

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

JUL 27 2011

Stephan Harris, Clerk
Cheyenne

Constance E. Brooks
Michael B. Marinovich
C.E. BROOKS & ASSOCIATES, P.C.
303 East 17th Avenue, Suite 650
Denver, CO 80203
(303) 297-9100

L. Galen West
West Law Office, P.C.
409 Broadway, Suite A
Rock Springs, Wyoming 82902
(307) 362-3300

Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

ROCK SPRINGS GRAZING)	
ASSOCIATION, a Wyoming)	
Corporation;)	PETITION FOR RELIEF TO
)	ENFORCE ORDER OF THIS COURT
v.)	IN THE MATTER OF <i>MOUNTAIN</i>
)	<i>STATES LEGAL FOUNDATION AND</i>
KEN SALAZAR, in his official capacity)	<i>ROCK SPRINGS GRAZING</i>
as Secretary of the Department of the)	<i>ASSOCIATION v. CLARK,</i>
Interior; the UNITED STATES)	<i>SECRETARY OF THE DEPARTMENT</i>
DEPARTMENT OF THE INTERIOR;)	<i>OF THE INTERIOR</i> , Civ. No. 79-275K
ROBERT V. ABBEY, in his official)	
capacity as Director of the Bureau of)	<i>11-CU-263-F</i>
Land Management; and the UNITED)	
STATES BUREAU OF LAND)	
MANAGEMENT.)	

Comes now the Rock Springs Grazing Association (RSGA), by and through counsel, to file a petition for relief to enforce the judgment and order entered in the case of *Mountain States Legal Foundation and Rock Springs Grazing Association v. Clark, Secretary of the*

Department of the Interior, Civ. No. 79-275, and to direct the Defendants to remove all of the wild horses that have strayed onto the RSGA lands within the Wyoming Checkerboard. In the alternative, RSGA seeks to enforce Section 4 of the Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. §1334, which requires Defendants to make arrangements to remove wild horses that have strayed onto the private lands upon the landowner's request.

INTRODUCTION

1. More than 32 years ago, Plaintiff RSGA filed suit to require the Bureau of Land Management (BLM) and the U.S. Marshal to remove the wild horses that had strayed onto the private lands within a portion of the Wyoming Checkerboard, which private lands are a strip of land 40 miles wide and 80 miles long that follows the railroad from Tipton to Bryan, Wyoming. The affected area is approximately two million acres or about one third larger than the State of Delaware.

2. RSGA owns and leases a total of approximately one million acres of private land within the above-described portion of the Wyoming Checkerboard. RSGA owns multiple, the odd-numbered sections within such strip of land, comprising approximately 550,000 acres. RSGA also leases the surface for grazing and agriculture purposes of approximately 450,000 acres, which are also multiple, adjacent alternating odd-numbered sections. These leased lands, are also within the same portion of the Wyoming Checkerboard and are privately owned by Anadarko Land Corporation.

3. The adjacent alternating even-numbered sections within the above-described portion of the Wyoming Checkerboard total approximately one million acres of federal lands owned by the United States and are primarily administered by BLM pursuant to federal law, including the Taylor Grazing Act (TGA) and the Federal Land Policy and Management Act (FLPMA). RSGA holds the federal grazing permit for these public lands and manages the public lands in concert with the unfenced private lands. The RSGA deeded lands plus the lands leased for grazing and agriculture purposes from Anadarko Land Corporation and the public lands under a BLM grazing permit are known as "the RSGA" or "the Lease" or "the BLM Rock Springs Grazing Allotment." These lands are hereafter referred to as "RSGA lands."

4. In March of 1981, this Court held that BLM must remove all of the wild horses from the RSGA lands "except that number which the RSGA voluntarily agrees to leave in said area." In agreements reached in 1979 with Wild Horses Yes! and the International Society for the Protection of Mustangs and Burros, RSGA had agreed to tolerate 500 wild horses within the RSGA lands. The RSGA and the two wild horse groups also agreed that the total number of wild horses in the Rock Springs District should be no more than 1500-1600 wild horses, including the 500 wild horses on the RSGA lands. BLM adopted these agreements negotiated between RSGA and the two wild horse organizations in its "apparent management objectives" and later in it's the appropriate management levels

(AMLs) for the number of wild horses allocated to the four wild horse herd management areas (HMAs) that include and are adjacent to the RSGA lands.

5. BLM has not adhered to the original court orders or the underlying agreements. BLM has failed to maintain wild horse numbers at the numbers that RSGA agreed to tolerate. BLM has not been able to accurately track and count the wild horses within the RSGA lands but readily admits that they greatly exceed the agreed upon levels in violation of the court orders, and exceed the AMLs adopted by BLM in the land use plans and a separate consent decree entered into with the State of Wyoming. As a result of the Defendants' failure to meet the agreed-upon numbers of wild horses, the rangeland resources on land owned and leased by RSGA have deteriorated and will continue to deteriorate.

6. RSGA changed its previous agreement to tolerate 500 wild horses on its RSGA lands to zero, based on Defendants proven inability to meet and maintain the agreed upon numbers of wild horses and the recent program changes that contradict the previous agreements.

7. On October 4, 2010, RSGA sent Defendants an official request to make the necessary arrangements to remove all of the wild horses that had strayed onto its lands in accordance with the Wyoming court orders as well as the provisions of the WHA, 16 U.S.C. §1334, on October 4, 2010. Defendants responded on February 7, 2011 but did

not state that it would make arrangements to remove the wild horses as requested by RSGA.

8. RSGA is entitled to and seeks relief in the nature of a mandatory injunction directing Defendants to comply immediately with the previous court orders and remove all wild horses that have strayed onto RSGA lands pursuant to RSGA's request.

9. Defendants admit the lack of compliance with the previous agreements. Defendants have a non-discretionary obligation to follow the orders of a federal court, unless and until such order is amended. Even without a court order, the WHA imposes a non-discretionary and ministerial obligation on the part of Defendants to make arrangements to remove, upon request, the wild horses that have strayed onto private lands. RSGA has made such a request, but Defendants have failed to undertake such arrangements in accordance with the request. Instead, Defendants reduced wild horse gathers and funding for wild horse gathers by 25% for the foreseeable future.

JURISDICTION AND VENUE

10. This action is brought pursuant to Rule 70 of the Federal Rules of Civil Procedure, the Wild Free-Roaming Horses and Burros Act (WHA), 16 U.S.C. §1334; 28 U.S.C. §1651, the All Writs Act, and the Administrative Procedure Act (APA), 5 U.S.C. §§701-706.

11. This Court has jurisdiction under 28 U.S.C. §1331 [federal question], 28 U.S.C. §2201 [declaratory judgment], 28 U.S.C. §1361 [mandamus], and the APA, 5 U.S.C. §§701-706.

12. Venue is properly laid in the District Court for the District of Wyoming. 28 U.S.C. §1391(e). The land and wild horses that are the subject of this action are located in Wyoming. The Plaintiff RSGA is incorporated in Wyoming and has its principal place of business in Rock Springs, Wyoming.

PARTIES

13. Plaintiff RSGA is a Wyoming corporation whose principal place of business is Rock Springs, Wyoming. RSGA owns and leases approximately one million acres of private land within the Wyoming Checkerboard where the excess wild horses have currently strayed.

14. RSGA and its shareholders are directly injured by Defendants' failure to comply with this Court's orders and the WHA. The excess numbers of wild horses cause deterioration of rangeland resources, including loss of native vegetation and damage to riparian areas on both the public and private lands. The deterioration of resource conditions results in lower forage production, which harms RSGA shareholders who would otherwise be able to use more forage on the RSGA lands. Since 1995, BLM rules require that RSGA meet or maintain rangeland health standards or face reductions in livestock grazing. RSGA shareholders will face livestock grazing reductions when BLM will not or cannot

acknowledge that wild horses are the significant causal factor in the failure to meet or maintain rangeland health standards and will then impose livestock grazing reductions. An order directing BLM to comply with the 1981 orders of this Court and the WHA and an order to remove the wild horses that have strayed onto the RSGA lands will redress the legal injuries suffered by RSGA by removing the significant causal factor in the possible deterioration of rangeland conditions.

15. The excess number of wild horses also fails to maintain “thriving natural ecological balance and multiple-use relationship in the area.” The excess number of wild horses interferes with or may interfere with RSGA meeting or maintaining the rangeland health standards and also causes the deterioration of habitat for big game and wildlife. Over the years, the BLM has documented damage to rangeland resources and wildlife habitat from excess wild horse populations. The riparian areas and creek beds are especially hard hit due to wild horses’ territorial nature. Wild horses will defend the territory and harass wildlife in order to keep them from using water sources, a scarce commodity in southwestern Wyoming.

16. Defendant Ken Salazar is the Secretary of the Department of the Interior (DOI). In his official capacity, the Secretary is responsible for upholding the Constitution of the United States and for setting public land policy in accordance with the provisions and requirements of federal law, including Wild Horses and Free-Roaming Burros Act and FLPMA.

17. Defendant DOI is the department of the federal government to which Congress delegated the authority to administer the public lands and wild horses in accordance with the Constitution of the United States and federal law.

18. Defendant Robert V. Abbey is the Director of the BLM. In his official capacity, Director Abbey is responsible for managing the public lands in accordance with the U.S. Constitution and federal law.

19. Defendant the Bureau of Land Management is the federal agency within DOI responsible for the management and conservation resources on 253 million surface acres, as well as 700 million acres of onshore subsurface mineral estates, including the public lands and wild horses in Wyoming.

STATEMENT OF FACTS

History of RSGA

20. RSGA was established in 1907 in order to assemble the land rights to use the rangeland resources within a portion of the Wyoming Checkerboard, which at that time was owned by the United States, the Union Pacific Railroad, and the State of Wyoming. The Wyoming Checkerboard where the RSGA lands are located consists of a strip of land located in southwestern Wyoming. The RSGA lands follow the railroad right-of-way from Tipton to Bryan, Wyoming, encompassing an area roughly 40 miles wide and 80 miles long, 3200 square miles or slightly more than two million acres. This area is roughly one-third larger than the land base for the State of Delaware.

21. The original shareholders of RSGA formed the corporation to gain control of the private land through continuously-held Union Pacific Railroad surface leases for grazing and haymaking to protect and manage grazing within this area. The private lands owned and leased by RSGA are located within the "Wyoming checkerboard," which was originally patented under the Union Pacific Railroad Land Grant in southwest Wyoming. These same lands are included within the boundaries of the BLM Rock Springs Grazing Allotment, which is held by RSGA.

22. RSGA shareholders grazed both the private and federal lands before Congress enacted the Taylor Grazing Act (TGA), in 1934. The TGA directed the Department of the Interior, through the General Land Office, and later the BLM, to manage public land grazing through the issuance of grazing permits or leases. Following enactment of the TGA, RSGA secured the grazing preference on the public lands adjacent to the RSGA lands and continues to hold the grazing permit for the adjoining federal lands.

23. Th RSGA grazing allotment, which is the largest single grazing allotment managed by BLM, encompasses an area slightly more than two million acres with few fences and a long history of winter grazing for sheep, cattle, and wildlife. The RSGA deeded land and grazing and agricultural surface leases from Anadarko Land Corporation represent about 51% of the entire land area. The BLM administers the alternating even-numbered sections of public land, which represent the remaining 49% of the lands.

Judgment in MSLF and RSGA v. Andrus

24. On December 15, 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act ("WHA"), 16 U.S.C. §§1331-1340, to protect all unclaimed wild horses and burros located on federal, state and private land.

25. The Act provides that landowners cannot remove or control wild horses on private lands. Only the DOI or the U.S. Marshal can do so but that upon request, the Secretary must arrange for the removal of the wild horses that stray onto private land. 16 U.S.C. §1334.

26. Following enactment, wild horses were protected from all harassment, death, or removal on all land, private, federal and state-owned. Wild horse numbers in Wyoming increased exponentially within a few years of the WHA enactment, overrunning the habitat, water and available rangeland resources.

27. Relying on Section 4 of the WHA, 16 U.S.C. §1334, RSGA and the Mountain States Legal Foundation (MSLF) requested that Defendants remove the wild horses from the RSGA lands. When Defendants failed to do so, RSGA filed suit in this Court to compel Defendants to remove the wild horses from the private land sections of RSGA lands. While not germane to this petition, RSGA also requested compensation for the private land forage that was consumed by the wild horses.

28. Federal law, cost and practical impediments preclude fencing the individual sections within the Wyoming Checkerboard. Federal law expressly prohibits fencing of the public lands and fencing individual private land sections would also fence the public lands.

43 U.S.C. §§1061-1066. Fencing individual sections would also impair wildlife habitat, migration and even result in injury to wildlife. Such fencing has been held to be unlawful in Wyoming. It is, thus, impossible to prevent wild horse trespass from the public land sections onto the private land sections and to RSGA lands within the Checkerboard without removing all of the wild horses.

29. Recognizing the legal and physical difficulties in fencing the private land sections of the Wyoming Checkerboard, RSGA reached an agreement with Wild Horses Yes! and the International Society for the Protection of Mustangs and Burros that RSGA would tolerate an upper limit of 500 wild horses year round on, and seasonal winter numbers of up to a total of 1500 to 1600 wild horses (including 500 on the RSGA lands) on the RSGA lands. This agreement also recognized that the number of wild horses would not exceed a total of 1500-1600 wild horses on public, state and private lands in the Rock Springs District. The Rock Springs District in 1981 was much larger than today and included public lands located in Lincoln and Sublette Counties as well as the area now called the Rock Springs Field Office.

30. This Court granted partial summary judgment on March 13, 1981, finding *inter alia* that:

- a. "the wild horse population has dramatically increased and the excess demand on grazing lands has created several problems for ranchers in the Rock Springs area and the ecological balance of the range"

- b. "After passage of the Act, the first Bureau of Land Management (BLM) inventory revealed 2364 wild horse in the Rock Springs area in February 1972, with 1,116 of these horses located on the lands of the Rock Springs Grazing Association. As of March 1979, 6,129 wild horses were in the Rock Springs District, with 3,413 of these on the lands of the Association."
- c. "BLM failed to remove a significant number from January 1, 1972 through September 1, 1976;"
- d. This Court ordered BLM "within one year from the date of this Order [to] remove all wild horses from the checkerboard grazing lands in the Rock Springs District ***except that number which the RSGA voluntarily agrees to leave in said area;***" (emphasis added)
- e. This Court further ordered BLM "within two years of the date of this Order [to] remove all excess horses from within the Rock Springs District;" and "The term excess is defined as the number in the Order and deemed appropriate by a final environmental impact statement."

In 1981, BLM was preparing a grazing environmental impact statement (EIS) to analyze the environmental impacts of the grazing program and forage capacity.

Implementation of 1981 Order in *MSLF and RSGA v. Andrus*

31. After the order of this Court on March 13, 1981, BLM removed all wild horses in Lincoln and Uinta Counties, where the public lands are now managed as the Kemmerer

Field Office. BLM also removed wild horses from Sublette County, where the public lands are now managed as part of the Pinedale Field Office.

32. When BLM first implemented this Court's order of March 13, 1981, it used a wild horse herd population objective of 1,525 wild horses, which also included the wild horses in the Pinedale Resource Area. These were called apparent management numbers, because BLM had not completed the grazing EIS, pursuant to which BLM would make formal land use decisions to designate herd management areas (HMA) and to establish the appropriate management levels (AMLs) for the number of wild horses to be maintained on public lands. The RSGA lands were included in the areas called the: (1) Salt Wells/Pilot Butte and the Checkerboard, as identified in the BLM Grazing EIS, and now the Salt Wells HMA and a small portion of the Adobe Town HMA; and (2) the Big Sandy, defined in the BLM Grazing EIS, now includes the White Mountain, Divide Basin, and Little Colorado HMAs and non-HMA areas. The wild horse population objectives were:

Big Sandy Solid Block	600
Salt Wells Checkerboard (RSGA lands)	500
Salt Wells Pilot Butte Solid Block	400
Pinedale	25

33. BLM initiated gathers to achieve the agreed upon numbers of wild horses but quickly fell behind.

34. In 1984, RSGA filed a motion to show cause why Defendants should not be held in contempt to enforce the order. Following discussions, the parties submitted a stipulated amendment to the order, which was signed by this Court on September 28, 1984. Pursuant to that amended order, BLM committed to the removal of all but 1500 to 1600 wild horses, and further committed to dedicate about 90% of the Wyoming BLM wild horse program funding for the next three years to achieve and maintain the AMLs.

35. By the end of September 1985, the District Manager for the Rock Springs office wrote to say that BLM had achieved the terms of the court's order and requested RSGA's acquiescence that it had in fact complied, as the estimated population was 1737.

36. RSGA declined to say that BLM was in compliance. When the letter was written, BLM exceeded the agreed-upon numbers by at least 225 wild horses and by the next year's foaling season, BLM would again be out of compliance.

37. Independent of the RSGA litigation and pursuant to the WHA, BLM identified HMAs for Wyoming public lands and set AMLs based on rangeland conditions, other land uses, including livestock grazing and wildlife habitat needs. The upper limit of the AML is defined as the number to achieve and maintain a thriving and natural ecological balance and to avoid deterioration of the range. DM 4710.42, ¶D.

38. BLM designated the HMAs and adopted the AMLs for the public lands that are within or adjacent to the RSGA lands to be consistent with Judge Kerr's orders and the agreements reached by RSGA and wild horse advocacy groups. The designated HMAs do

not correspond to solely the Wyoming Checkerboard or RSGA lands but include other public lands. The HMAs share unfenced boundaries and the wild horse bands move freely between the HMAs as well as between the public lands and RSGA lands.

39. The following reflects the RSGA agreements regarding wild horse numbers and the current location by HMA:

Salt Wells HMA = 251-365 wild horses

Great Divide Basin HMA = 415-600 wild horses

White Mountain HMA = 205-300 wild horses

Little Colorado HMA = 69 -100 wild horses

40. About 26,000 acres of the Adobe Town HMA are owned/leased by RSGA and are also part of what was formerly called the Salt Wells, Pilot Butte and Solid Block. The Adobe Town HMA borders Salt Wells and is unfenced. The wild horse herds roam freely between the two HMAs. BLM now manages the two HMAs as the Salt Wells-Adobe Town HMA complex. The total AML for Adobe Town is 610 to 800 wild horses.

41. The Salt Wells, Adobe Town, White Mountain, Little Colorado and Great Divide Basin HMAs are included in, partially located in, or adjacent to the Wyoming Checkerboard and the RSGA lands. The tendency of wild horses to roam without regard to land ownership boundaries led BLM to manage the adjacent or nearby HMAs as a single complex, *e.g.* Salt Wells and Adobe Town HMAs, White Mountain and Little Colorado

HMA, and the Red Desert Complex which includes the Lost Creek, Stewart Creek, Antelope Hills, Crooks Mountain and Green Mountain HMA.

42. In March 1997, the Green River Resource Management Plan (RMP), which governs public land management for the Rock Springs Resource Area, adopted the wild horse numbers and AMLs previously determined for the Salt Wells, a portion of Adobe Town, White Mountain, Little Colorado and Divide Basin HMA.

State of Wyoming v. BLM: Consent Decree

43. BLM decreased active gathers in the early 1990s due to a change in national policy that favored monitoring the wild horse numbers over gathers and adoptions. By 2003, public lands throughout the State of Wyoming were in resource crisis due to excess wild horse populations. The State of Wyoming then filed suit against BLM to enforce the terms of the respective land use plans governing public lands in Wyoming. *State of Wyoming v. BLM*, Civ. No. 03-169WFD.

44. BLM and Wyoming quickly signed a consent decree resolving the lawsuit. In the Consent Decree, to which RSGA was not a party, BLM agreed to maintain the AMLs for each HMA, to inventory and gather from each HMA every three years to the lower level of the AML. If BLM did not have enough funding, it was required to inform the State and then request additional funding and to schedule a gather within one year. BLM also agreed to promptly removal all wild horses outside of the HMA.

45. BLM initially instituted the steps required under the Consent Decree and gathered and removed wild horses from the HMAs that are also within or bordered the RSGA lands.

46. From the fall of 2007 to October 2010, the BLM gather schedule was disrupted by poor weather and diversion of federal funds to other states. As a result, BLM did not remove wild horses from the HMAs, affecting the RSGA lands for more than three calendar years (from August 2007 to November 2010) or the beginning of fiscal year 2011.

Estimated Number of Wild Horses In Violation of Orders

47. The current number of wild horses located in the HMAs within the RSGA lands greatly exceed the previously agreed range of 500 horses within the RSGA lands and no more than a total of 1500 to 1600 wild horses within the four Rock Springs HMAs that include RSGA lands and the HMAs adjacent to the RSGA lands. These numbers also exceed the AMLs adopted in horse management plans and Resource Management Plans (RMPs) for the Rawlins and Rock Springs Resource Areas.

48. Based on the reported counts as adjusted for foaling seasons and undercount bias as detailed in paragraphs 52 through 54 of this complaint, RSGA estimates that there are almost 4300 wild horses in the four HMAs within or next to the RSGA lands as compared with the agreed upon AML range of 1445 to 1680 wild horses. There are also an estimated 400 to 500 uncounted wild horses outside of the HMAs adjacent to RSGA lands. The number of wild horses exceeds the previously agreed number of wild horses by 280%.

49. In 2010, BLM resumed work on planning for wild horse gathers with the proviso that no removals would occur until after October 1, 2010. After November 1, 2010, the BLM gathered about 2,250 wild horses from the Adobe Town-Salt Wells HMAs but returned more than 374 on the grounds that the EA and the gather contract did not authorize the removal of additional wild horses from the Adobe Town and Salt Wells HMAs. The net number of wild horses removed was 1876. BLM knew at the time that it returned the wild horses to RSGA lands and the adjacent public lands that the two HMAs still exceeded the AMLs.

50. In response to RSGA objections about the return of 374 wild horses to RSGA lands, BLM represented to RSGA that it would try to return to Adobe Town-Salt Wells HMAs to remove additional wild horses in the summer of 2011. This did not occur.

51. The last gather for White Mountain-Little Colorado HMAs was fiscal year 2008 or the fall of 2007. BLM has scheduled a gather for White Mountain-Little Colorado HMAs for August 2011. BLM reports that as of April 2010 there were 560 wild horses and projects that there are now nearly 1000 wild horses in the two HMAs as compared to the AML of 205 to 300. BLM proposed to gather to the lower AML of 205 and the return any wild horses only after sterilization. RSGA and BLM supported the non-reproducing herd as a means to reduce costs of immunization, control rates of reproduction and to enable BLM to catch up on the backlog of excess wild horses. BLM modified the gather decision on June 22, 2011 to remove the spaying option for mares but wild horse advocates have pledged to sue.

Due to BLM's aversion to controversies with wild horse advocate groups, RSGA believes that BLM will voluntarily stay the White Mountain-Little Colorado gather, if the decision is appealed.

52. The last gather in Divide Basin Herd Management Area was in fiscal year 2007 or August 2007. Relying on the 2010 aerial count, BLM projects that there are 1640 wild horses in the HMA as compared to an AML of 415 to 600. No gather is scheduled until after October 1, 2011 or the start of the 2012 fiscal year. RSGA estimates that there are also anywhere from 400 to 500 wild horses outside of the HMA boundary.

Undercounting Wild Horse Numbers

53. It is very difficult to accurately count wild horses in the mountainous and remote terrain of southwestern Wyoming. The southwestern Wyoming topography, wild horse herd mobility and limitations in aerial flying to count wild horses make undercounting significant factor in the number of excess wild horses.

54. The aerial survey numbers used by Wyoming BLM are based on sight-double count methodology, which has been found to undercount wild horses in large HMAs or where there is varying topography. The undercount bias is a more significant factor in large HMAs, including Adobe Town, Salt Wells, Little Colorado and Divide Basin, all of which are within or adjacent to the RSGA lands. It is easier to keep a tally for small geographic areas or small AMLS, e.g. less than 100 wild horses. If the BLM reported the numbers of wild

horses as adjusted for undercounting, the excess wild horse populations increase by at least 17.5%, not the 14% bias correction selected by the Wyoming BLM in 2011.

55. The observed count method used by Wyoming BLM has chronically undercounted the number of wild horses in Wyoming and especially on the Wyoming Checkerboard. While RSGA also participated in the aerial surveys to count wild horses, RSGA shareholders and others have repeatedly reported bands of wild horses in areas that were not flown and were not gathered or where no wild horses had been sighted previously.

56. A USGS study of the Adobe Town-Salt Wells HMA confirmed the inaccuracies and concluded that the undercounting ranged from 10% to 25%. The USGS recommended that BLM adjust its observed numbers to compensate for this bias. On February 1, 2010, BLM adopted a new instruction memorandum to address the undercounting bias. Instruction Memorandum (IM) 2010-57. In the IM, BLM acknowledged that previous research suggested that observed counts could err by as much as 60%. The IM also referred to a 2009 study finding a statistical undercounting of as much as 32%. BLM now states that undercounting varies from 10% to 25%. The IM directed BLM to adjust the observed double count method using Lincoln-Peterson calculations.

57. Wyoming BLM did not implement the 2010 BLM policy for its wild horse counts made in 2010, citing the need for staff training. The EAs written in 2011 for the wild horse gathers in the White Mountain-Little Colorado HMAs and Divide Basin HMA adjusted the 2010 wild horse populations to reflect two foaling seasons, 21% increase annually and

adjusted wild horse numbers 14%. The EAs state that BLM selected 14% as a reasonable starting point for the number of wild horses not being observed during a census survey and may be adjusted in the future as more information is gathered.

58. RSGA is of the information and belief that Wyoming BLM has undercounted the number of wild horses by an unknown number but certainly more than 14%. This was confirmed in November 2010, when BLM found nearly double the number of wild horses anticipated in the Adobe Town-Salt Wells HMA.

59. The history of the implementation of the wild horse program shows that wild horse numbers increase 18% to 33% a year and BLM uses an average population increase of 20 to 21% in its environmental and decision documents. Wild horses do not have natural predators although foals are reported to die of dehydration and cold in southwestern Wyoming.

60. BLM is currently applying fertility control in the form of inoculating gathered mares with the porcine zona pellucida (PZP) vaccine. This immunization is about 40% effective and must be renewed every two to three years. Immunization requires BLM to gather the same wild horses repeatedly to re-immunize them. If such gathers do not occur, then any fertility control will expire.

BLM Changes Wild Horse Program

61. On June 2, 2010, BLM announced a new draft strategy for wild horse management designed to reduce the costs of caring for wild horses that are removed from

public lands but cannot be adopted and, thus, must be held in corrals. BLM acknowledged that the severe recession resulted in a sharp drop in the national horse market and resulted in fewer adoptions. There continues to be little opportunity to improve adoptions during the continued recession. The draft strategy proposed to increase immunization or fertility control for the mares by administering a shot that lasts for two years and is 40% effective, contracts for wild horse sanctuaries in the East and Midwest, use agreements with livestock operators to support more wild horses on public lands in lieu of livestock, and to create new HMAs on public lands.

62. The draft strategy did not recognize the outstanding court orders in the RSGA case or the State of Wyoming consent decree.

63. On February 25, 2011 BLM announced the revised strategy for the wild horse program. The centerpiece of the program was a National Academy of Science study to address questions framed by BLM. In order to support funding for the research, BLM announced a sharp reduction in wild horse gathers from at least 10,000 wild horses nationwide a year to less than 7,600 wild horses a year. The revised management strategy continues to emphasize creating more places to manage wild horses, now called wild horse sanctuaries. The revised wild horse program strategy also omitted the court orders that require removal of wild horses from the RSGA lands and from Wyoming public lands, even though RSGA submitted comments documenting the previous litigation and court orders.

64. At the National Wild Horse Advisory Committee meeting held in Mid-March, 2011, BLM officials stated that the reduction in wild horse gathers was due to lack of funding. This was inconsistent with the fact that the continuing appropriations resolution adopted by Congress did not change the previous fiscal year 2010 budget that included additional funding for wild horse gathers, including additional wild horse gathering funds for Wyoming.

65. On March 15, 2011, based on the wild horse gathers already completed at the beginning of FY2011, Wyoming BLM told RSGA that there would be no additional wild horse removals for the FY2011. This echoed reports by other BLM officials that there would be no additional gathers for this fiscal year due to lack of funding.

66. On March 24, 2011, BLM announced the \$40 million in funding from the wild horse program to contract for wild horse sanctuaries and invited proposals. This announcement contradicted BLM officials' statements that BLM lacked funding for wild horse gathers.

Efforts to Pursue Voluntary Enforcement

67. Review of the 2010 proposed revision to the BLM wild horse program led RSGA to conclude that BLM would not honor the 1981 court order, the agreements and land use plan, or the 2003 Consent Decree. At its next Board meeting, the RSGA Board voted unanimously to request that BLM remove all of the wild horses from the RSGA lands,

thereby rescinding its 1979 agreement to tolerate 500 wild horses year round on RSGA lands.

68. In an effort to resolve the issues outside of litigation, RSGA communicated its position to Wyoming BLM officials. BLM officials made it clear that RSGA would have to sue to enforce its rights under this Court's order.

69. RSGA also met with Deputy Assistant Secretary Sylvia Baca to deliver its demand that BLM remove all of the wild horses on RSGA lands, to explain its rights under the 1981 order, and to formally request removal of all of the stray wild horses. RSGA also presented a copy of its letter to the U.S. Marshal officially asking for removal of all wild horses that have strayed onto the RSGA lands in light of repeated failure on the part of BLM to manage and control the wild horse numbers.

70. The Assistant Secretary attributed the failure to comply with external influences on the Department and Congress, and the lack of funding due to the need to contract for sanctuaries. The Assistant Secretary stated that litigation would be necessary to secure additional funding for wild horse gathers.

71. On October 4, 2010, RSGA wrote to BLM officially asserting its rights under the previous court order and the WHA, 16 U.S.C. §1334, to request removal of all of the wild horses that have strayed onto the RSGA lands. On February 7, 2011, RSGA received the BLM response. BLM avoided directly addressing the request to remove the wild horses from RSGA lands. Instead, BLM described the scope of the wild horse program, the

number of HMAs [4] in RSGA lands and its cooperative relationship with RSGA. BLM noted that RSGA helps count and BLM is 'flexible' about removing wild horses outside of the HMAs and that it works to schedule additional gathers when new information shows AMLs exceeded. BLM admitted that no additional gathers in Rock Springs Field Office were funded for the balance of FY2011 but that the Divide Basin HMA was to have priority in FY2012. BLM noted that the HMA AMLs were adopted in the 2003 Consent Decree. Finally, BLM stated that it was beginning to implement IM 2010-57 but the staff needed additional training. BLM closed its letter by stating that it will continue to manage under the RMP and will consult with RSGA as it revises the Green River RMP.

72. The BLM response inaccurately referred to the AMLs as based on agreement between BLM and RSGA. The AML numbers reflect an agreement between RSGA and Wild Horses Yes! and International Society for Protection of Mustangs and Burros. BLM merely adopted the agreements.

73. After much work by the staff of the Wyoming High Desert District BLM office, the Washington Office of BLM agreed to fund a single gather in the White Mountain-Little Colorado HMAs in fiscal year 2011. The first decision for this gather was withdrawn on June 17, 2011 and revised at the demand of the Washington Office when wild horse advocacy groups threatened litigation over the BLM objective of a non-reproducing herd. BLM may well withdraw its removal decision if an appeal is filed. BLM stayed a Nevada wild horse gather when the Cloud Foundation filed a motion for a preliminary injunction as part

of the stipulated briefing schedule. *Cloud Foundation v. Salazar*, Civ. No. 11-0459 (pending D. Nev.).

74. Notwithstanding funding uncertainties and contradictory direction, Wyoming BLM has prepared environmental assessments (EAs) and findings of no significant impact for the Divide Basin HMA and White Mountain-Little Colorado HMA as well as the Red Desert complex consisting of adjacent or nearly adjacent HMAs in the Lander and Rawlins Field Offices.

CLAIM I ENFORCEMENT OF COURT ORDER

75. Plaintiff restates and incorporates the allegations in paragraphs 1-74.

76. Pursuant to federal rules and law, Plaintiff is entitled to enforce the judgment entered by this Court on March 13, 1981 and amended in September 1984.

77. Rule 70 of the Federal Rules of Civil Procedure provides that:

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done-at the disobedient party's expense-by another person appointed by the court. When done, the act has the same effect as if done by the party.

It also provides that a party can apply for a writ of assistance to enforce a judgment.

78. The All Writs Act, 28 U.S.C. §1651, provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

79. RSGA no longer agrees to voluntarily allow BLM to leave wild horses on its lands. RSGA formally notified BLM on October 4, 2010 that it demanded the removal of all of the wild horses that have strayed onto the RSGA lands, as is its right under the original order and judgment of this Court as well as the WHA, 16 U.S.C. §1334. RSGA based its request on the failure of BLM to observe the terms of the original agreements and flaws in the program that undercount the number of wild horses and fail to address the exponential population increases.

80. On February 7, 2011, BLM acknowledged the previous court orders but appeared to assume the AML decisions in the RMPs and the Consent Decree to which RSGA is not a party supersede the 1981 order as amended. A land use plan decision is not the same as a federal court order and cannot supercede an order of a federal court. RSGA was not a party to the Consent Decree and the Consent Decree it did not address the number of wild horses on private lands or the rights of private landowners.

81. While the BLM response stated that it would continue to work with RSGA, it pleaded inability to meet AML obligations due to lack of funding and other priorities. BLM did not address the provisions of the WHA that require removal of wild horses that stray onto private lands or the right of RSGA to enforce this right of removal. Most importantly, BLM did not say that it would honor this request and make arrangements to remove the wild horses that have strayed onto the RSGA lands.

BLM Admits Wild Horse Numbers Exceed AML

61. The number of wild horses on the Checkerboard, including RSGA lands, exceed the agreed upon range of 1500 to 1600 wild horses. BLM admits that the HMAs located within or adjacent to RSGA lands exceed the respective AMLs and that there are quite a few wild horses outside of the HMAs as well.

62. BLM has not met the terms of the 1981 Order by Judge Kerr to remove the wild horses to a number agreed upon by RSGA and to remove horses to meet AMLs. The program flaws and policy changes, and regular increases in wild horse numbers due to breeding success make it unlikely that BLM will maintain the previous agreement on the number of wild horses on RSGA lands.

63. Any wild horses on the RSGA lands are excess and must be removed. The wild horses on public lands outside of the RSGA lands that exceed the AML are also excess and must be removed.

64. RSGA calculates and estimates that the number of wild horses that are now located on and adjacent to the RSGA lands range from 4,000 to 5,000, thus clearly violating the 1981 order or any previous agreement. Following the foaling season for 2011, which would have increased wild horse numbers by an average of 20%, if the BLM wild horse survey numbers are adjusted for undercounting and the subsequent foaling seasons, RSGA is of the information and believe that there are at least:

- a. 1150 wild horses in Salt Wells and Adobe Town HMAs;
- b. 1970 wild horses in Divide Basin HMA,

- c. 420 wild horses outside of HMAs;
- d. 810 wild horses in White Mountain HMA; and
- e. 320 wild horses in Little Colorado HMA.

65. If BLM completes the two planned gathers for White Mountain-Little Colorado HMAs in August of 2011 and White Mountain HMA in FY 2012, BLM will still be in violation of the Orders by having excess numbers of wild horses in Adobe Town-Salt Wells HMAs. Within one foaling season or by July 2012, all of the HMAs will exceed the upper level of the AMLs. BLM has not announced plans to gather in Salt Wells/ Adobe Town in the next fiscal year.

82. BLM has not proceeded to make arrangements to remove the wild horses from the RSGA lands. By ignoring the RSGA demand that DOI make arrangements to remove the wild horses that have strayed onto RSGA lands, BLM refused to honor its statutory and court-ordered obligation to make arrangements to remove all of the wild horses on the RSGA lands.

83. As this Court held in the predecessor case, RSGA is entitled to relief in the nature of a mandatory injunction directing BLM to "within one year from the date of this Order [to] remove all wild horses from the checkerboard grazing lands in the Rock Springs District except that number which the RSGA voluntarily agrees to leave in said area;" follow the terms of the 1981 Court Order and WHA.

84. RSGA seeks a mandatory order or injunction from this Court that would direct BLM to follow the 1981 order forthwith and remove all of the wild horses from within the RSGA lands.

CLAIM II, IN THE ALTERNATIVE, SECTION 4 OF WHA

85. Plaintiff restates and incorporates the allegations in paragraphs 1-90.

86. Section 4 of the WHA provides in relevant part: "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 marshal or agent of the Secretary, who shall arrange to have the animals removed." 16 U.S.C. §1334(a).

87. Wild horses have strayed onto the lands of RSGA. RSGA requested that BLM make arrangements to remove all such wild horses.

88. BLM declined to do so, relying instead on RMP decisions that reflected the previous agreements and its Consent Decree with the State of Wyoming.

89. RSGA was not a party to the Consent Decree and the Consent Decree could not and did not apply to private lands or bind private landowners.

90. BLM provided no assurances that it would make any arrangement to remove the stray wild horses as requested by RSGA and, to date, it has not made arrangements to remove all of the wild horses from RSGA lands.

91. Section 4 of the WHA imposes a ministerial and non-discretionary obligation on BLM to remove wild horses at the request of the private landowner when the wild horses have strayed.

92. BLM's rationale for not complying, namely lack of funding, is contradicted by explicit policy decisions whereby BLM has committed up to \$40 million for wild horse sanctuaries and additional funds for research at the expense of its legal obligations to remove stray wild horses from private lands.

93. RSGA is entitled to an order finding that BLM must comply with its request to make arrangements to remove the wild horses that have strayed onto the RSGA lands forthwith.

WHEREFORE, Plaintiff seeks the following relief:

1. A declaratory judgment that RSGA is entitled to enforce the orders of this Court in *MSLF and RSGA v. Andrus*;
2. Alternatively, a declaratory judgment that Section 4 of the WHA provides that BLM must remove wild horses that have strayed onto the private lands, that it is not lawful nor feasible to fence the RSGA lands, and therefore, BLM must remove all of the wild horses that have strayed onto the RSGA lands and the adjacent public lands within the Wyoming Checkerboard;
3. An order directing BLM to remove all wild horses from the RSGA lands within one year;

4. Attorneys fees and costs incurred by RSGA in seeking to enforce this Court's previous orders; and
5. Such other equitable relief as may be appropriate.

Dated: July 25, 2011.

Respectfully submitted:

/s/ Constance E. Brooks
Constance E. Brooks connie@cebroids.com
Michael B. Marinovich mike@cebroids.com
C.E. Brooks & Associates, P.C.
303 East 17th Avenue, Suite 650
Denver, CO 80203
(303) 297-9100 fax: (303) 297-9101

/s/ Galen West 
L. Galen West
galen.west@bwtpc.com
West Law Office, P.C.
409 Broadway, Suite A
Rock Springs, Wyoming 82902
(307) 362-3300 fax: (307) 362-3309

Counsel for Plaintiffs