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16 (will comply with LR IA 10-2 within 45 days)

17 **IN THE UNITED STATES DISTRICT COURT**
18 **DISTRICT OF NEVADA**

19 FRIENDS OF ANIMALS, and)
20 PROTECT MUSTANGS)
21 Plaintiffs,)

Civ. No. _____

22 vs.)

23 **COMPLAINT FOR DECLARATORY**
24 **AND INJUNCTIVE RELIEF**

25 THE UNITED STATES BUREAU)
26 OF LAND MANAGEMENT, an agency)
27 of the United States;)

28 _____)
Defendant.

INTRODUCTION

1. Plaintiffs, Friends of Animals (“FoA”) and Protect Mustangs, file this action on their own behalf and on behalf of their adversely affected members against the United States Bureau of Land Management (“BLM”) to challenge the agency’s December 19, 2014, decision to round-up and remove approximately 332 wild horses from the Pine Nut Herd

1 Management Area (“HMA”), located south of Dayton and east of Carson City and
2 Gardnerville, Nevada within Lyon, Douglas, and Carson City Counties. While a majority of
3 these wild horses will be permanently removed from the HMA, BLM’s Record of Decision
4 (“Pine Nut ROD”) calls for the administration of a fertility control drug, porcine zona
5 pellucide (“PZP”), to all mares one-year of age and older. According to the ROD, the gather is
6 expected to last up to ten days during late January or early February 2015. It is unclear
7 when the PZP-dosed mares will be returned to the HMA.

8 2. In reaching this decision last month, BLM failed to: (1) provide the public
9 reasonable notice that the Pine Nut herd would be subject to removals and administration
10 of PZP in early 2015; (2) comply with the notice and comment requirements of the federal
11 Administrative Procedure Act (“APA”); and/or (3) fulfil its obligation under the National
12 Environmental Policy Act (“NEPA”) to evaluate the physical, behavioral and social impacts
13 associated with the use of PZP on wild mares.

14 3. BLM purports to have fulfilled its APA and NEPA duties through the use of a
15 document that is nearly 5 years old—a 2010 Environmental Assessment for the Clan Alpine,
16 Pilot Mountain and Pine Nut Herd Management Areas Gather Plan (hereinafter, “2010 EA”).
17 This document, which was open to a mere 30 day public comment period between August
18 23, 2010 and September 23, 2010, cannot be said to have placed the public and interested
19 organizations (like the plaintiffs) on reasonable notice that more than 4 years later the Pine
20 Nut herd would be made subject to a hasty round-up in 2015.

21 4. BLM’s reliance on the 2010 EA is especially misplaced because the 2010 EA
22 does not adequately address the physical, behavioral and social impacts of PZP on wild
23 mares. Information was available to BLM at that time that PZP likely creates instability in
24 wild horse bands, effects the health of the group members, and can increase wild horse
25 mortality.

26 5. Since the 2010 EA significant new scientific information has become available
27 further demonstrating the negative impacts of PZP.
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1 6. For these reasons, as further alleged below, Plaintiffs seek a declaration from
2 the Court that BLM has violated the APA and NEPA. Plaintiffs further request that the Court
3 vacate and remand the December 19, 2014 ROD, and enjoin the removal of wild horses from
4 the Pine Nut HMA and/or use of PZP on mares from the Pine Nut herd.

4 **PARTIES**

5 7. Friends of Animals (“FoA”) is a non-profit, international animal advocacy
6 organization, incorporated in the state of New York since 1957. FoA works to cultivate a
7 respectful view of nonhuman animals, free-living and domestic. FoA’s goal is to free animals
8 from cruelty and institutionalized exploitation around the world. FoA informs its members
9 about animal advocacy issues and its progress in addressing them through its magazine,
10 *ActionLine*, its website, and other public reports. FoA is a leading organization advocating
11 for the preservation of wild horses on public lands. FoA has published articles on wild
12 horses. Members of FoA regularly visit the Pine Nut HMA to view, appreciate, study, and
13 photograph the wild horses there. FoA has also organized several events to educate the
14 public about wild horses and the cruel impacts of the round-ups and PZP.

15 8. Protect Mustangs is a non-profit organization founded in 2011 to educate,
16 protect and preserve native and wild horses. Protect Mustangs actively reaches out to its
17 members and the public to educate them about native wild horses, and to advocate for the
18 right of wild horses to live freely. Protect Mustangs has a diverse membership base with
19 some members living in Nevada, and some who visit Nevada to view, study, and photograph
20 wild horses, including those in the Pine Nut HMA.

21 9. Plaintiffs and their members have a significant interests in the wild horses at
22 the Pine Nut HMA. For example, Protect Mustangs member, Craig Downer, is a wildlife
23 biologist specializing in the study of wild horses and their habitats. Mr. Downer has written
24 several articles and books about wild horses, and has long evaluated the ramifications of the
25 federal government’s treatment of wild horse populations in the west. Mr. Downer has been
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1 following the Pine Nut herd for decades. Not only does he enjoy observing the Pine Nut
2 Herd, this herd also assists him in his professional work as a wildlife biologist.

3 10. Defendant BUREAU OF LAND MANAGEMENT is an agency located within the
4 Department of Interior. The mission of the BLM is “[t]o sustain the health, diversity, and
5 productivity of America’s public lands for the use and enjoyment of present and future
6 generations.” The agency administers over 245 million surface acres of public lands, most of
7 which is located 12 Western states, including Nevada. The Pine Nut HMA is located on BLM
8 administered public land, and the agency is responsible for ensuring that federally-
9 administered actions within the HMA comply with the requirements of all federal laws,
10 including NEPA and the APA.

11 JURISDICTION AND VENUE

12 11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331
13 (federal question). This action presents a case and controversy arising under APA and
14 NEPA. This Court also has jurisdiction pursuant to 28 U.S.C. § 1346, as the United States is a
15 defendant. The relief sought is authorized by 28 U.S.C. § 2201 (declaratory judgment) and
16 28 U.S.C. § 2202 (injunctive relief).

17 12. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e). A substantial
18 part of the events giving rise to the claims occurred in this judicial district, as the challenged
19 ROD was issued by the Nevada State BLM Office, which is located in this judicial district.

20 FACTUAL BACKGROUND

21 **A. The Planned Round-Up, Removal, and Forced Drugging of the Pine Nut Wild Horses.**

22 13. The Pine Nut HMA, encompassing approximately 90,000 acres, is located in
23 the Pine Nut Mountain Range of Lyon, Douglas and Carson Counties near Carson City and
24 Dayton, Nevada. Wild horses were present in this area in 1971 when Congress passed the
25 Free Roaming Wild Horse and Burro Act (“WHBA”).
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14. In passing the WHBA, Congress sought to protect wild horses, like those present in the Pine Nut HMA, from threats posed by humans, while ensuring the ecological health of public lands. In passing the WHBA, Congress found and declared “that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene.” As such, “[i]t is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.”

15. In 2010, the BLM issued an Environmental Assessment for Clan Alpine, Pilot Mountain and Pine Nut Herd Management Areas Gather Plan. The 2010 EA evaluated a proposal to round-up 118 wild horses, with limited treatment of mares with PZP.

16. The ROD for the 2010 proposal states: “The Proposed Action Alternative is to gather approximately 185 wild horses. Remove approximately 67 excess horses established within non-HMA areas, treat approximately 45 mares with fertility control vaccine and release 118 horses back into the Pine Nut Mountain HMA. . . . The BLM intends, if necessary, to return to the HMA in 2-3 years to gather and re-treat the mares to maintain the population control measures. The Proposed Action Alternative decision is a site-specific action located on public lands administered by the BLM Carson City District Office (CCDO). The gather has been planned with input from the interested public and users of public lands.”

17. On December 19, 2014, over 4 years removed from the 2010 EA, the BLM Sierra Front Field Office issued the Pine Nut Wild Horse Gather Decision Record. The ROD authorized the decision to gather up to approximately 332 wild horses from the Pine Nut HMA, permanently remove 200 of those wild horses, and treat all mares one-year of age and

1 older with PZP. According to the ROD, the round-up is expected to last up to ten days during
2 late January or early February 2015.

3 18. Also on December 19, 2014, the BLM Sierra Front Field Office issued a
4 Determination of NEPA Adequacy (“DNA”) for the proposed 2015 Round-up. The DNA relies
5 upon the 2010 EA.

6 19. No further environmental assessment of the impacts associated with the 2015
7 planned round-ups is provided in the Pine Nut ROD, DNA, or any other associated public
8 document.

9 20. Unlike with the round-ups evaluated in the 2010 EA, the 2015 proposed
10 round-ups for the Pine Nut herd was not “planned with input from the interested public and
11 users of public lands.”

12 **B. Inadequate Public Disclosure of Impacts Associated with PZP.**

13 21. *Porcine zona pellucida* (PZP) is a form of *zona pellucida* extracted from the
14 ovaries of pigs. It is registered pesticide by the U.S. Environmental Protection Agency.
15 Notably, EPA did not receive an application to register PZP as a pesticide until 2010.

16 22. In the 2010 EA, BLM concludes that PZP “does not cause significant changes in
17 behavior at the individual or herd levels.” In support, BLM cited a 2005 Study of the
18 Southwest Regional GAP Analysis Project. That report, however, does not appear to contain
19 any discussion on the impacts of PZP.

20 23. BLM’s conclusion completely disregards a 2010 paper by Cassandra Nunez,
21 “Effects of Immunocontraception With Porcine Zona Pellucida (PZP) on the Behavior of Wild
22 Horses.” That study concluded, “that contraception with PZP significantly alters the social
23 behavior of Shackleford Banks horses, refuting prior studies of other wild horse
24 populations. This work demonstrates the risks of making managerial decisions in one
25 population based upon limited data collected from another.”

1 particular applicability and future effect designed to implement, interpret, or prescribe law
2 or policy." *Id.* § 551(4).

3 29. Before making a rule an agency must publish notice of proposed rulemaking
4 in the Federal Register, unless persons subject thereto are named and either personally
5 served or otherwise have actual notice thereof in accordance with law. 5 U.S.C. § 553(b).

6 30. The notice must include: "(1) a statement of the time, place, and nature of
7 public rule making proceedings; (2) reference to the legal authority under which the rule is
8 proposed; and (3) either the terms or substance of the proposed rule or a description of the
9 subjects and issues involved. *Id.* § 553(b)(1)-(3).

10 31. After notice, the agency must give interested persons an opportunity to
11 participate in the rule making through submission of written data, views, or arguments. 5
12 U.S.C. § 553(c). The agency must publish notice of a substantive rule at least 30 days before
13 its effective date, unless it is a "(1) a substantive rule which grants or recognizes an
14 exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3)
15 as otherwise provided by the agency for good cause found and published with the rule." *Id.*
16 U.S.C. § 553(d).

17 **B. National Environmental Policy Act.**

18 32. NEPA is our nation's basic charter for environmental protection.

19 33. Congress enacted NEPA for two central purposes. First, Congress sought to ensure
20 that all federal agencies examine the environmental impacts of their actions before acting. Second,
21 Congress sought to provide the public with a statutory means to be informed about, and to
22 comment on, the environmental impacts of proposed agency action.

23 34. NEPA requires federal agencies to analyze the environmental impact of a
24 particular federal action before proceeding with that action. *See* 42 U.S.C. § 4332(2)(C).

25 35. Accordingly, before a federal agency can act in a way that significantly affects the
26 quality of the human environment, NEPA requires the acting agency to prepare a detailed
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1 environmental impact statement (“EIS”) that discusses, among other things: “(i) the
2 environmental impact of the proposed action, (ii) any adverse environmental effects which
3 cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed
4 action.” 42 U.S.C. § 4332(2)(C).

5 36. The EIS is the cornerstone of NEPA. An EIS is required for all “major Federal
6 actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).
7 The requirement to prepare an EIS is broad and intended to compel agencies to take
8 seriously the potential environmental consequences of a proposed action.

9 37. Whether an agency action is “significant” enough to require preparation of an
10 EIS involves “considerations of both context and intensity.” 40 C.F.R. § 1508.27. The context
11 of the action includes factors such as “society as a whole (human, national), the affected
12 region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity “refers to
13 the severity of the impact” and requires BLM to consider several factors including: impacts
14 of the action, unique characteristics of the geographic area, the degree to which
15 environmental effects of the proposed action are highly controversial; the degree to which
16 the action may have a precedential effect; the degree to which possible effects of the action
17 are highly uncertain or involve unique or unknown risks; whether the action is related to
18 other actions with individually insignificant but cumulatively significant impacts; and the
19 degree to which the action may have an adverse effect on threatened species or their critical
20 habitat. 40 C.F.R. §1508.27(b).

21 38. Agencies may prepare an Environmental Assessment (“EA”) to determine
22 whether a proposed action requires preparation of an EIS or warrants a finding of no
23 significant impact.

24 39. An EA must take a “hard look” at the potential consequences of its actions and
25 provide enough evidence and analysis for determining whether to prepare an EIS. Agencies
26 must involve the public, to the extent practicable, in preparing this assessment. 40 C.F.R. §
27 1501.4 (b).
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1 40. If the agency decides the impacts are not significant, it must supply a
2 convincing statement of reasons why, and make its finding of no significant impact available
3 to the public. 40 C.F.R. § 1501.4 (e).

4 41. A significant effect may exist even if the federal agency believes that on
5 balance the effect will be beneficial. 40 C.F.R. §1508.27(b)(1).

6 42. Whether in an EA or EIS, an agency must adequately evaluate all potential
7 environmental impacts of the proposed action. *See* 42 U.S.C. § 4332(2)(C). To meet this
8 obligation, the federal agency must identify and disclose to the public all foreseeable
9 impacts of the proposed action, including direct, indirect, and cumulative impacts. *See id.* §
10 4332(2); *see also* 40 C.F.R. §§ 1508.7-1508.8

11 43. After preparing an EA or EIS, an agency may not simply rest on the original
12 document. The agency must gather and evaluate new information that may alter the results
13 of its original environmental analysis, and continue to take a hard look at the environmental
14 effects of its future planned actions. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552,
15 557 (9th Cir. 2000).

16 44. NEPA requires an agency to prepare a supplemental NEPA analysis when
17 “[t]he agency makes substantial changes in the proposed action that are relevant to
18 environmental concerns; or . . . [t]here are significant new circumstances or information
19 relevant to environmental concerns and bearing on the proposed actions or its impacts.” 40
20 C.F.R. § 1502.9(c)(1).

21 **C. Wild Free-Roaming Horses and Burros Act.**

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

1 roaming horses and burros shall be protected from capture, branding, harassment, or death,
2 and to accomplish this they are to be considered in the area where presently found as an
3 integral part of the natural system of public lands.” 16 U.S.C. § 1331.

4 46. WHBA requires BLM to “protect and manage wild free-roaming horses and
5 burros as components of the public lands . . . in a manner that is designed to achieve and
6 maintain a thriving, natural ecological balance on the public lands.” 16 U.S.C. §1333(a).
7 Additionally, WHBA requires management of wild horses and burros to be at “the minimal
8 feasible level.” *Id.*

9 47. To do so, for each Herd Management Area (“HMA”), BLM must: (1) maintain a
10 current inventory of wild horses in the management area, (2) “determine [the] appropriate
11 management level” of wild horses that the HMA can sustain (i.e., the AML), and (3)
12 determine the method of achieving the designated AML and managing horses within it. 16
13 U.S.C. § 1333(b)(1); 43 C.F.R. §§ 4710.2, 4710.3-1. An AML, according to BLM’s Wild Horses
14 and Burros Management Handbook, is “expressed as a population range within which [wild
15 horses] can be managed for the long term” in a given HMA without resulting in rangeland
16 damage.

17 48. Lastly, WHBA requires BLM to make a determination that there are excess
18 wild horse prior to gathering or removing any wild horses from the range. *See Colorado*
19 *Wild Horse & Burro Coal., Inc. v. Salazar*, 639 F. Supp. 2d 87 (D.D.C. 2009). WHBA defines the
20 term “excess” as animals that “must be removed from an area in order to preserve and
21 maintain a thriving ecological balance and multiple-use relationship in that area.” 16 U.S.C. §
22 1332(f). BLM’s Wild Horses and Burros Management Handbook explains that: “Before
23 issuing a decision to gather and remove animals, the authorized officer shall first determine
24 whether excess [wild horses] are present and require immediate removal. In making this
25 determination, the authorized officer shall analyze grazing utilization and distribution,
26 trend in range ecological condition, actual use, climate (weather) data, current population
27 inventory, wild horses and burros located outside the HMA in areas not designated for their
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1 long-term maintenance and other factors such as the results of land health assessments
2 which demonstrate removal is needed to restore or maintain the range in a [thriving,
3 natural ecological balance].”

4 **FIRST CAUSE OF ACTION**

5 **(Administrative Procedure Act: Failure to Provide for Notice and Comment)**

6 49. Plaintiff alleges and incorporates by reference all of the preceding
7 paragraphs.

8 50. Under the WHBA, the Secretary of the Interior, through her delegate, the BLM,
9 is obligated to make “determinations as to whether and where an overpopulation exists and
10 whether action should be taken to remove excess animals; determine appropriate
11 management levels of wild free-roaming horses and burros on these areas of the public
12 lands; and determine whether appropriate management levels should be achieved by the
13 removal or destruction of excess animals, or other options (such as sterilization, or natural
14 controls on population levels).” 16 U.S.C. § 1333(b).

15 51. Given this express delegation, BLM was obliged to engage in formal notice and
16 comment rulemaking as prescribed by law before BLM issued the determination regarding
17 whether the Pine Nut HMA contained “excess” wild horses or issued any decision to manage
18 those animals *See* 5 U.S.C. § 553.

19 52. In issuing the Pine Nut ROD without any advance notice to the public, or
20 opportunity for public comment, the BLM’s actions are arbitrary and capricious, and not in
21 accordance with law or required procedure, in violation of the APA, 5 U.S.C. § 706(2).

22 53. Absent injunctive and declaratory relief against BLM, Plaintiffs will suffer
23 irreparable harm, and they request the relief set forth below in their request for relief.

24 **SECOND CAUSE OF ACTION**

25 **(VIOLATIONS OF NATIONAL ENVIRONMENTAL POLICY ACT: (1) FAILURE TO**
26 **CONDUCT AN EA OR EIS FOR THE PROPOSED 2015 PINE NUT WILD HORSE**
27 **ROUND-UPS; (2) FAILURE TO ADEQUATELY DISCLOSE AND ANALYZE THE**
28 **PHYSICAL, BEHAVIORAL, AND/OR SOCIAL IMPACTS OF PZP USE ON WILD**
MARES; AND/OR (3) FAILURE TO SUPPLEMENT THE 2010 EA)

45. FoA herein incorporates all allegations contained in the preceding paragraphs.

1 46. The round-up of upwards of 332 wild horse from the Pine Nut HMA and the
2 use of PZP, a registered pesticide, on mares to be returned to the wild, is a major federal
3 action subject to NEPA.

4 47. Before issuing the December 19, 2014 ROD authorizing the proposed 2015
5 Pine Nut round-ups, BLM did not prepare an environmental assessment or an
6 environmental impact statement, or conduct any additional review of the potential
7 environmental impacts from its proposed action that was made available to the public.

8 48. The 2010 EA does not cover the proposed round up of 332 wild horses
9 from the Pine Nut HMA in 2015.

10 49. The 2010 EA does not cover the proposed round up and administration of
11 PZP on upwards of 132 wild mares from the Pine Nut HMA in 2015.

12 50. Even assuming BLM could rely upon the 2010 EA as a basis for complying
13 with NEPA with regard to the proposed 2015 Pine Nut round-ups, the 2010 EA fails to
14 consider, or inadequately considers, the physical, behavioral and social impacts of PZP on
15 wild mares.

16 51. Even assuming BLM could rely upon the 2010 EA as a basis for complying
17 with NEPA with regard to the proposed 2015 Pine Nut round-ups, BLM has failed to
18 supplement or update the 2010 EA to account for significant new information that has
19 been reported in scientific studies regarding the physical, behavioral and social impacts
20 of PZP on wild mares.

21 52. In issuing the Pine Nut ROD without complying with NEPA, BLM's actions are
22 arbitrary and capricious, an abuse of discretion, and not in accordance with law or
23 required procedure, in violation of the APA, 5 U.S.C. § 706(2).

24 53. Absent injunctive and declaratory relief against BLM, Plaintiffs will suffer
25 irreparable harm, and they request the relief set forth below in their request for relief.
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PRAYER FOR RELIEF

1 FoA respectfully requests that this Court enter judgment providing the following relief:

- 2 A. Declare that BLM’s Pine Nut Wild Horse Gather Decision Record and Determination
3 of NEPA Adequacy violated the National Environmental Policy Act and the
4 Administrative Procedure Act;
- 5 B. Enjoin any action previously authorized by the Pine Nut Wild Horse Gather Decision
6 Record and Determination of NEPA Adequacy at issue in this case unless and until
7 the violations of federal law set forth herein have been corrected to the satisfaction
8 of this Court;
- 9 C. Vacate and remand back to BLM the Pine Nut Wild Horse Gather Decision Record
10 and Determination of NEPA Adequacy;
- 11 D. Award Plaintiff reasonable costs, litigation expenses, and attorneys’ fees associated
12 with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et*
13 *seq.*, and/or all other applicable authorities; and/or
- 14 E. Grant such further relief as the Court deems just and equitable.

15 Dated January 26, 2015

Respectfully submitted,

16 /s/ Jennifer Spencer

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