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December 23, 2015

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**VIA FEDERAL EXPRESS PRIORITY  
OVERNIGHT & EMAIL**

USDA Forest Service  
Attn: Appeal Reviewing Officer  
210 14<sup>th</sup> Street, SW  
EMC-LEAP, Mailstop 1104  
Washington, DC 20250  
Email: [appeals-chief@fs.fed.us](mailto:appeals-chief@fs.fed.us)

**Re: *Notice of Appeal: Land Management Plan for the Apache-Sitgreaves  
National Forests***

Dear Appeal Reviewing Officer:

Pursuant to 36 CFR 219.17(b)(3) (2012 planning rule) and 36 CFR 219.35, Appendix A (2000 planning rule, as amended July 2010), this notice of appeal regarding the Record of Decision (“ROD”) and Final Environmental Impact Statements (“FEIS”) for the Land Management Plan for the Apache-Sitgreaves National Forests (the “Plan”) is filed on behalf of the International Society for the Protection of Mustangs and Burros and TerraWind Ranch Eco-Action Group (collectively referred to as “appellants”), whom I represent, under the Optional Appeal Procedures Available during the Planning Rule Transition Period (the former 36 CFR 217 appeal procedures in effect prior to November 9, 2000).

Legal notice of the ROD appeared in the *White Mountain Independent* on September 25, 2015, making this appeal timely.

**DECISION DOCUMENT:** *Record of Decision for the Apache-Sitgreaves National Forests Land Management Plan.*

**DATE DECISION SIGNED:** July 30, 2015.

**RESPONSIBLE OFFICIAL:** Calvin N. Joyner, Regional Forester, Southwestern Region, USDA Forest Service

**DATE DECISION PUBLISHED:** September 25, 2015.

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PUBLICATION VENUE: *White Mountain Independent*, Show Low, Arizona.

LOCATION: The Apache-Sitgreaves National Forests spans 2.1 million acres. The portion of that forest relevant to this appeal is the Heber Wild Horse Territory, which is approximately 20,000 acres on the Black Mesa Ranger District.

APPELLANTS:

**International Society for the Protection of Mustangs and Burros**

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**TerraWind Ranch Eco-Action Group**

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**APPELLANTS' INTERESTS**

The International Society for the Protection of Mustangs and Burros

The International Society for the Protection for Mustangs and Burros (“ISPMB”) is a non-profit organization formed for the purpose of promoting animal welfare and protection, including the protection of wild horses. Appellant, ISPMB, is the oldest wild horse and burro organization in the United States. Along with its first president, Wild Horse Annie, ISPMB was instrumental in securing and implementing the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331, *et seq.* (the “Act”). ISPMB was headquartered in Arizona from approximately 1993 until 2000 when it relocated its headquarters to Lantry, South Dakota.

ISPMB served as a party to the lawsuit filed against the United States Forest Service (“USFS”), among others, in the District Court for the District of Arizona in 2005 (the “2005



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Litigation”).<sup>1</sup> See Complaint (without exhibits) attached hereto as Exhibit 1. In the 2005 Litigation, ISPMB sought a preliminary injunction and alleged that the USFS had not conducted a census, inventory, or any other type of survey to determine how many of these approximate 300 to 400 horses were “wild free-roaming” horses and thus entitled to protection under the Act. ISPMB also alleged that the USFS issued a solicitation entitled “Trespass Horse Capture and Transport, by which the horses were to be captured and transported out of the Apache-Sitgreaves National Forests. The solicitation provided for the round-up and capture of all horses in the Apache-Sitgreaves Forest including those in the Heber Wild Horse Territory and all mares, even those with foals. See Complaint, Exhibit 1.

The District Court substantiated the claims that appellants make in this appeal. In particular, the court provided:

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

*Id.* ISPMB successfully obtained the injunction. See Order Granting Injunction, dated December 13, 2005, attached hereto as Exhibit 2. In the Order Granting Injunction, the United States Federal Court for the District of Arizona enjoined the defendants from “rounding up, removing, or awarding a bid for capture and removal of horses from the ASNF.” See Order Granting Injunction, Exhibit 2.

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<sup>1</sup> The 2005 Litigation was styled *In Defense of Animals, et al. v. United States Government, Department of Agriculture, et al.*, Civil Action No. 05-2754 PHX-FJM and is referred to throughout this appeal.



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

- The USFS agreed that the Heber Wild Horse Territory still exists and has not been dissolved.
- The USFS agreed that the wild horses are by law an integral part and component of the natural system of the public lands, as expressed by Congress in the Act.
- The USFS will work with the public, including ISPMB, in the development of a written Heber Wild Horse Territory Management Strategy in accordance with the provisions of the Act.
- The USFS will refrain from any gathering or removing of horses within the Heber Wild Horse Territory, as well as, on the Black Mesa and Lakeside Ranger Districts, considered the Sitgreaves National Forest, until the USFS completes, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develops a written Heber Wild Horse Territory Management Strategy.
- The USFS will involve the public, including ISPMB, in scoping for the analysis.
- The USFS agreed to provide ISPMB with specific notice of the document and consider its comments on the same.
- The USFS agreed to continue to coordinate with the White Mountain Apache Tribe for repair and maintenance of the boundary fence.

#### TerraWind Ranch Eco-Action Group

TerraWind Ranch Eco-Action Group (“TerraWind”) is a 501c3 nonprofit whose mission is: “To protect our natural resources from commercial exploitation through education, advocacy and direct action.” Proceeds from the nonprofit fund the steps necessary to meet that goal. TerraWind’s first mission is to preserve the freedom of Arizona’s beautiful wild horses and burros. For that reason, TerraWind has a vested interest in the well-being of the wild horses associated with the Heber Wild Horse Territory within the Apache-Sitgreaves National Forests. TerraWind and its members gain enjoyment from the wild horses in their natural habitat. TerraWind and its members have and shall continue to observe, research, and seek protection for



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the magnificent wild horses and the integral part of the ecosystem that they occupy. Any USFS shortcomings with regard to the Heber Wild Horse Territory and the wild horses will have adverse impacts on the same. The result of those impacts will be to harm the interests of TerraWind and its members.

## **REASONS FOR THE APPEAL**

### **1. THE LAND MANAGEMENT PLAN FAILS TO RECOGNIZE THE HISTORIC AND CONTEMPORARY PRESENCE OF THE WILD HORSES.**

Acknowledged historians for the Heber Wild Horse Territory (the "Territory") trace the history of the wild horses directly back to the journeys of the Jesuit Priest, Father Eusebio Kino, in his explorations of the area for new mission sites during the late 17<sup>th</sup> and early 18<sup>th</sup> centuries. See Jinx Pyle, *Narrative of History of Wild Horses on the Mogollon Rim* (Aug. 2005), attached hereto as Exhibit 5. Books on the area, including the famous account of the Hashknife Ranch by Stella Hughes, verify the continued existence of the horses on the Rim and of their great value to the ranchers who often caught a few and made them prized ranch horses. See Stella Hughes, *Hashknife Cowboy: Recollections of Mack Hughes* (1996), attached hereto as Exhibit 6; see also Joan Baeza, *Horses of Arizona*, 2 Arizona Highways 65 (Feb. 1988), attached hereto as Exhibit 7; Bob Thomas, *The Astonishing Double Life of Frontier Rancher Cecil Creswell*, 71 Arizona Highways 10 (Oct. 1995), attached hereto as Exhibit 8; *The Holbrook Argus*, Vol. XII No. 26 (Oct. 1, 1907), attached hereto as Exhibit 9; Will C. Barnes, University of Arizona Bulletin, Vol., VI, No. 1, General Bulletin No. 2 *Arizona Place Names* (Jan. 1, 1935) (excerpt) ("Bronco Mountain"), ("Dry Lake"), ("Wild Horse Lake"), attached hereto as Exhibit 10. Spanish horse experts, who have visited the area, verify the remarkable resemblance of many of the herds to the Andalusian, the Spanish Barb, and the Spanish Colonial horse, ridden by Spanish soldiers who visited the area with Jesuit priests, explorers and settlers. See Jinx Pyle, *Narrative of History of Wild Horses on the Mogollon Rim* (Aug. 2005), Exhibit 5.

The Plan sets out the roles and contributions of the Apache-Sitgreaves National Forests. In that section of the Plan, the USFS provides an overview of distinct characteristics of the National Forests and the diverse ecosystem within it. It pays respect to various wildlife species ranging from the Springerville pocket mouse to the Mexican gray wolf, yet gives no deference to the wild horses as symbols of the West. See Plan at pp. 11-12. This is a foreshadowing of the minimization throughout the Plan of the Territory and of the wild horses.

The USFS has historically concocted reasons to diminish the existence and importance of the wild horses and the Territory. For one, it has made an (erroneous) assumption that the wild horses present in the Territory before the Rodeo-Chediski Fire originated from the Fort Apache Indian Reservation or were abandoned. This assumption is contradicted by local accounts



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regarding the wild horses. Local families remember wild horses in the area from the 1930s to the present. *See* Letter to Zieroth, dated August 25, 2005, attached hereto as Exhibit 11; *see also* Affidavits of various Heber area residents (conclusively demonstrating the historic presence of the unbranded, unclaimed (wild) horses on public lands associated with the Apache-Sitgreaves Forests for well over 30 years prior to the Rodeo-Chediski fire), attached hereto as Exhibit 12; *see also* Photographs of horses in the area taken in the fall of 2006 (conclusively showing the lack of any branding), attached hereto as Exhibit 13.

Additionally, wild horse behavior expert Mary Ann Simonds has opined that the horses have inhabited the Mogollon Rim where the Territory is located since at least the early 1900s and most likely since 1699. *See* Mary Ann Simonds, *Determination of Whether Horses Inhabiting the USFS Heber Wild Horse Territory are “Wild Free-Roaming Horses”*, dated March 5, 2007, at 8, attached hereto as Exhibit 14. Simonds concluded, among other things, that:

- At least two or more distinct bands of wild horses exist in the Territory.
- One group, with a dominant buckskin stallion, numbered from 15-30 horses.
- Another group, with a dominant black/bay stallion, numbered approximately 15-30 horses.
- Field observations from October 2006 support these findings, as fresh manure and hoof prints were observed throughout the area and especially near water sources.

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

Notwithstanding, the USFS continues to rely on unproven claims regarding the alleged diminishing of wild horses in the Territory. Significantly, when put to the test under the fire of litigation, the USFS was utterly unable to support these rumors. *See* Order Granting Injunction, Exhibit 2. The Plan contains only cursory information regarding the population of wild horses in the Territory. Nor is there any indication therein regarding how the USFS determined the population of wild horses at any time since the United States Congress established the Territory. There is no scientific study or facts to indicate that only two mares remained in the 1990s or that the stud for the herd was sterile. The USFS has done absolutely nothing to prove these rumors.



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In 1971, there were *at least* seven horses occupying the Territory, but likely many more. *See* Forest Service Memo to Regional Forester, attached hereto as Exhibit 15. It is not known how the USFS estimated the population of the horses. *See* Deposition of Bumpus, taken Oct. 13, 2006 (“Bumpus Dep.”) at 36:23-37:25, attached hereto as Exhibit 16; Hughes Deposition, taken Oct. 5, 2006 (“Hughes Dep.”) at 66:4-22, attached hereto as Exhibit 17. This appears to be nothing more than a guess based upon a single fly-by. In 1974, the USFS speculated that “the stud [for the herd] may be sterile as no colts have been seen for several years, and there is no indication of unauthorized removal.” *See* Forest Service Memo to Regional Forester, attached hereto as Exhibit 15. The USFS never took any action to test this unverified assumption. Based on incomplete and marginal surveys, from 1974 to 1978, the population of the herd appeared to decrease from seven to three. In 1980, however, the population increased to eight head which suggests, contrary to the USFS’s suspicion in 1974, that the stud was not sterile. *See* Documented Wild Horse Population Numbers, Heber Wild Horse Territory, Apache-Sitgreaves National Forests, attached hereto as Exhibit 18. The wild horse population reportedly dropped to five head in 1982 but increased to seven head in 1984 before holding steady at five head between 1986 and 1991. *Id.* In 1992 the population was listed as zero. *Id.* However, the USFS indicated as late as 1993, that there were two mares left in the herd. *See* Territory Withdrawal Recommendation, attached hereto as Exhibit 23.

The USFS has consistently disregarded the Act’s requirement to maintain a current inventory of wild horses. *See* 16 U.S.C. § 1333(b). Indeed, a census was never conducted to accurately estimate the wild horse population in the Territory – let alone the Apache-Sitgreaves National Forests.<sup>2</sup> *See* Wild and Free Roaming Horses and Burros on Public Lands Report (estimating the wild horse population in the Territory to be 5 head, but indicating the estimate was not based on a census), attached hereto as Exhibit 19; *see also* Klein Deposition, taken Oct. 13, 2006 (“Klein Dep.”) at 19:14-21:17 (indicating that a census was not conducted to determine whether there were only two horses left), attached hereto as Exhibit 20; Zieroth Deposition, taken Sept. 25, 2006 (“Zieroth Dep.”) at 28:23-30:21 (indicating that she was unaware of any inventories after 1993), attached hereto as Exhibit 21. In addition, it is not clear whether foals or losses from deaths were always included in the estimates of the number of horses. *See* Forest Service letter to Denver Public Library (noting the population estimate as of December 1973 did not include the 1974 foal crop or death losses), attached hereto as Exhibit 22. USFS employees do not know how the population numbers listed in the historical documents were obtained.

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<sup>2</sup> In the 2005 Litigation, the USFS argued that pursuant to the Act, it needed only census horses in the Heber Wild Horse Territory, and not the entire Apache-Sitgreaves National Forests. However, 36 C.F.R. § 222.25 (revised as 36 C.F.R. § 222.65) requires the surveillance and protection of wild horses on national forest lands, other public lands, and lands of other ownership and jurisdiction. *See* Order Granting Injunction at p. 5, Exhibit 2. As such, the USFS’s obligation is not limited to the Territory.





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Hughes Dep. at 65:13-70:22, Exhibit 17; Bumpus Dep. at 37:10-39:11, 65:22-66:20, Exhibit 16. Little is known about the “inventory” in 1993 which indicated that there were two horses remaining in the Territory. Klein Dep. at 19:14-21:17, Exhibit 20. The USFS continued to report the wild horse population as zero in 2004 even though it never conducted a recent census. *See* Zieroth Dep. at 28:23-30:21, 49:5-50:10, Exhibit 21; Klein Dep. at 35:2-23, Exhibit 20; Hughes Dep. at 26:4-22, Exhibit 17; Bumpus Dep. at 40:2-42:2, 65:22-66:20, Exhibit 16; *see also* Order Granting Injunction at p.4 (finding the evidentiary value of the of the USFS’s documentation of zero horses to have *de minimus* value, because USFS failed to explain how the figures were derived), Exhibit 2.

Notably, USFS Black Mesa Ranger District Ranger Kathleen Klein testified that she only came to the realization that the Territory had not been disbanded after the 2005 Litigation was filed. She provided that it was at that time that she actually reviewed the provisions of the Act. Klein Dep. at 46:3-23, Exhibit 20. She also testified that the USFS then recognized that Forest Supervisor Bedell either had not withdrawn the territory or he was not able to do so. *See* Klein Dep. at 51:1-52:24, Exhibit 20. This documentation (along with additional evidence) was provided to the USFS in the 2005 Litigation. Accordingly, the USFS has copies of these documents and knowledge of this information.

Ms. Klein acknowledged that it was USFS practice to discount the existence of the Territory and of the wild horses. Klein Dep. at 52, Exhibit 20. Despite prior court orders and legally binding agreements to the contrary, the Plan continues this alarming practice in violation of the Act. This must be corrected.

### **Relief Sought**

The Plan should remove the following blatantly false statement: “[n]o known records or documentation exists that the Apache NF had any unbranded and unclaimed horses prior to December 15, 1971.” *See* Plan, Glossary, at p. 170 (“wild horse”); FEIS, Vol. II, Glossary, at p. 546 (“wild horse”). The Plan should also remove all unsubstantiated references to the alleged diminishing of wild horses in the Territory. In particular, the unsubstantiated reference to only two mares remaining on the Territory in 1993, which a federal court specifically determined to have no evidentiary value, should be removed. *See* Order Granting Injunction, Exhibit 2.

The Territory and the wild horses were considered significant enough to be named and honored in statute, and the USFS should give them the deference deserved by including the historical significance and presence as well as the evidence of the present inhabitation. The Plan should be revised to recognize:

- The wild horses as living symbols of the historic and pioneer spirit of the West;





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- The wild horses contribute to the diversity of life forms within the Nation and, specifically, the Apache-Sitgreaves National Forests;
- The wild horses enrich the lives of the American people; and
- The wild horses are by law an integral component of the natural system of the public lands, as expressed by Congress in the Act.

The USFS is obligated to protect and manage the wild horses in accordance with the Act. These obligations include, but are not limited to the following:

- The USFS has an obligation to manage and protect wild horses residing on any public lands such as the Apache-Sitgreaves National Forests and especially within the Heber Wild Horse Territory.
- The USFS has an obligation to maintain a current inventory of wild horses located in the Apache-Sitgreaves National Forests including means such as observation for branding or domestic markings, use of genetic testing and/or other means or study.

**2. THE USFS VIOLATES THE WILD FREE-ROAMING HORSES AND BURROS ACT OF 1971, A FEDERAL COURT ORDER, AND THE NATIONAL ENVIRONMENTAL POLICY ACT BY IGNORING ITS OBLIGATIONS UNDER EACH.**

The Plan blatantly disregards the obligations the USFS has under the Act, a Federal Court Order, and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”).

**The Wild Free-Roaming Horses and Burros Act of 1971**

The Plan plays mere lip service to the Act only to say that the purpose was to provide use by and for the protection of wild horses. It fails to elaborate on and include relevant provisions of the Act including Congress’ recognition of the horses and burros. Pursuant to Congressional designation, the Territory is a “special area”. *See* Plan at p. 7; *see generally* the Act. Indeed, Congress specifically found and declared that:

[W]ild-free roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from



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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.

16 U.S.C. § 1331.

The USFS must manage the Territory as required by Congress. *See* 1982 Planning Rule § 219.2. Pursuant to the Act, the Territory has specific requirements for its management. For instance, under the Act, the Secretary of Agriculture is “directed to protect and manage wild free-roaming horses as components of the public lands...” 16 U.S.C. § 1333. The term “wild free-roaming horses and burros” is specifically defined under the Act to mean “all unbranded and unclaimed horses and burros on public land of the United States.” 16 U.S.C. § 1332(b). The Act further provides that the Secretary “shall manage wild free-roaming horses and burros in a manner that is designated to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. § 1333(a). The Secretary “shall consider the recommendations of qualified scientists in the field of biology and ecology, some of whom shall be independent of both Federal and State agencies and may include members of the Advisory Board established in § 1337 of this title.” 16 U.S.C. § 1333(a). To date, the USFS has not complied.

Significantly, Section 1333 of the Act further provides that the Secretary “shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands.” 16 U.S.C. § 1333(b). “All management activities shall be at the minimal feasible level.” 16 U.S.C. § 1333(a). Moreover, it is illegal to maliciously or negligently injure or harass wild horses or burros protected by the Act, treat them inhumanely or use them for commercial gain. 16 U.S.C. § 1338(a).

Section 1337 of the Act directs the Secretary to “appoint a joint advisory board of not more than nine members to advise them on any matter relating to wild free-roaming horses and burros and their management and protection.” The Plan fails to mention any such advice or recommendations from the Wild Horses and Burros Advisory Board.

Furthermore, the Plan repeatedly refers to the “Heber Wild Horse Territory Management Plan” within the Desired Conditions and Guidelines for the Territory. *See* Plan at p. 118. Despite agreeing to complete, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develop a written Wild Horse Territory Management Strategy in accordance with the provisions of the Act, *the USFS has yet to do so. See* Federal Court Order, Exhibit 2. Any attempt to incorporate direction from the nonexistent “Heber Wild Horse Territory Management Plan” is blatantly improper. *See* 1982 Planning Rule § 219.2 (“If, in a particular case, special area authorities require the preparation of a separate special area plan, the direction in any such plan may be incorporated without modification in



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plans prepared under this subpart.”). Where the “special area plan” does not (yet) exist, there is simply no “direction” to incorporate.

Disappointingly, the USFS has – and continues to – flout its obligations under the Act. Indeed, the prior management plan for the Apache-Sitgreaves National Forests failed to provide any direction for the Territory. *See* Plan at p. 4. Despite purporting to do so, this Plan fails to acknowledge the specific requirements for management of the Territory. *See* Plan at pp. 118-19.

### **Federal Court Order**

The actions of the USFS, including the disregard for the Territory and its wild horses in the Plan, indicates that the USFS must have disavowed the Federal Court Order it entered into in the 2005 Litigation.

The Federal Court Order provides the following:

- The Heber Wild Horse Territory still exists and has not been dissolved.
- The wild horses are by law an integral part and component of the natural system of the public lands, as expressed by Congress in the Act.
- The USFS will work with the public, including ISPMB, in the development of a written Heber Wild Horse Territory Management Strategy in accordance with the provisions of the Act.
- The USFS will refrain from any gathering or removing of horses within the Heber Wild Horse Territory, as well as, on the Black Mesa and Lakeside Ranger Districts, considered the Sitgreaves National Forest, until the USFS completes, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develops a written Heber Wild Horse Territory Management Strategy.
- The USFS will involve the public, including the ISPMB, in scoping for the analysis.
- The USFS will provide ISPMB with specific notice of the document and consider its comments on the same.
- The USFS will continue to coordinate with the White Mountain Apache Tribe for repair and maintenance of the boundary fence.



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Remarkably, eight years after the Federal Court Order, the USFS has not progressed towards fulfilling its obligations. It is as if the Federal Court Order does not exist. The Federal Court Order addresses the very concerns that appellants have and argue here: the USFS continues to operate without any regard for the Territory or the wild horses associated therewith.

### **National Environmental Policy Act**

The USFS must comply with the NEPA before taking any “major federal action.” Specifically, § 4332 of NEPA provides in pertinent part:

(2) [A]ll agencies of the Federal Government shall...

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, shall accompany the proposal through the existing agency review processes.



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Regrettably, the FEIS is devoid of any analysis of the effects of Plan implementation on wild horses associated with the Heber Wild Horse Territory as required by NEPA. *See generally* FEIS. Indeed, unlike for “Wildlife and Rare Plants”, the FEIS contains no section describing the affected environment for wild horses nor any evaluation or disclosure of the potential environmental consequences on wild horses of implementing four plan alternatives. *Id.* There is, in fact, but scant reference anywhere in the three volume (1374 page) FEIS to the Heber Wild Horse Territory. *See e.g.* FEIS, Vol. I, at pp. 479, 489 (“Livestock Grazing”); *see also* Range Specialist Report. Instead, the FEIS further exposes the Forest Service’s improper characterization of wild horses associated with the Territory as “feral” and “invasive”. *See e.g.* FEIS, Vol. I, at pp. 336 (“Invasive Species”); *see also* Invasive Species Specialist Report.

Significantly, NEPA mandates that the Forest Service take a “hard look” at the direct, indirect, and cumulative impacts on wild horses posed by any proposed project or activity within the Apache-Sitgreaves National Forests. Moreover, the USFS is precluded from gathering or removing any horses within the Heber Wild Horse Territory, as well as, on the Black Mesa and Lakeside Ranger Districts (which are considered the Sitgreaves National Forest) until it completes, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develops a written Heber Wild Horse Territory Management Strategy. *See* Federal Court Order, Exhibit 4.

### **Relief Sought**

The Plan should be revised to recognize USFS’s obligations under the Act, the Federal Court Order and NEPA. Specifically, the Plan should reference the Act and its obligation to protect and manage the wild horses, as well as the requirement to maintain a current inventory of the wild horses. Additionally, the Plan should incorporate the Federal Court Order obligations including, but not limited to, acknowledging the wild horses as an integral component of the Apache-Sitgreaves National Forests, coordinating with the White Mountain Apache Tribe for repair and maintenance of the boundary fence, and refraining from gathering or removing horses associated with the Territory. The Plan should incorporate how the USFS will comply with NEPA and analyze the effects of Plan implementation on wild horses associated with the Territory. Moreover, the Plan should delineate how it will evaluate and disclose potential environmental consequences on the wild horses of implementing four plan alternatives.

Further, the appellants seek specific guidance and information for project and activity decision-making concerning the Territory. This guidance and information has been lacking since the 1987 Plan. Even then, the Plan lacked an incorporation of direction for special areas, including the Territory. *See* ROD at p. 1 (purporting that the Plan provides specific guidance and information for project and activity decision making). *See also* ROD at p. 5 (indicating the need



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for the Plan to incorporate direction for special areas including the Territory). The Plan should provide detailed and specific “Desired Conditions” and “Guidelines” as it does in the lengthy sections devoted to “Wildlife Quiet Area” in stark contrast to the “Wild Horse Territory.” *Compare* Plan at pp. 119-20 to Plan at p. 118.

**3. THE USFS’S CHARACTERIZATION OF THE WILD HORSES AS “FERAL” AND “INVASIVE” IS UNFOUNDED AND IGNORES EVIDENCE CONTRARY TO THOSE LABELS.**

The Act, and subsequent federal regulations, define what a wild horse is – not the USFS’s arbitrary determination as reflected in the Plan. Again, all unbranded and unclaimed horses and their progeny that have used lands of the National Forest System on or after December 15, 1971, or do hereafter use the lands as all or part of their habitat, qualify as “wild horses.” *See* 36 C.F.R. § 222.60(b)(13). Unbranded claimed horses for which the claim is found to be erroneous are also wild. *Id.* The regulations also provide that horses not meeting the above definition, but which become intermingled with wild free-roaming horses or burros, are accorded the same protection as “wild” horses. *See* 36 C.F.R. § 222.63.

Despite establishment of the Territory in 1973, the USFS has historically ignored its responsibilities with respect to the wild horses within the Apache-Sitgreaves National Forests, including the Territory. Indeed, the USFS stated that “[t]he territory was not an issue raised during development of the [1987] Forest Plan. It was not discussed in the EIS, nor is it discussed anywhere in the Plan itself. A Territory Plan has not been written.” *See* Territory Withdrawal Recommendation, Exhibit 23.

Moreover, since 1991, the USFS has alleged that horses associated with the Territory were feral horses and began advocating for their elimination. In a report it compiled, the USFS noted, “[a]pproximately 5 feral horses wander along the Mogollon Rim back and forth from the White River Apache Reservations. The Indians do not manage the horses, neither does the Forest Service. Natural Attrition will eliminate the horses eventually.” *See* Forest Service Wild Free Roaming Horses and Burros on Public Land Report, Part V (the “Report”), attached hereto as Exhibit 19. In addition, the Report goes on to express how the USFS would like to preclude horses from its management responsibilities. It stated, “[e]limination of incidental feral horses and burros from formal management consideration to reduce impacts on management resources, personnel and time. The A/S ‘herd’ should not be recognized at all.” *See* Forest Service Wild Free Roaming Horses and Burros on Public Land Report, Part V, Exhibit 19.

By 1993, the USFS asserted that the territory was designated in the early 1970s because there were unclaimed animals in the Forest. Some of these were “unclaimed animals from the Fort Apache Indian Reservation and some were animals abandoned in the area when a local family left.” *See* Territory Withdrawal Recommendation, Exhibit 23; *see also* USFS letter from



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Hughes to Onken (stating the Territory was only populated with feral horses at the time the Act passed and the Territory should have never been designated as a wild horse territory), attached hereto as Exhibit 24. But, there is no evidence in documents from the 1970s that supports these assertions. *See* Forest Service Memo to Regional Forester, Exhibit 15 and Forest Service letter to Denver Public Library, Exhibit 22.

In a letter dated March 10, 1994 to Steve Bragg from Kate Klein, she provides “[w]e have observed unauthorized horses in the Phoenix Park unit this spring. You will try to capture them, if you can, in hopes to eliminate the few horses that are left this year, which is about eight head.” *See* Letter from Klein to Bragg, dated Mar. 10, 1994, attached hereto as Exhibit 25. The foregoing illustrate the USFS’s sentiment that elimination of the horses associated with the Territory is the USFS’s desired action for advancement of their management responsibilities. *See also* Letter from Zieroth to Sirower, dated September 7, 2005 (stating that “there are hundreds of horses grazing freely on the reservation so they are not really managed. The next step is to gather the horses and contact the State Department of Agriculture...;” and “We do not classify these stray horses as ‘wild free-roaming horses,’ nor do they have connection to the Heber Horse Territory of record.”), attached hereto as Exhibit 26. The conclusion Zieroth provided was not supported by research or investigation. *Id.* Alarming, the USFS admits that “over the years, several attempts have been made to gather feral horses with limited success.” *See* Final Invasive Species Report at p. 7. Such actions would be in direct violation of not only the Act and NEPA, but also (depending on the time frame) Federal court orders, *i.e.* Order Granting Injunction and Federal Court Order. Appellants request any and all information concerning these “gathers.”

Contrary to the USFS’s long-standing and specious position, the horses associated with the Territory are “wild” and entitled to protection under the Act. Indeed, Mary Ann Simonds, a leading authority on wild and domestic horse behavior, opined that there was no data indicating in any way that the horses inhabiting the Territory were feral. She reported that no horses were observed with brands or with horse shoes and that it was unlikely that there was much permanent migration of horses from surrounding areas. *See* Expert Report of Mary Ann Simonds at p. 3, Exhibit 14. Moreover, she reported that the Mogollon Rim is a geographic barrier known to support wild horses through the last century. *Id.* She asserted that all data indicated the horses were living in stable, natural, family-based groups, mixing into larger herds at times or bachelor groups with a few young, lone stallions, characteristic of wild horse behavior. *Id.* Ms. Simonds found that sufficient social data collected from local residents substantiated her findings that there is a stable population of various bands of black/dark and brown/bay horses and buckskin horses that exist on the Rim and within and near the original Heber Wild Horse Territory. *Id.* at p. 8. *See also* Photos of the Heber wild horses attached as Exhibits 13.





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It is clear that the USFS has not changed its sentiment towards the Territory or the horses in the last four-plus decades. To date, there is still no “Heber Wild Horse Territory Management Strategy.” *See e.g.* Plan at p. 118. Nor does this Plan provide any meaningful guidance or information for project or activity decisions concerning the Territory, let alone the wild horses.

The Plan focuses exclusively on feral and/or stray equine. *See generally* Plan. For instance, within the “Wild Horse Territory” section, the Plan refers only to a current population of “bands of free-ranging stray and/or feral equine...both inside and outside the territory” – implying no current population of wild horses exists. *See* Plan at p. 118. Indeed, the Forest Service goes so far as to suggest that it could unilaterally amend the Plan in the future to remove the Territory. *See* FEIS, Vol. II, App. A, Public Comments and Responses, at p. 693 (“The Heber Wild Horse Territory Management plan (in progress) will identify the appropriate management level (number of wild horses) for this area. If this number is zero, the plan could be amended in the future to remove the territory.”) Further, in the section devoted to “invasive species,” the USFS specifically contends that “feral and/or stray equine have become established on the forests” and that “these unauthorized animals are impacting ecological conditions as well as management opportunities.” The USFS identifies specific locations, namely: Black River drainage, west of Big Lake, and along and north of FR 300. *See* Plan at p. 65. Disturbingly, the USFS recommends that to manage these horses, the forests identify appropriate methods for control and *eradication*. *See* Plan at p. 66.

In neither section, does the USFS acknowledge procedures it must follow in the removal of horses. It fails to recognize that 36 C.F.R. § 222.63 concerning the removal of other horses and burros, provides special protection for horses that do not fall initially within the protection of the Act, if they are subsequently introduced into a protected territory “by accident, negligence or willful disregard of private ownership” and become intermingled with wild free-roaming horses. *See* 36 C.F.R. § 222.63. Further, the USFS fails to acknowledge that it is specifically precluded from gathering or removing *any* horses within the Territory, as well as on the Black Mesa and Lakeside Ranger Districts, until it completes, with public involvement, an analysis and appropriate environmental document pursuant to NEPA and develops a written Heber Wild Horse Territory Management Strategy. *See* Federal Court Order, Exhibit 4.

The USFS’s characterization of wild horses as “feral” or “stray” and, in turn, an “invasive species,” is based on pure speculation. For instance, the Range Specialist Report alleges that “[u]nauthorized horses have been observed on all five ranger districts. Most are *probably* feral or stray equine from adjacent land owners, while others *may have been* abandoned by recreational owners.” *See* Range Specialist Report at p. 9 (emphasis added). Similarly, the Invasive Species Specialist Report further contends that:



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Feral horses have become established in several locations within the forests. Herds (small groups) of these animals can be found along the western forest boundary on the Apache portion (within the Black River drainage on Alpine and Springerville RDs, areas west of Big Lake on the Springerville RD, and upper Eagle Creek on the Clifton RD), and along the southern forest boundary on the Sitgreaves portion (along and north of FR 300 on the Black Mesa and Lakeside RDs).

*See* Final Invasive Species Report at 7.

In fact, the Plan provides no evidence supporting its (mis)characterization. Indeed, the evidence demonstrates that the USFS has failed to maintain a current inventory of wild horses in the Apache-Sitgreaves from which a determination as to their status could (properly) be made. Moreover, there is no evidence the USFS has sought the input of individuals with scientific expertise or knowledge of wild horses. *See* Plan at p. 147-48 (List of Preparers); FEIS, Vol. II, at pp. 521-26 (Consultation and Coordination). This failure is in direct contravention of the 1982 Planning Rule. *See* 1982 Planning Rule § 219.5(b) (“The team shall collectively represent diverse specialized areas of professional and technical knowledge applicable to the planning area, and the team members shall have recognized relevant expertise and experience in professional, investigative, scientific, or other responsible work in specialty areas which they collectively represent. The team may consist of whatever combination of Forest Service staff and other Federal government personnel is necessary to achieve an interdisciplinary approach. The team is encouraged to consult other persons when required specialized knowledge does not exist within the team itself.”)

The USFS must begin the process anew, not simply build on a false and unsupported premise. *See Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211-1212, 1231 (9th Cir. 1998) (“General statements about possible effects and some risk do not constitute a hard look absent justification regarding why more definite information could be provided.”); *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (holding that the purpose of an EIS is to obviate the need for speculation by ensuring that available data are gathered and analyzed prior to the implementation of the proposed action).

### **Relief Sought**

Revise definition of “feral horse” as it is contrary to the Act and regulations. *See* FEIS, Vol II at p. 531. Revise definition of “wild horse” as it is not in conformance with the Act or regulations. *See* FEIS, Vol. II, at p. 546. Revise any and all references to feral horses and wild horses in the text of the Plan, FEIS, etc., accordingly.



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The USFS should withdraw the portions of the Plan that makes reference to the wild horses as feral, stray, and/or as an invasive species. *See e.g.* Plan at pp. 118-19. Remove any references to feral, stray, or invasive species of equine unsupported by evidence. Any references to removal of horses must be to pertinent sections of the Code of Federal Regulations as well as with recognition that such removals are precluded by the Federal Court Order. The USFS must undertake the necessary studies and consult with wild horse experts to obtain reliable data from which a determination of wild (or feral) may properly be made to ascertain reliable numbers of wild horses.

**4. THE USFS FAILS TO CONSIDER – LET ALONE ANALYZE – HOW THE LAND MANAGEMENT PLAN WILL IMPACT THE WILD HORSES AND THE TERRITORY.**

**The Plan lacks validity and completeness without a Wild Horse Territory Management Strategy in place.**

The Plan is curiously devoid of any true consideration of the wild horses. Despite purporting to incorporate direction for special areas that were not included in the 1987 Plan, including the Heber Wild Horse Territory, the Plan fails (again) to include any information or strategy of value. *See* Plan p. 4.

Furthermore, the Plan includes but four Desired Conditions and only one Guideline for the Territory. In comparison, for the Wildlife Quiet Area, the Plan includes fifteen Desired Conditions and five Guidelines. *See* Plan at p. 119-20. At a minimum, the Plan should include Desired Conditions for the Territory concerning core habitat, preserving natural behaviors, population and genetic exchange, lack of disturbance, and high quality winter range. Guidelines for the Territory should at least ensure fencing to allow movement, connectivity of habitat, and minimization of impacts to the wild horses and their habitat. The USFS does, however, find a position in the Plan for a thorough analysis of other wildlife and rare plants. The USFS here thoughtfully includes a background and description of rare and unique species in the Apache-Sitgreaves Forest. The Plan provides desired conditions and objectives for the named wildlife and rare plants. *See* Plan at pp. 61-62. In contrast, the brief section on the Territory fails to provide the significant history that is part of the background of the Heber wild horses that should be highlighted and cherished.

In the 2005 Litigation, the Federal Court Order included that “[t]he parties hereby agree that wild horses are by law an integral part of the component of the natural system of the public lands, as expressed by Congress in the Wild Free-Roaming Horses and Burros Act of 1971 as amended. The Forest Service will work with the public, including Plaintiffs, in the development of a written Heber Wild Horse Territory Management Strategy in accordance with the provisions of the Act.” *See* Stipulated Settlement Agreement, Exhibit 3. While that Stipulated Settlement



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Agreement provided promise that the Forest Service would at last place overdue attention onto the Heber Wild Horse Territory and the valuable horses associated with that territory, now eight years later the Forest Service has yet to advance any closer to the development of a written management strategy. Notwithstanding, the Plan improperly attempts to incorporate direction from this nonexistent Heber Wild Horse Territory Management Plan.

While the Plan alludes to a management strategy, it focuses almost exclusively on removal of wild horse populations when they exceed the appropriate management levels (“AML”). *See e.g.* Plan at p. 118 (Guideline) (“When wild horse populations exceed the appropriate management levels, horses should be removed in accordance with the ‘Heber Wild Horse Territory Management Plan’ (when completed)”); *id.* (Desired Conditions) (“Horse numbers within the Territory are aligned with the appropriate management level as described in the ‘Heber Wild Horse Territory Management Plan.’”). With more of a focus on the removal strategy, the USFS gives no consideration to Desired Conditions or Guidelines focused on keeping the horses thriving and healthy.

Significantly, failure to prioritize wild horse management plagues the USFS at the national level as well. As recently as August 25, 2014, at a meeting of the Wild Horse and Burro Advisory Board, the USFS discussed the *continued* need to: (1) describe and define thriving natural ecological balance; (2) develop a basic framework for territory management plan components; and (3) develop a framework for NEPA components specific to wild horse and burro decisions. *See* USFS Inter-Regional Action Plan PowerPoint, attached hereto as Exhibit 27. These concepts all pertain to the wild horses and the requirements the USFS must follow in the Territory. This advisory board meeting information demonstrates the *lack of development* in these areas remaining as of 2014. There is no wonder that the lack of development continues to be the norm and is further exemplified by the utterly deficient guidance for the Territory in the Plan.

**The Plan ignorantly refers to the Wild Horse Territory as suitable for all uses – other than the protection of wild horses.**

Pursuant to the Act, the Heber Wild Horse Territory was designated as a “sanctuary” for the protection and preservation of wild horses. 16 U.S.C. § 1333(a). Moreover, even designated ranges managed under a multiple use concept are to be “devoted principally” to wild horses. 16 U.S.C. § 1332(c). Notwithstanding, the Plan fails to provide a framework that ensures the welfare of wild horses associated with the Territory. *See* discussion *supra* at pp. 17-18. Indeed, the Plan identifies the Territory as “suitable” for every possible use imaginable, including: livestock grazing; energy corridor and other energy development; communications sites; timber

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production and tree cutting; motorized travel, including new designated motorized areas; and mechanized recreation. *See* Plan at pp. 133-40.

Pursuant to the 1982 Planning Rule, the appropriateness of applying certain resource management practices to a particular area of land is to be determined by an analysis of the economic and environmental consequences and the alternative uses foregone. *See* 1982 Planning Rule § 219.3 (“Suitability”). Despite this mandate, in no way does the Plan consider the impact that any of these uses may have on the designated Territory or the protected wild horses associated with that Territory. *See also* discussion *supra* at pp. 11-13 (NEPA).

The USFS’s failure to analyze the consequences of livestock grazing on the wild horses is particularly glaring. In forest planning, “the suitability and potential capability of National Forest System lands for producing forage for grazing animals and for providing habitat for management indicator species shall be determined.” *See* 1982 Planning Rule § 219.20. Specifically,

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

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

Authorized livestock grazing (particularly within the Territory) may adversely affect the wild horse herds’ genetic, behavior, nutritional, and/or reproductive health. For instance:

- Hundreds of livestock occupying the same lands as the wild horses – including the Territory, which was designated pursuant to the Act, may disrupt and displace wild horses.
- Livestock grazing necessarily results in competition between livestock, wild horses, and wildlife for limited forage to maintain a healthy population with the allotments.



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- Livestock grazing may result in insufficient forage to maintain a healthy population of wild horses.
- Overuse, especially during dry conditions near water sources, may lead to insufficient available forage, accelerated soil erosion, and stress that could jeopardize wild horses.
- Damage from livestock grazing on the Territory degrades range conditions for wild horses.
- Maintaining and installing structural improvements, including fencing and cattle guards, restricts wild horse movement contrary to the “free-roaming” lifestyle mandated by the Act.
- Maintenance and installation of new structural improvements may negatively impact wild horse free-roaming behavior, including natural rest and rotation of vegetation.
- Maintaining and installing structural improvements may impact wild horse social units, resulting in fragmentation and small sub-divided populations with low genetic variability.
- Vegetative treatments may further disrupt and displace wild horses associated with the Territory.

Moreover, given that the entirety of the Territory is situated within grazing allotments, namely the Heber and Black Canyon Allotments, the cumulative impacts of the livestock grazing on the Territory may be so significant as to render the Territory not “suitable” for wild horses – the very purpose for which it was established. The Territory most certainly cannot be designated as suitable for all uses without an investigation and analysis of the effects of such uses on the wild horses and the Territory.

As put forth in the section immediately above, the Territory is one which requires the USFS to develop and articulate a written Heber Wild Horse Territory Management Strategy. The USFS, however, has delayed for decades now, the development of that strategy. Until the USFS has developed a Wild Horse Territory Management Plan, it is impossible for it to determine for what other uses the Territory may be suitable. Any decision as to the suitability of the Territory for multiple uses would be arbitrary and capricious or otherwise not in accordance with applicable law.



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### **Relief Sought**

The USFS must develop a written Heber Wild Horse Territory Management Strategy, in accordance with the Act. Until it does so, it should be precluded from making any decisions potentially impacting the Territory or the welfare of the horses associated with it. To do so would be to allow the USFS to completely disregard the applicable law, in particular the Act, and the protected horses associated with it.

The USFS should revise the Plan to remove the identification of the Territory as suitable for all of the various uses described, until proper investigation and analysis is conducted.

Importantly, the appellants seek the Plan's differentiated management and guidance according to the unique needs of the Territory. While the ROD purports that the "Plan provides direction for management areas that have specific management direction that differs from the general forest[.]" including the Heber Wild Horse Territory, the Plan – in fact – fails (again) to include any information or strategy of value. *See* ROD at p. 19. The very real danger is that without such unique guidance, resource management activities within the Territory would be no different than those within the Apache-Sitgreaves National Forests in general. The Territory's needs, however, are unmistakably distinct from those of the general forest.

### **CONCLUSION**

The Plan, as approved, categorically fails to recognize the role and significance that Congress, among others, has placed upon the wild horses associated the Heber Wild Horse Territory. The Plan fails to meet obligations it has under federal acts such as the Wild Free-Roaming Horses and Burros Act and NEPA, including protecting and managing the wild horses and keeping current inventories of the same. The Plan makes references to unsubstantiated claims of the number of horses remaining on the Territory although a federal court has held these claims to be of no evidentiary value. Additionally, the Plan ignores a Federal Court Order providing that the USFS not gather or remove horses within the Territory without first conducting an analysis to develop a written Territory management strategy. Evidencing a failure to meet these obligations, the Plan is void of any guidance or direction as to the Territory.

The Plan should be required to contain specific direction and objectives for the Territory. The brief section devoted to the Territory pales in comparison to other sections with significantly more developed guidance, such as that provided in the "Desired Conditions" and "Guidelines" sections of the Plan. The indifference to the wild horses and the Territory is further illustrated in the Plan by its ignorant characterization of the Territory as suitable for all uses – without analysis of the Territory itself. The Plan failed to carefully analyze the needs of the wild horses associated with the Territory and the impact that other uses would have on them both. The lack of attention





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to the Territory and the horses is dumbfounding in light of the fact that the Plan purports to include particular direction for special areas, naming the Heber Wild Horse Territory as one of those areas.

The Plan must be revised to develop the areas highlighted here. To allow the Plan to be implemented as approved would cause irreversible and irretrievable damage to the Territory and the wild horses. Without focused guidance and a management strategy concentrated on the Territory and the horses, the USFS will have broad discretion to implement general activities provided under the Plan. The needs of the National Forests as a whole vary greatly from the needs of the Territory and therefore, should not be applied. The Plan requires revision to include distinctive and specialized objectives and safeguards for the Heber Wild Horse Territory.

Very truly yours,

A handwritten signature in black ink that reads "Anthony W. Merrill".

Anthony W. Merrill

Enclosures