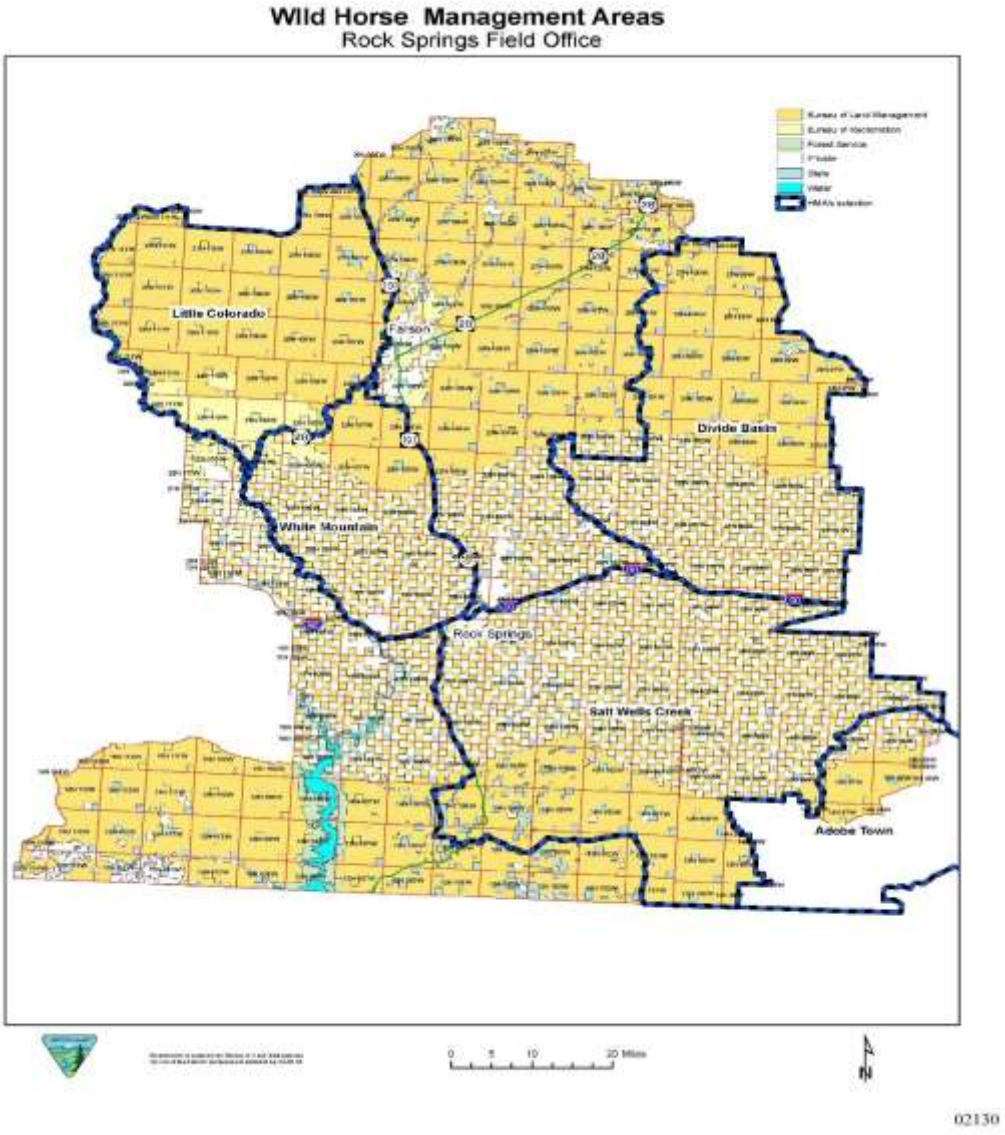
provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit."); *Fed. Lands Legal Consortium v. U.S.*, 195 F.3d 1190, 1196 (10th Cir. 1999) ("A grazing permit . . . gives the permittee merely a license to use federal land, *not a vested right in that land*.") (emphasis added).

## B. Factual Background

### *1. The Adobe Town, Salt Wells Creek, And Great Divide Basin HMAs*

The Adobe Town, Salt Wells Creek, and Great Divide Basin HMAs are located in southwestern Wyoming, comprising 2,427,220 acres of land. *See* AR642 (Pet.App.132); AR3356 (Pet.App.175). Roughly 70% of these three HMAs (1,695,517 acres) are federally administered public lands, while only 30% (731,703 acres) are private lands. AR3356 (Pet.App.175). The privately owned land falls within the Wyoming Checkerboard and is owned or leased by Intervenor Rock Spring Grazing Association ("RSGA"), with RSGA's private holdings ranging from as little as 8% of the Adobe Town HMA to as much as 39% of the Great Divide Basin HMA. *Id*. The non-Checkerboard lands within these three HMAs—i.e., the portions of these HMAs falling outside of the Checkerboard—

comprise well over half of the total land area in these three HMAs and primarily consist of large contiguous blocks of public land, as depicted in the following map:




RSGA2130 (Pet.App.238). Livestock owners in the area are permitted to graze their sheep and cattle on the Checkerboard's *public* lands pursuant to the Taylor Grazing Act, at rates far below market value for such forage.

### *2. The 1981 Court Order And The Post-1981 Development Of AMLs*

After formally establishing these three wild horse HMAs in 1971 upon Congress' enactment of the Wild Horse Act, BLM began managing the wild horses allocated to these HMAs pursuant to the Act. By 1979, RSGA became frustrated with BLM's failure to reduce the wild horse population on RSGA's private Checkerboard lands to a number RSGA deemed acceptable, so RSGA entered into an agreement with wild horse advocacy organizations, including at least one of the Petitioners, in which RSGA consented to allowing up to 500 wild horses on *RSGA's private lands* in the Checkerboard. See RSGA3329 (Pet.App.239) (agreeing to allow specified numbers of wild horses "*on the Rock Springs Grazing Association lands*" in the Checkerboard) (emphasis added).

That same year, RSGA sued BLM seeking to compel the agency to remove all wild horses from the Checkerboard. *Id.* In 1981, the district court ruled on the merits of RSGA's case, finding that more than 3,400 wild horses were located on RSGA's private lands and ordering BLM to: (1) within one year, remove "all wild horses from the checkerboard *grazing lands*"—i.e., RSGA's private grazing lands—"except that number which [RSGA] voluntarily agrees to leave in said area," and (2) within two years, remove all "excess" horses from the public lands in the HMAs at issue. RSGA870 (Pet.App.233) (emphasis added). The court

defined "excess" wild horses to mean "the wild horse population [that] exceeds the number deemed appropriate by a final environmental [impact] statement" as part of the RMP process. RSGA871 (Pet.App.234). In 1982, the court modified its earlier order and explained again that the term "excess" means "those horses above the population level that [BLM] has determined to be appropriate, in accordance with its multiple-use management responsibilities" under FLPMA and the Wild Horse Act—i.e., excess horses in these HMAs are those horses above the AML established by BLM through its RMP process. RSGA888 (Pet.App.237).

To satisfy its obligations under FLPMA and the Wild Horse Act, BLM instituted extensive multi-year RMP processes to determine proper AMLs for the public lands of these HMAs—processes which were accompanied by detailed NEPA review and public comment. *See* AR1 (Pet.App.106); AR235 (Pet.App.110). Based on several factors—(1) RSGA's consent to allow up to 500 wild horses on RSGA's privately owned land in the Checkerboard, (2) the abundant forage and other resources in the public lands of the Checkerboard that could support wild horse use, and (3) data showing that the large contiguous blocks of public land in these HMAs could support many wild horses outside of the Checkerboard lands—BLM formally determined in its 1997 Green River RMP that the AML for the Salt Wells Creek HMA must be established at 251-365 wild

horses and that the AML for the Great Divide Basin HMA must be established at 415-600 horses. *See* AR91 (Pet.App.109). BLM likewise formally determined in its 2008 Rawlins RMP that the AML for the Adobe Town HMA must be established at 610-800 wild horses. *See* AR235 (Pet.App.110). In reaching these AML determinations, BLM explained that it deemed these AML numbers to constitute the "optimum number of wild horses that provides a thriving natural ecological balance on the public range" within these HMAs. AR63 (Pet.App.108). Both RMPs are still in effect and expressly require that BLM "[m]aintain wild horse populations within the appropriate management levels (AML)." AR235 (Pet.App.110); *see also* AR41 (Pet.App.107) (stating that the "appropriate management level . . . will be maintained").

### *3. RSGA's 2011 Lawsuit And The Resulting 2013 Consent Decree*

In 2011, RSGA once again became frustrated with BLM's management of wild horses in the Checkerboard. In turn, RSGA revoked its consent to tolerate any wild horses on its private lands in the Checkerboard and then filed a lawsuit seeking an order pursuant to Section 4 of the Wild Horse Act compelling BLM to remove all of the wild horses that had strayed onto RSGA's private Checkerboard lands. *See* DE 83 at 7-8 (Pet.App.82-83). Initially, BLM strenuously argued that the court could not "forc[e] BLM to manage wild horses on private and public

lands [within the Checkerboard] to the number [RSGA] deem[ed] appropriate" because "[s]uch relief *would exceed the scope of Section 4 of the Wild Horse Act*" that applies only to private land, *Rock Springs Grazing Ass'n v. Salazar* ("*RSGA*"), No. 2:11-cv-263, DE 67 at 25-26 (Pet.App.220-21) (emphasis added), and that such action "would interfere with BLM's discretion" in managing the public lands under its authority. *Id*. at 41 (Pet.App.209). Wild horse advocates, including Petitioners, were allowed to intervene in that case and took the position that RSGA could not force BLM to remove *any* horses from the Checkerboard's *public* lands. *See RSGA*, DE 65 at 24-26 (Pet.App.214-16).

Despite the disagreement between the parties about BLM's authority under Section 4 of the Act, in February 2013 BLM and RSGA abruptly filed a proposed Consent Decree and sought to dismiss the case. They asserted that "the Consent Decree serve[s] the objectives of the WHA by *retaining wild horses on the public lands while reducing landowner conflict where the wild horses stray onto private lands*." *RSGA*, DE 81 ¶ 2 (Pet.App.224-25) (emphasis added). In response to concerns raised by the wild horse advocate intervenors, RSGA and the government assured the district court that the Consent Decree promoted "the public interest by providing that *future decisions concerning the wild horse areas and numbers will occur through a public process*." *Id*. at ¶ 4 (Pet.App.225-26) (emphasis added).

The Consent Decree also asserted that "it is in the public interest to . . . enter into a stipulation with respect to the *wild horses located on **private** RSGA land* and *to initiate a process to better manage wild horses on the adjacent public lands*." AR467 (Pet.App.121) (emphases added). As such, the Consent Decree provided that: (a) BLM will "remove all wild horses located on RSGA's ***private*** lands, including Wyoming Checkerboard lands," *id.* (emphasis added), and (b) "BLM will commit to gather and remove wild horses from [the public portions of the] Checkerboard lands within Salt Wells and Adobe Town HMAs in 2013, Divide Basin HMA in 2014, and White Mountain HMA in 2015, *with the exception of those wild horses that are allowed to remain as identified in paragraphs 1 and 4*,"AR469 (Pet.App.123) (emphasis added)—i.e., no horses would be removed below AML. *See* AR468 (Pet.App.122) (stating that BML would only remove horses on the public lands of these HMAs "to the low end of AML"). BLM also agreed to "submit to the Federal Register for publication a notice of scoping under NEPA to consider . . . revising the respective [RMPs]" to reduce the Salt Wells, Great Divide Basin, and Adobe Town AMLs. AR469-70 (Pet.App.123-24).

The Consent Decree further stated that "[n]othing in this Consent Decree shall be construed to *limit or modify the discretion accorded to BLM by the applicable federal law and regulations* . . . or general principles of administrative

law with respect to the *procedures to be followed in carrying out any of the activities* required herein." AR471-72 (Pet.App.125-26) (emphases added).

Despite objections from the intervenors, the district court approved the Consent Decree, stressing that "[u]nder the proposed Consent Decree, BLM *agrees only to consider*" AML modifications and "the potential environmental effect thereof *in resource management plan revisions and associated NEPA documents*." *RSGA*, DE 88 at 7-8 (Pet.App.231-32) (emphases added). Hence, recognizing BLM's "duty to remove wild horses from private lands under Section 4," *id.* at 6 (Pet.App.230), BLM and RSGA assured the Court that, in implementing the Consent Decree, BLM would remove wild horses from RSGA's ***private*** land, but would *not* permanently remove any wild horses from *public* land (or modify AMLs) until BLM satisfied the appropriate procedures under FLPMA, the Wild Horse Act, and NEPA. *See RSGA*, 935 F. Supp. 2d at 1189-91.

Thus, in approving the Consent Decree, the district court specifically noted that the AMLs for these HMAs are not "changed by the Consent Decree," *id.* at 1189, meaning that they are still in effect until and unless BLM formally amends the governing RMPs consistent with the legal requirements of FLPMA, the Wild Horse Act, and NEPA.

### *4. BLM's Implementation Of The Consent Decree*

a. The 2013 Adobe Town-Salt Wells Roundup

In 2013, BLM immediately began to implement the Consent Decree with a roundup in the Adobe Town and Salt Wells Creek HMAs designed to remove wild horses from RSGA's private lands while *also* removing excess horses from the public lands of these HMAs in order to maintain wild horse populations within the established AMLs. AR469 (Pet.App.123) ("BLM will commit to gather and remove wild horses from Checkerboard lands within Salt Wells and Adobe Town HMAs in 2013."); AR645 (Pet.App.135) (noting that the roundup is "necessary to meet the terms of the 2013 Consent Decree"); AR694 (Pet.App.138) ("Wild horses will be removed from private lands and the checkerboard and be maintained at AML within the federal land block in accordance with the existing 1997 Green River RMP and the 2008 Rawlins RMP."). In other words, BLM proposed rounding up *all* horses from the Checkerboard portion of these HMAs to satisfy RSGA's Section 4 request while at the same time BLM proposed returning to the non-Checkerboard federal land block the minimum number of wild horses necessary to achieve the established AMLs in these areas—i.e., accomplishing the objectives of Sections 3 and 4 simultaneously.

Accordingly, in July 2013, BLM issued a decision combining two separate actions into a single decisionmaking process: (1) the permanent removal of "excess" wild horses from *public* lands in the Adobe Town and Salt Wells HMAs under Section 3 of the Wild Horse Act (including the public Checkerboard lands), and (2) the removal of all horses that had strayed onto RSGA's private lands within the Adobe Town and Salt Wells HMAs under Section 4. *See* AR645 (Pet.App.135); AR741 (Pet.App.141). In that decision, BLM identified the AMLs for both the Adobe Town HMA (610-800 wild horses) and the Salt Wells Creek HMA (251-365 wild horses) and, because public lands were involved, made a formal "excess" determination as required by Section 3 of the Wild Horse Act. *See* AR644 (Pet.App.134) ("BLM has determined that approximately 586 excess wild horses need to be removed"). BLM explained why the agency was required to maintain the AML within the Adobe Town and Salt Wells Creek HMAs:

> Wild horses will be removed from private lands and the checkerboard and *be maintained at AML within the federal land block in accordance with the existing 1997 Green River RMP and the 2008 Rawlins RMP. Changes to HMA boundaries and AML are land use planning allocations and are outside the scope of this analysis . . . . Interim management of wild horses will continue to be in conformance with the existing RMPs until the amendments and revision is complete*, in accordance with 43 C.F.R. § 1610.5.

AR694 (Pet.App.138) (emphases added).

In November 2013, pursuant to that decision, BLM rounded up 668 horses from the Adobe Town and Salt Wells HMAs (including from the public and private Checkerboard lands). *See* AR3357 (Pet.App.176). BLM permanently removed 586 of those wild horses from the range, which was the combined number of horses BLM determined were "excess" wild horses. *Id*. The remaining 79 wild horses that were necessary to achieve the AML in the Adobe Town and Salt Wells HMAs were *not* returned to the private Checkerboard lands, but instead were released onto the federal public land block in these HMAs, meaning that at the end of the roundup BLM had not only removed all wild horses from the *private* Checkerboard lands consistent with Section 4 but the agency had also ensured compliance with the applicable AMLs on the large *public* land blocks in these HMAs pursuant to Section 4 and FLPMA. *Id*.

b. The Initially Proposed Roundup in Great Divide Basin

Soon after completing the Adobe Town-Salt Wells roundup, BLM again invoked the Consent Decree to "gather and remove wild horses from Checkerboard lands within . . . [the] Great Divide Basin HMA in 2014." AR469 (Pet.App.123). In December 2013, BLM initiated a NEPA process, again combining two separate actions: (1) the permanent removal of "excess" wild horses from public lands in the Great Divide Basin HMA under Section 3, and (2) the removal of wild horses

from private lands within that HMA under Section 4. *See* AR822 (Pet.App.144). BLM clarified that, while *all* horses would be removed from private land to comply with Section 4, some "may be relocated in the northern part of the Great Divide Basin HMA"—i.e., the federal public land block of this HMA—to achieve the operative AML of no less than 415 wild horses in order to comply with Section 3, FLPMA, and the governing RMP. *Id.* This scoping statement mirrored the approach undertaken by BLM in its 2013 Adobe Town-Salt Wells roundup.

In response to BLM's proposal, RSGA "identified concerns with BLM's proposed action to remove wild horses to the low [AML] for the HMA, as this was believed to be inconsistent with the 2013 Consent Decree provision for removing all wild horses from checkerboard lands." AR3357 (Pet.App.176). RSGA asserted that BLM must "remove all wild horses from the Checkerboard" because, in RSGA's view, "the Checkerboard is effectively off limits to wild horses and cannot be considered as part of their available habitat," notwithstanding that the Consent Decree did not—and could not, consistent with the WHA, FLPMA, or NEPA—modify the AMLs. AR1318 (Pet.App.156); *see also* AR469-70 (Pet.App.123-24) (agreeing in 2013 Consent Decree that AMLs would not be modified without formal RMP revision process under FLPMA and accompanying

NEPA compliance). In turn, RSGA demanded that the Great Divide Basin AML "be reduced to reflect the reduction in land." AR1317 (Pet.App.155).

RSGA's counsel separately notified BLM that the agency was in violation of the 2013 Consent Decree because, in RSGA's view, the Checkerboard "is no longer available to wild horses," AR3313 (Pet.App.161), and accused BLM of "sabotag[ing] the Consent Decree" by ensuring compliance with the applicable AMLs during the 2013 Adobe Town-Salt Wells roundup. AR3314 (Pet.App.162). Despite the fact that the Consent Decree did not—and could not—formally modify the RMPs and the AMLs contained therein, RSGA nevertheless threatened BLM that "gathering only a minimum number of wild horses and leaving the rest"—i.e., ensuring compliance with the applicable AML—"is not [in] compliance with the Consent Decree." AR 3317 (Pet.App.165).

As a result of RSGA's demands, the Justice Department—i.e., the same agency that previously assured the district court that, under the Consent Decree, no wild horses would be removed from public lands in these HMAs unless BLM first achieved compliance with the Wild Horse Act, FLPMA, NEPA, and the governing RMPs, *see supra* at 20-22—advised BLM that the 2013 Adobe Town-Salt Wells roundup was in violation of the Consent Decree and that BLM could not proceed in the same manner in the future. AR3341-42 (Pet.App.167-68). Thus, BLM

decided not to "gather the Great Divide Basin HMA to low [AML] under Section 3 of the WHA" but instead to "gather *all* wild horses from the checkerboard within the HMAs"—relying *solely* on BLM's authority under Section 4 of the statute. AR3369 (Pet.App.188).

BLM acknowledged that this was "a fundamental change" in the way the agency interpreted the Consent Decree and the Wild Horse Act. AR3341 (Pet.App.167). Indeed, the BLM State Director expressed serious concerns that: (1) proceeding solely under Section 4 "will result in the HMA[s] being significantly below low AML," (2) "remov[ing] wild horses from the checkerboard lands with no regard for the low AML will be very challenging and has not previously been done in Wyoming," and (3) because this action would, in effect, modify the AMLs, it would "require analysis that is typically done in an EIS through the land use planning process and will . . . be very controversial." AR3349 (Pet.App.174).

In May 2014, a BLM official wrote RSGA to "clarify apparent misunderstandings between our respective clients over the terms of the Consent Decree." AR3344 (Pet.App.170). The official informed RSGA that BLM intended to "remove all wild horses from the Checkerboard" pursuant to Section 4 and not "return gathered horses to [the] public land solid block of the HMA."

AR3345 (Pet.App.171). Nevertheless, she explained that "HMA boundaries and AML[s] established in the RMPs are land use planning decisions that would require amendment or revision of the RMPs." *Id.* As such, she explained that "any changes to AMLs or HMA boundaries" are "outside the scope" of this decision, even though the effect of the decision would, as a practical matter, modify the AMLs by taking the wild horse population on the public lands of these HMAs far below their legally established AMLs. *Id.*

c. BLM's Decision To Remove All Wild Horses From The Wyoming Checkerboard Under Section 4

In July 2014, acceding to RSGA's demands, BLM issued a Decision Record and a Categorical Exclusion under NEPA authorizing the "removal of all wild horses from Checkerboard Lands within the Great Divide Basin, Adobe Town, and Salt Wells Creek [HMAs]." AR3369 (Pet.App.188). BLM's decision rested solely on its limited authority under Section 4 of the Wild Horse Act, *id.*, which allows it to remove horses that "stray *from* public lands *onto* privately owned land." 16 U.S.C. §1334 (emphases added). However, despite the fact that Section 4 only pertains to the removal of wild horses that have strayed "onto privately owned land," *id.*, BLM made clear that as part of the action "wild horses *will also be removed from the public land* portions of the [C]heckerboard." AR3360 (Pet.App.179) (emphasis added); AR3371 (Pet.App.190).

Thus, although Section 3 of the Act is the only provision authorizing BLM to permanently remove any wild horses from public land, BLM did not purport to comply with—or even invoke—Section 3 in making this decision. In particular, BLM did not make the "excess" determination required by Section 3 prior to permanently removing *any* wild horses from public lands in these HMAs. Nor did BLM identify—let alone discuss—the operative AMLs for these three HMAs. Rather, BLM ignored the public land component of its action and asserted that the "management direction set forth in the Green River and Rawlins RMPs, including that related to [AMLs], do not apply to *private* lands." AR3371 (emphasis added).

## C. Proceedings in the District Court

### *1. Preliminary Injunction Proceedings*

Petitioners filed suit on August 1, 2014 raising claims under the Wild Horse Act, FLPMA, and NEPA. *See* DE 1 (Pet.App.12-49). Because BLM refused to postpone the challenged roundup by more than a few weeks, Petitioners were forced to seek preliminary injunctive relief, which the district court denied on August 28, 2014. Petitioners filed an emergency motion in this Court for an injunction pending appeal, which the Court denied on September 10, 2014, stating only that "[w]e conclude that Petitioners-Appellants have not shown that the balance of these factors favors granting the motion." *See* Appeal No. 14-8063.

### *2. The October 2014 Roundup*

After the denial of Plaintiffs' request for preliminary injunctive relief, BLM permanently removed 1,263 wild horses from these HMAs and placed them in long-term holding facilities, *see* DE 58-1 ¶ 5 (Pet.App.51). As the following table demonstrates, based on BLM's own post-roundup population numbers, only 649 wild horses remained on the 2,427,220 acres of land—70% of which is public—within these three HMAs at the conclusion of the roundup. *Id.* ¶ 7.

| HMA | AML | Post-Roundup Population |
|---|---|---|
| Great Divide Basin | 415-600 | 91 |
| Salt Wells Creek | 251-365 | 39 |
| Adobe Town | 610-800 | 519 |

Thus, according to BLM's own data, BLM's October 2014 roundup reduced the wild horse population in all three HMAs *far below their established AMLs*, and in two HMAs nearly eradicated wild horses entirely.

### *3. The District Court's Merits Ruling*

After the October 2014 roundup, the parties proceeded with merits briefing. Petitioners argued that the plain language of the Wild Horse Act and the overall statutory framework compelled the conclusion under *Chevron* Step 1 that BLM had acted in excess of its statutory authority by circumventing the specific safeguards enacted by Congress before any federally protected wild horse may be

permanently removed from *public* lands in an HMA. Alternatively, Petitioners argued that, even if the language of the Act were somehow deemed ambiguous, BLM's statutory interpretation in this instance is not permissible because it violates several well-established canons of statutory construction. Petitioners also asserted that BLM violated FLPMA and the governing RMPs by reducing the wild horse populations at issue far below the applicable AMLs. Petitioners also contended that BLM violated NEPA in myriad ways by categorically excluding this action from NEPA review.

After oral argument, the district court rejected Federal Respondents' mootness argument and determined that Petitioners' claims present a live controversy because of the court's ability to order BLM to return horses to the range or to compel BLM to comply with various statutory procedures. *See* DE 83 at 12-14 (Pet.App.87-89). On the merits, the court ruled for Respondents on the Wild Horse Act and FLPMA claims, and ruled for Petitioners as to the NEPA claim. *See id.* at 14-27 (Pet.App.89-102). With respect to the Wild Horse Act claim, the court bypassed any analysis under *Chevron* Step 1 and instead skipped immediately to *Chevron* Step 2 in adopting a position overly deferential to Respondents' new policy argument that it is administratively inconvenient under Section 4 of the Act for the agency to remove only those wild horses on private

lands in the Checkerboard due to its unique land management scheme. Moreover, although the district court purported to rely on *Fallini v. Hodel* in ruling that BLM may rely on Section 4 to remove wild horses from *public* lands, *see id.* at 16-20 (Pet.App.91-95), that decision ruled that Section 4 does *not* authorize BLM to remove wild horses from *public* lands merely because they may in the future stray onto private land. *See* 783 F.2d at 1346 (holding that BLM has no "duty, ministerial or prescribed, to prevent straying of wild horses onto private land" under Section 4 of the Act).

Likewise, as to FLPMA, although the court acknowledged that BLM's decision "had the practical effect of reducing horse populations far below the express AML requirements of the operative RMPs," the court affirmed BLM's action on the ground that BLM only invoked its Section 4 private land removal authority for this action to which AMLs do not apply, without reconciling the fact that BLM *also* permanently removed hundreds of wild horses from *public* lands to which these AMLs *do* expressly apply. DE 83 at 21-23 (Pet.App.96-98).

Under NEPA, although the district court found that BLM did not act arbitrarily in categorically excluding this action from NEPA review on the grounds that BLM only invoked Section 4 of the Wild Horse Act in taking this action (despite the fact that it involved the removal of hundreds of horses from *public*

land), the court nevertheless found that BLM contravened NEPA by failing to adequately consider alternatives to the action. *Id.* at 23-27 (Pet.App.98-102). The court remanded the NEPA analysis to BLM to address certain deficiencies. *Id.* at 27 (Pet.App.102).[6]

## SUMMARY OF ARGUMENT

**1.** The district court's affirmance of BLM's newly minted construction of the Wild Horse Act—in which the agency asserted for the first time that it is authorized to permanently remove wild horses from *public* land under Section 4 of the statute, which only authorizes the removal of horses from *private* lands—is in error for several reasons.

First, because the district court failed to conduct any analysis under *Chevron* Step 1 in upholding BLM's new interpretation of the Wild Horse Act, and in the process ignored the statute's plain language and the unequivocal conditions Congress placed on BLM before it may remove any wild horses from *public* land, the court misapplied the *Chevron* framework and neglected Congress' clear direction for how BLM must proceed when it permanently removes wild horses

[6] Although Federal Respondents and Intervenor RSGA initially appealed the NEPA ruling in Petitioners' favor as well as the district court's certification of its merits ruling as a final appealable order pursuant to 28 U.S.C. § 1291, they have since dismissed those appeals.

from public land. In so doing, the district court adopted BLM's new statutory interpretation that, if adopted by this Court, would grant BLM sweeping authority under Section 4 that Congress plainly did not intend. Additionally, such a holding would cause an unnecessary split with the Ninth Circuit's holding in *Fallini v. Hodel* where that court expressly rejected the notion that Section 4 of the Act authorizes BLM to remove wild horses from *public* land if such horses may stray onto private land at some future time.

Second, even if the Act were somehow ambiguous despite Congress' clarion dictates concerning wild horse management involving federally administered *public* lands, the district court erred under *Chevron* Step 2 by deferring to a Wild Horse Act interpretation from BLM that violates well-established canons of statutory construction, contradicts the agency's own prior interpretations and past practices, and conflicts with a statutory interpretation adopted by the Ninth Circuit.

**2.** The district court also erred by finding that BLM did not act arbitrarily and capriciously, and in violation of FLPMA and the governing RMPs, by reducing the wild horse populations in these HMAs far below their legally established AMLs. In the absence of any qualifying emergency that might justify temporarily reducing these wild horse populations below their applicable AMLs, it was plain error for BLM to contravene the binding standards of the RMPs and to,

in effect, dramatically modify the AMLs without first going through the legal process required to achieve that result under FLPMA.

## ARGUMENT

### I. STANDARD OF REVIEW

Under the APA, this Court "shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). An action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, although an agency may deviate from its prior practice, it "is obligated to supply a reasoned analysis for the change." *Id*. at 41-43. If the agency's explanation is deficient, the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id*.

When determining whether an action is "in accordance with law," the Court applies the two-step analysis set forth in *Chevron*, 467 U.S. at 842. Under this framework, the Court must first "determine 'whether Congress has directly spoken to the precise question at issue.'" *United Keetoowah Band of Cherokee Indians of*

*Okla. v. HUD*, 567 F.3d 1235, 1239 (10th Cir. 2009) (quoting *Chevron*, 467 U.S. at 842). "If Congress has spoken directly to the issue, that is the end of the matter; the court . . . must give effect to Congress's unambiguously expressed intent." *Id*. As this Court has made clear, when "the statute's language is plain and plainly satisfied, the sole function of the courts can only be to enforce it according to its terms." *United States v. Adame-Orozco,* 607 F.3d 647, 652 (10th Cir. 2010) (internal citations omitted); *BP Am., Inc. v. Okla. ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir. 2010).

Only if the statute is ambiguous on the pertinent issue should the Court "proceed to step two and ask 'whether the agency's answer is based on a permissible construction of the statute.'" *United Keetoowah Band*, 567 F.3d at 1240 (quoting *Chevron*, 467 U.S. at 843). However, while the Court "must not impose [its] own construction of the statute," it "will not defer to an agency's construction" if it is "manifestly contrary" to the statutory scheme. *Id*.

## II. THE DISTRICT COURT ERRED IN UPHOLDING BLM'S CONSTRUCTION OF THE WILD HORSE ACT.

As further explained below, it is indisputable that Section 3 of the Wild Horse Act, 16 U.S.C. § 1333, governs all BLM actions related to wild horses on public land, while Section 4 of the Act, *id.* § 1334, governs BLM's actions on private land. Hence, under the statute's plain terms, BLM has a non-discretionary

statutory obligation to comply with Section 3 before taking action to permanently remove any horses from the Wyoming Checkerboard's public lands, as is the case on any other public lands managed within a wild horse HMA.

Here, thumbing its nose at these obligations—and four decades of BLM's *own* interpretation of these statutory mandates—BLM entirely ignored its Section 3 duties and treated the entire Checkerboard, including the *public* lands found therein, as if it all belonged to RSGA. *See* AR3313 (Pet.App.161) (RSGA demanding that the Checkerboard "is no longer available to wild horses"). By turning a blind eye to the reality that half of the Checkerboard consists of *public* land that is currently allocated through legally enforceable RMPs to wild horse use and management, BLM relied solely on Section 4 of the Act in removing wild horses from *public* land for the ***first time in agency history***. In so doing, the agency violated the plain language of the Act by: (1) permanently removing wild horses from public land without first satisfying any of the statutory prerequisites that apply to the removal of wild horses from public land, (2) removing non-excess wild horses from the public lands, and (3) reducing and managing wild horse populations in these HMAs significantly below their legally established AMLs.

### A. BLM's Statutory Interpretation That Allows BLM To Rely On Section 4 Of The Wild Horse Act To Permanently Remove Hundreds Of Wild Horses From *Public* Lands Cannot Be Sustained Under *Chevron* Step 1.

#### *1. The Plain Language Of Section 3 Mandates That Its Provisions Must Be Satisfied Before BLM May Remove Any Wild Horses From Public Lands.*

The plain language of the Wild Horse Act could not be any clearer: Section 3 governs *all* BLM actions on *public* lands related to wild horses and delineates the specific legal prerequisites that must be satisfied before BLM may permanently remove *any* wild horses from public land allocated to a wild horse HMA. *See* 16 U.S.C. § 1333(b)(2). It provides that:

> Where the Secretary determines on the basis of . . . all information currently available to him, that an overpopulation exists on a given area of the *public lands* and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range *so as to achieve appropriate management levels*.

*Id.* (emphases added).

Thus, Congress created two key requirements that expressly limit how many horses BLM may permanently remove from public land: (1) a formal determination that an overpopulation exists and therefore that there are excess horses present in the public lands of an HMA, *id.*, and (2) the AML established for each HMA to which BLM must adhere in removing horses from public lands. *Id.* (requiring that BLM "achieve appropriate management levels"). Hence, in the

Act, Congress explicitly required that BLM *must* make an excess determination before permanently removing *any* wild horses from public land, and must not remove any horses *below* the AML. *Id.*; *see also* 43 C.F.R. § 4720.1; *Colo. Wild Horse and Burro Coal. v. Salazar*, 639 F. Supp. 2d 87, 95-98 (D.D.C. 2009) (finding that "Congress clearly intended to protect non-excess wild free-roaming horses . . . from removal and that BLM's removal authority is limited to those . . . horses . . . that it determines to be 'excess animals' within the meaning of the [Act]," and holding that "[a] prerequisite to removal under the [Act] is that BLM first determine that an overpopulation exists and that the . . . horses . . . slated for removal are 'excess animals'").[7]

Importantly, although Congress was acutely aware of the peculiarities of the Checkerboard when it enacted the Wild Horse Act in 1971—indeed, Congress itself established the Checkerboard ownership pattern in 1862—Congress did *not* create any exemptions from the statutory safeguards that apply to public land wild

[7] Pursuant to BLM's own Handbook, the only extremely narrow exception where BLM may remove wild horses from public lands without observance of all Section 3 procedures—i.e., making a formal excess determination and managing within AML—is where an "emergency" situation exists and immediate action is needed to ***protect*** "the health and welfare of a wild horse . . . population." AR3397 (Pet.App.204). BLM did not invoke that limited exception here, as no qualifying emergency situation existed when BLM issued its decision.

horse removals in order to accommodate BLM's prospective actions in the Checkerboard. *See Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (courts must "necessarily assume[] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject") (citation omitted). To the contrary, in Section 3 Congress broadly and unequivocally directed BLM to first satisfy all of the legal prerequisites before permanently removing *any* wild horses from *any* public lands under BLM's jurisdiction.

Crucially, the text of the Act speaks of no exceptions—for the Checkerboard or otherwise—nor is there any legislative history suggesting that Congress intended to impose a different legal regime in the Checkerboard from all other HMAs. This is fatal to the district court's ruling and BLM's interpretation, as Congress would have clearly articulated a major exception of this kind in the statute itself, especially given that the sharp division between BLM's authority on public lands and on private lands—via separate provisions of the Act—is a central part of the statutory scheme. As the Supreme Court has explained, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *Levy v. Kansas Dept. of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1170 (10th Cir. 2015) ("agree[ing]

with the Supreme Court . . . that Congress does not hide elephants in mouseholes"). Nor does Congress do so with wild horses. The Act's plain terms offer no indication that Congress intended a special approach for mixed parcels of public and private land in the interaction between Sections 3 and 4.

Ignoring Congress's dictates, however, BLM admittedly removed *hundreds* of wild horses from *public* land in its 2014 roundup, without even attempting to comply with the statutory requirements set forth in Section 3—i.e., the *only* legal mechanism Congress created in the Wild Horse Act under which BLM is authorized to remove wild horses from public land. As a result, BLM permanently removed hundreds of *non-excess* horses from the range and reduced these populations far below their established AMLs. Thus, because BLM is deliberately ignoring Congress' plain language in Section 3, this should be the end of the matter as the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see also Adame-Orozco*, 607 F.3d at 652 (explaining that "the sole function of the court[] can only be to enforce [the statute] according to its terms").

### *2. BLM's Sole Authorization For The Removal Of Wild Horses From Private Lands Is Governed By Section 4 Of The Act.*

The conclusion that BLM flouted the plain language of the Act is bolstered by the fact that the *sole* authority BLM invoked in authorizing the permanent

removal of hundreds of wild horses from *public* lands in these three HMAs—Section 4 of the Act, *see* AR3369 (Pet.App.188)—plainly does *not* confer BLM *any* authority to permanently remove wild horses from *public* lands (whether or not adjacent to private lands). Rather, Section 4 merely provides that:

> If wild free-roaming horses or burros stray *from* public lands *onto* privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed.

16 U.S.C. § 1334 (emphasis added).

Thus, by permanently removing hundreds of wild horses from *public* land under its Section 4 authority, BLM violated the explicit language of the Act. For example, the words "from" and "onto" as used in Section 4 clearly mean that any wild horses removed pursuant to this provision must actually be *on* private lands when they are so removed. *See* Merriam-Webster 2015 Online Dictionary (defining "from" as "indicat[ing] a starting point of a physical movement" and defining "onto" as to move "to a position on"). However, BLM ignored the commonsense meaning of these words in relying solely on Section 4 to remove hundreds of wild horses from *public* land—an action that cannot withstand *Chevron* scrutiny. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are

assumed to bear their ordinary, contemporary, common meaning") (quotation marks and citation omitted).

Notwithstanding that the Act's clarion language is dispositive of this straightforward legal inquiry under *Chevron* Step 1, and despite the Supreme Court's clear instruction that statutory construction inquiries begin by analyzing the statutory text, the district court inexplicably sidestepped any analysis under Step 1 of this framework and skipped directly to Step 2 to determine whether BLM's statutory construction—in light of BLM's assertion that the statutory provisions at issue are ambiguous—is permissible under "the circumstances presented." *See* DE 83 at 18-21 (Pet.App.93-96). Although Petitioners address below why BLM's interpretation cannot pass muster under *Chevron* Step 2, Petitioners first address two key points bearing on the *Chevron* Step 1 analysis that the district court neglected even to conduct.

First, contrary to the district court's ruling, a Section 4 request by a private landowner does *not* authorize BLM to permanently remove *any* wild horses from *public* land, irrespective of whether such horses *may* stray onto private land at some *indeterminate* future time—which is the case with *any* wild horse since every HMA either includes private land or is surrounded by it. *See* DE 83 at 19 (Pet.App.94) (acknowledging that BLM's Section 4 duty is limited to "hav[ing] all

animals removed that stray from public lands *onto privately owned lands*," but holding that BLM may nevertheless remove horses from public land because they may "simply stray back to RSGA's checkerboard, triggering another request" at some indeterminate future time) (emphasis added). Rather, again, Congress spoke clearly in delineating the scope of BLM's limited authority under Section 4, which may only be invoked to remove horses from private land "[i]f wild free-roaming horses or burros *stray from public lands onto privately owned land*." 16 U.S.C. § 1334 (emphasis added).

Indeed, the district court's counter-textual holding authorizing BLM to preemptively remove wild horses from public land to prevent them from straying onto private land at some future time is not only at odds with the statute itself, but also directly conflicts with the Ninth Circuit's interpretation of Section 4. In *Fallini v. Hodel*, the Ninth Circuit determined that "Section 4 is the *only provision of the Act that pertains to wild horses straying onto private lands*," Section 4 "*clearly contemplates* the possibility that wild horses may stray onto private lands," and "Section 4 does not require the BLM to prevent straying in the first instance." 783 F.2d at 1345-46 (emphasis added). Further, in accepting *the federal government's argument in that case*, the court found that "*Congress* ***declined to authorize*** *the BLM* to fence the wild horses or to use intensive

management techniques" such as preemptively removing wild horses from public lands to prevent future straying. *Id.* (emphasis added). Thus, the court concluded that it "fail[ed] to find any suggestion by Congress . . . that the BLM ha[s] a duty, ministerial or prescribed, *to prevent straying of wild horses onto private land*" by preemptively removing them from public land. *Id.* (emphasis added); *see also id.* ("The Act does not charge BLM with the duty to 'prevent' wild horses from straying.").

Hence, reversal under *Chevron* Step 1 is also imperative here to avoid an unnecessary circuit split over the meaning of the statutory language that the Ninth Circuit has already interpreted to foreclose the action taken by BLM here. *See United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) ("[T]he circuits have historically been loath to create a split where none exists."); *id.* ("The avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location.").[8]

[8] The only other court to address this question also reached a conclusion at odds with the district court here. In *Roaring Springs Assocs. v. Andrus*, the court found that "[e]ven if . . . [BLM] must go back again to retrieve the animals" each time it receives a new request from a private landowner to remove a horse from his private land, "that is *nevertheless [BLM's] duty prescribed by the statute*." 471 F. Supp. 522, 523 (D. Or. 1978) (emphasis added). That holding cannot be reconciled with the district court's position in this case in which the court held that

Second, in ignoring the *Chevron* Step 1 framework altogether, the district court's ruling adopted BLM's protestation that allowing BLM to remove wild horses from *public* lands of the Wyoming Checkerboard under Section 4 of the Act would be more administratively convenient for the agency than complying with *both* provisions of the Act. *See* DE 83 at 21 (Pet.App.96) (upholding BLM's decision to use Section 4 to remove wild horses from the *public* lands "to avoid intensive management of horses" in the Checkerboard.). While it is always more convenient for an agency to ignore its statutory mandates, this simply is not permitted under *Chevron* Step 1. *See Elwell v. Okla. ex rel. Bd. Of Regents of Univ. of Okla.*, 693 F.3d 1303, 1313 (10th Cir. 2012) (Courts are "never permitted to disregard clear statutory directions.").

As the Supreme Court recently reiterated, it is axiomatic that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute *should* operate." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (emphasis added); *see also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to

---

precisely the scenario envisioned in *Roaring Springs* would be unlawful under the Act. *See* DE 83 at 19 (Pet.App.94) (finding that it would contravene the Act if the "horses would simply stray back to RSGA's checkerboard [at some future time], triggering another request, [and then] another removal").

address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.").

In turn, because an agency's discretion does not come into play under *Chevron* Step 1—i.e., the inquiry turns on the statutory language *alone*—courts must reject agency attempts to circumvent clear statutory language on the basis of asserted public policy rationales such as administrative convenience. *See Lewis v. Chicago*, 560 U.S. 205, 217 (2010) ("[I]t is not our task to assess the consequences of each approach [to interpreting a statute] and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted."); *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy."); *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of [an] Act" of Congress).

Accordingly, in removing wild horses from *public* lands—no matter *where* they may be located—BLM may not rely on Section 4, which pertains only to its

authority to remove horses from *private* lands. Therefore, the district court's contrary ruling must be reversed.[9]

### B. Even If The Act Is Ambiguous, BLM's Novel Statutory Construction Cannot Be Upheld Under *Chevron* Step 2.

#### *1. BLM's Statutory Construction Is Not Entitled To Deference Because It Is Not A Permissible Construction Of The Act.*

Even assuming that Sections 3 and 4 of the Wild Horse Act are ambiguous—which they plainly are not—BLM's statutory interpretation that allows it to avoid Section 3's requirements in managing the *public* land portion of these wild horse HMAs also fails under *Chevron* Step 2.

To begin with, BLM has *not* asserted in its decision documents that a statutory ambiguity exists, nor has the agency provided any discernible rationale for why it must resolve any purported ambiguity in the manner it has selected—

[9] Because the plain language of Section 4 does not authorize the actions that were taken here, this Court need not determine whether the plain language of this provision imposes a mandatory duty on BLM that may be compelled under Section 706(1) of the APA, pursuant to the Supreme Court's decision in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (explaining that the mandamus remedy upon which the APA was based requires a "precise, definite act . . . about which [an official] ha[s] *no discretion whatever*") (emphasis added); *see also* 16 U.S.C. § 1334 (imposing no deadline for the removal of wild horses from public lands, but simply stating that upon notice BLM "shall *arrange* to have the animals removed") (emphasis added); 43 C.F.R. § 4720.2-1 (providing that the removal shall take place "*as soon as practicable*" ) (emphasis added).

i.e., to dispense entirely with Section 3 when permanently removing wild horses from public land in these HMAs in order to preemptively prevent them from straying onto private land at some time in the future. Rather, the most that BLM said in the decision under review is that "it is practicably infeasible for the BLM to meet its obligations under Section 4 of the [Act] while removing wild horses solely from the private land sections of the checkerboard," AR3371-72 (Pet.App.190-91), although BLM did not explain why, consistent with the agency's past practice, BLM could not or would not proceed in a manner that would allow BLM to meet its obligations under *both* Sections 3 and 4 simultaneously since public and private lands would both be involved in the roundup. Given the brevity and lack of formality underlying BLM's statement, the agency's silence on these crucial questions cannot fill any purported gap in the statutory scheme and serves as another basis for reversal. *See Dep't of the Treasury, IRS v. Fed. Labor Rel. Auth.*, 494 U.S. 922, 933 (1990) (giving "reasonable content to the statute's textual ambiguities" is "not a task [the court] ought to undertake on the agency's behalf") (citations omitted).

In any event, the cursory statement BLM *did* provide—without any formal interpretation or analysis in a rulemaking process with the benefit of public participation—raises serious questions as to whether BLM's new statutory

"interpretation" is eligible for any deference, should the Court reach that step of the *Chevron* analysis. As the Supreme Court has explained, the level of deference afforded an agency interpretation depends on the formality observed by the agency in rendering the interpretation, the consistency of that position with the agency's prior interpretations, and the degree of care exercised by the agency. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). As a result, *Chevron* deference is typically limited to "the fruits of notice-and-comment rulemaking or formal adjudication[s]." *Id.* Thus, given that BLM's first-ever decision to permanently remove wild horses from public lands under its limited private land removal authority did not involve a formal rulemaking process, did not solicit public comment, and contradicted past agency interpretations (including the 2013 Adobe Town-Salt Wells decision and the December 2013 scoping notice for the Great Divide Basin roundup), BLM's novel interpretation is not entitled to any deference by the Court.[10]

[10] By the same token, because BLM's cursory statement in the decision under review does not even refer to any ambiguity in the Wild Horse Act, much less explain the reasons why BLM *now* believes it to be ambiguous, all of BLM's arguments to that effect are nothing more than post hoc rationalizations to which this Court may not defer. *See State Farm.*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action" because "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

More important, even if BLM *had* formally advanced the statutory interpretation attributed to it by the district court—i.e., that Sections 3 and 4 of the Act are in such fundamental tension when jointly implemented in the Checkerboard that it somehow creates a statutory ambiguity—that interpretation cannot be deemed a permissible statutory construction under *Chevron* Step 2 for several reasons.

First, BLM's statutory construction is legally impermissible because it directly conflicts with decades of the agency's *own* practice in the Checkerboard. *See Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1267-68 (10th Cir. 1994) (no *Chevron* deference is due "where the agency's interpretation . . . is inconsistent with its prior administrative interpretations"). Here, any tension between Sections 3 and 4 has been manufactured by BLM for the sole purpose of justifying its unprecedented decision to remove wild horses from public land without satisfying the legal prerequisites of Section 3. Notably, this is the *first time* in BLM's 44-year history of managing wild horses within the Checkerboard—or anywhere else—that the agency has *ever* suggested that Sections 3 and 4 are even remotely incompatible.

For example, in 2013 BLM conducted a functionally identical roundup of wild horses from two of the three HMAs at issue here and had little trouble

fulfilling its statutory obligations under *both* Section 3 (on public land) and Section 4 (on private land). *See* AR645 (Pet.App.135); AR741 (Pet.App.141). Moreover, BLM failed to produce in the administrative record a *single* instance from its four decades of wild horse management where it *permanently* removed wild horses from *public* land on the basis of its Section 4 authority. And, as noted, it was *BLM* that successfully argued to the Ninth Circuit in *Fallini* that Section 4 does *not* authorize BLM to preemptively remove from public land horses that might one day stray onto private land.

BLM cannot have it both ways. The agency's longstanding interpretation and practice—in conjunction with the representations it has previously made to other federal courts—dispel any notion that BLM cannot comply with both its Section 3 and 4 obligations in the Checkerboard, and defeats any backdoor attempt to seek deference for this unprecedented action. Indeed, at an absolute minimum, that BLM has abruptly changed its legal interpretation without justifying the departure is grounds for finding BLM's action arbitrary and capricious. *See Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) ("When an agency

departs from a prior interpretation of a statute that it is charged with implementing, the agency must justify the change of interpretation with a reasoned analysis.").[11]

Second, even assuming a genuine ambiguity existed—which simply is not true here—the manner in which BLM opted to resolve the ambiguity cannot be upheld under basic canons of statutory construction. BLM's overly expansive reading of Section 4 to allow permanent removals of wild horses from public land renders the portion of Section 3 dealing with permanent removals of horses from public land "mere surplusage" and reads that provision entirely out of the statute—an outcome that cannot be squared with Circuit precedent. *See United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002) ("[W]e cannot construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.") (citations and quotation marks omitted).

Rather, as BLM has done for decades in managing wild horses in the Checkerboard (including the 2013 Adobe Town-Salt Wells roundup), BLM was

[11] BLM's interpretation also cannot be squared with the agency's own Handbook and Manual, which prohibit BLM from permanently removing wild horses from public lands without *first* making a formal excess determination and managing wild horse populations within the AML. *See* AR3395 (Pet.App.202); AR262-64 (Pet.App.115-17). These requirements further render BLM's decision arbitrary and capricious. *See Town of Barnstable, Mass. v. FAA*, 659 F.3d 28, 34-36 (D.C. Cir. 2011) (finding actions "arbitrary and capricious because they depart[ed] from the agency's own internal guidelines" established in "its own handbook").

required to adopt a statutory construction that gives meaning to *both* Sections 3 and 4 of the Act. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981) (courts must adopt statutory interpretations that "give effect to each [provision] if we can do so while preserving their sense and purpose"). Thus, under well-established canons of construction, it was impermissible under *Chevron* Step 2 for BLM to admittedly abandon any attempt to comply with Section 3 of the Act—and to instead rely only on its authority under Section 4—when BLM's past actions readily demonstrate that *both* provisions can be harmonized.

Finally, BLM's anomalous construction is not permissible because it is "manifestly contrary" to the statutory scheme. *United Keetoowah Band*, 567 F.3d at 1240; *Chevron*, 467 U.S. at 844 (interpretations are not given controlling weight if they are "manifestly contrary to the statute."). BLM's facially implausible interpretation of Section 4 as somehow broadly authorizing permanent removal of wild horses from *public* land is not only at loggerheads with the statute's plain text, but is also antagonistic to the overall statutory scheme and its express purpose of *protecting* wild horses. *See* 16 U.S.C. § 1331.

Simply put, the Act is a wildlife protection law that "is not unique in its impact on private [land] owners." *Mtn. States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986). However, by allowing, for the first time, the limited

relief in Section 4 to trump Section 3's crucial substantive protections for wild horses on all public lands—rather than harmonizing those provisions as BLM has done for decades—BLM has subverted the Act's express purposes. If ever there were an agency action undeserving of deference as "manifestly contrary to the statute," *Chevron*, 467 U.S. at 844, it is this one. Therefore, the Court should reverse the district court's ruling.

### *2. The District Court's Rationales In Finding BLM's Interpretation Permissible Are Without Merit.*

Ignoring that BLM's statutory construction fails to satisfy *any* of the hallmarks necessary to afford it deference under *Chevron* Step 2, the district court upheld BLM's interpretation while mistakenly relying on three factors—none of which transforms BLM's interpretation into a permissible construction of the Act under *Chevron*.

First, the court rejected what it characterized as "a sequence for the only action that would satisfy" Petitioners, in finding that such a sequence would result in BLM having to remove horses from private lands in the event that horses on the solid federal land blocks of these HMAs happen to stray onto private land in the future. *See* DE 83 at 18-19 (Pet.App.93-94). To be clear, that is not a sequence that Petitioners devised; rather, it is the sequence that *BLM* has long deemed the best approach for accommodating both Sections 3 and 4 in managing the public

and private lands of the Checkerboard, including in its 2013 Adobe Town-Salt Wells decision, *see* AR694 (Pet.App.138). Moreover, under *Chevron* Step 2, the sole question is whether *BLM's* new interpretation is legally permissible under the circumstances, meaning that avoiding what the district court believed were Petitioners' preferences is not relevant to the *Chevron* inquiry.

Second, in deferring to BLM's interpretation, the district court placed heavy emphasis on the fact that RSGA revoked its consent in 2011 to tolerate horses on the private lands of the Checkerboard, as amended by the 2013 Consent Decree. *See* DE 83 at 19 (Pet.App.94). However, that fact is of no legal consequence to the *Chevron* analysis because it is well established that a Consent Decree may not trump clear statutory language. *See, e.g.*, *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 526 (1986) (parties may not "agree to take action that conflicts with or violates the statute upon which the complaint was based"). In any event, nothing in that Consent Decree authorized BLM to take actions inconsistent with the plain language of the Act; to the contrary, BLM expressly agreed to *comply with the Act* and other laws in implementing the Consent Decree. *See* AR471-72 (Pet.App.125-26).

Thus, as explained, *supra* at 10-13, Section 3 applies with full force to all *public* lands in these HMAs—in the Checkerboard or otherwise—until and unless

BLM formally modifies the boundaries of these HMAs to exclude these public lands or adopts an AML for these public lands of zero wild horses. Indeed, RSGA and BLM recognized as much in their 2013 Consent Decree, agreeing that the HMA boundaries and AMLs could *only* be modified through the formal RMP revision process under FLPMA (accompanied by NEPA review), *see* AR469-72 (Pet.App.123-26), and the district court memorialized this fact in approving the Consent Decree. *RSGA*, 935 F. Supp. 2d at 1189 ("The AMLs for the HMAs are established in the Green River RMP" and they are not "changed by the Consent Decree."). Accordingly, because BLM had not yet completed the necessary RMP revisions at the time of the challenged decision—indeed, BLM *still* has not concluded those processes—RSGA's revocation of consent in 2011 with respect to its *private* lands is legally irrelevant to the application of Section 3 to the *public* land portions of the HMAs at issue that are ***currently*** allocated for wild horse use under the legally operative RMPs.

Third, the district court relied on a 1981 court order requiring BLM to remove all horses from the "checkerboard grazing lands," and pointed to that order in determining that BLM was not deviating from past practice. *See* DE 83 at 19-20 (Pet.App.94-95). However, that order was based on a 1979 settlement agreement—which cannot override a statutory mandate, *see supra* at 57—and that

agreement pertained only to RSGA's prior commitment to allow wild horses to remain on its *private* land, *see* RSGA3329 (Pet.App.239). As a matter of both law and logic, RSGA would have had no authority to "allow" BLM to manage wild horses on the *public* lands of the Checkerboard which, contrary to the district court's apparent belief, are *not* owned or controlled by livestock owners but rather the federal government. Indeed, BLM has admitted that Judge Kerr's remedy with respect to the "checkerboard grazing lands" "can only be interpreted as" applying to RSGA's "private land," *RSGA*, DE 67 at 23, and that order therefore has no relevance to BLM's action here on *public* lands.

Moreover, although the district court characterized the earlier case as "virtually identical" to this case, the differences are stark. Here, the Court is explicitly constrained by the governing RMPs and the legal standards set forth therein (e.g., HMA boundaries and wild horse AMLs) until such time as BLM goes through a formal RMP process to revise those standards. Indeed, Judge Kerr explicitly recognized this fact, explaining that once BLM promulgated formal AMLs through the RMP process, BLM's future actions *would be restricted* to complying with those AMLs. *See* RSGA888 (Pet.App.237). Thus, BLM's management discretion is constrained by its governing RMPs, and the agency cannot disregard its own binding standards found therein.

For all of these reasons, BLM's anomalous construction of the Wild Horse Act—which finds no support in the Act, its legislative history, or BLM's own past practices in managing the Checkerboard—cannot survive scrutiny under either step of the *Chevron* framework.[12]

## III. BLM VIOLATED FLPMA BY REMOVING MORE HORSES FROM THESE HMAs THAN AUTHORIZED BY THE GOVERNING RMPs.

According to BLM's own data, as a result of BLM's 2014 roundup and the new statutory interpretation upon which it was premised, BLM reduced the wild horse populations in these HMAs *far below* the legally enforceable AMLs that BLM itself established in the ***currently operative*** 2008 Rawlins RMP and 1997 Green River RMP. *See* DE 58-1 ¶¶ 3-5 (Pet.App.51). Indeed, although the combined AML of these HMAs requires that BLM manage *at least* 1,276 wild horses at all times on the public lands of these HMAs, only 649 wild horses remained in these HMAs after the challenged roundup. *See id.* Thus, by blatantly

[12] The district court rejected Petitioners' claim that BLM violated NEPA by invoking a categorical exclusion limited to the removal of wild horses from private land when the agency was also removing hundreds of horses from public land. The court's only rationale for this finding was that the court had already deferred to BLM's Wild Horse Act interpretation under *Chevron* Step 2. *See* DE 83 at 26 (Pet.App.101). Accordingly, should this Court reject BLM's Wild Horse Act construction, it should likewise reverse the district court's erroneous categorical exclusion holding.

deviating from its own governing RMPs, and in the process using its roundup decision and new statutory interpretation to modify, *de facto*, these AMLs by significantly reducing them by more than ***600*** wild horses combined, BLM has also flouted its duties under FLPMA, which prohibit BLM from modifying AMLs until BLM has evaluated specific evidence and data as part of an extensive notice-and-comment RMP amendment process. *See* 43 C.F.R. §§ 1610.5–5, 1610.5–6; AR255 (Pet.App.114).[13]

While conceding that "[n]o one disagrees with Petitioners' argument that AMLs are established and adjusted through the land use planning process," the district court nevertheless brushed aside the patent FLPMA violation by asserting that the AML reduction "was not under BLM's control, as BLM was obligated to take timely and appropriate action in response to a Section 4 request from a landowner." DE 83 at 22 (Pet.App.97).

Here, as already explained, a Section 4 request by definition applies only to wild horse removals from *private* land, whereas AMLs apply to all *public* land in these HMAs, including the public lands of the Checkerboard. Thus, irrespective of

[13] In its decision document, BLM made the puzzling assertion that FLPMA does not apply here because "[t]he management direction set forth in the RMPs, including that related to [AMLs], do not apply to *private* lands," AR3359 (emphasis added), which willfully ignores that more than a million acres of public lands were also involved here.

BLM's handling of its duties on RSGA's *private* lands pursuant to Section 4 of the Act, BLM was prohibited by its own RMPs from removing horses from the *public* lands in such a manner that would reduce those populations below the legally enforceable AMLs. As the Ninth Circuit has explained in an analogous context, and as BLM's *own* regulations require, "[o]nce a land use plan is developed, '*[a]ll* future resource management authorizations and actions . . . *shall conform to the approved plan*.'" *Ore. Natural Res. Council v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007) (quoting 43 C.F.R. § 1610.5-3(a)) (emphases added).

Here, BLM plowed ahead with its decision—which reduced these populations far below the express AML requirements of the operative RMPs—without: (a) formally amending the RMPs through the FLPMA process, (b) evaluating necessary monitoring and inventory data, or (c) providing notice-and-comment opportunities on the consequent AML reduction. However, nothing in the 2008 Rawlins RMP or the 1997 Green River RMP excuses BLM from these legal obligations when modifying the AML. *See* AR694 (Pet.App.138). Hence, BLM was required to go through the formal RMP amendment process under FLPMA in order to reduce the AMLs—just as BLM committed to doing in the Consent Decree. *See* AR469-70 (Pet.App.123-24) (agreeing that BLM would, under FLPMA and NEPA, "consider revising the respective Resource

Management Plans" to revise the AMLs). However, because BLM has now abandoned that commitment and has not even *attempted* to comply with FLPMA's RMP amendment procedures before reducing these wild horse populations below their AMLs, BLM's actions cannot be upheld.

Accordingly, BLM has acted arbitrarily and capriciously, and not in accordance with FLPMA, BLM's regulations, or the operative RMPs.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court declare BLM in ongoing violation of the Wild Horse Act and FLPMA; set aside BLM's July 2014 Decision Record; and remand the matter to BLM with instructions to ensure that BLM promptly comes into compliance with these statutory directives.

## STATEMENT OF REASONS SUPPORTING ORAL ARGUMENT REQUEST

Petitioners hereby request oral argument because this appeal raises important issues of first impression in this Circuit and could lead to a split in the circuits. In addition, because the appeal involves complex legal and factual issues, Petitioners believe the Court would benefit from hearing oral argument in this matter.

Respectfully submitted

/s/ William S. Eubanks II
William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 / (202) 588-5049 (fax)
beubanks@meyerglitz.com

Katherine A. Meyer
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue NW, Suite 210
Washington, DC 20016
(202) 588-5206 / (202) 588-5049 (fax)
kmeyer@meyerglitz.com

November 20, 2015

Attorneys for Petitioners-Appellants

## CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 13,990 words.

/s/ William S. Eubanks II
William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 / (202) 588-5049 (fax)
beubanks@meyerglitz.com

## CERTIFICATE OF SERVICE

I, William S. Eubanks II, hereby certify that on November 20, 2015, I served copies of Petitioners-Appellants' Opening Brief and Addendum on all counsel of record in this case by way of electronic mail (ECF filing)—in addition to submitting the requisite number of identical hard copies to the Court—and I further certify that all parties to this case are registered to receive ECF filings in this matter.

/s/ William S. Eubanks II
William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 / (202) 588-5049 (fax)
beubanks@meyerglitz.com

## CERTIFICATE OF PRIVACY REDACTION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Court.

/s/ William S. Eubanks II
William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 / (202) 588-5049 (fax)
beubanks@meyerglitz.com

## CERTIFICATE OF VIRUS SCAN

I hereby certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Endpoint Protection, Version 12.1) and according to the program, are free of viruses.

/s/ William S. Eubanks II
William S. Eubanks II
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 / (202) 588-5049 (fax)
beubanks@meyerglitz.com