

4-1-2017

Cowboys Gone Rogue: The Bureau of Land Management's Mismanagement of Wild Horses in Light of its Removal Procedures of 'Excess' Wild Horses

Kelsey Stangebye

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

Kelsey Stangebye, *Cowboys Gone Rogue: The Bureau of Land Management's Mismanagement of Wild Horses in Light of its Removal Procedures of 'Excess' Wild Horses*, 37 N. Ill. U. L. Rev. 371 (2017).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

Cowboys Gone Rogue: The Bureau of Land Management's Mismanagement of Wild Horses in Light of its Removal Procedures of 'Excess' Wild Horses

KELSEY STANGEBYE*

In 1971, Congress passed the Wild Free-Roaming Horses and Burros Act ("the Act"), which made the Bureau of Land Management ("BLM") responsible for managing and protecting the free-ranging wild horses and burros on federal public land in the western United States. As the Act permits, the BLM has been removing wild horses from the public range when the BLM determines that an overpopulation of wild horses exists. The excess wild horses are then managed by the BLM in holding facilities for an indefinite period of time. This management practice is unsustainable because the BLM spends nearly two-thirds of their annual budget to manage the horses in the holding facilities. Due to the excessive removal practices as the main form of population control and the ever-increasing reproduction rates of the wild horse herds on the range, the BLM's Wild Horse and Burro Program has become unsustainable.

This Article explores the fiscal, ethical, and legal complications that the BLM faces as they manage the Wild Horse and Burro Program and summarizes various alternative management strategies that the BLM could implement to more effectively manage the wild horse herds on the public range. This Article argues that the courts should not grant deference to the BLM when they propose removal plans that are not supported by the Act; and specifically analyzes that the management practice of removing non-excess wild horses is not supported by the Act. Additionally, this Article analyzes the statutory duties that the BLM is required to follow, such as the "order and priority" for removing the wild horses from the range. The intent of this Article is to show that if the BLM were to follow the strict removal procedures as mandated by the Act, the BLM is more likely to follow the "minimal feasible

* Juris Doctor Candidate, May 2017, and Research Editor of the *Northern Illinois University Law Review*. Thank you to the *Northern Illinois University Law Review* Editorial Board and Staff for their valuable critique and their diligent review of this Article. I am very appreciative to Professor Robert Jones and Daniel Mark for their thoughtful suggestions for this Article. I would like to express gratitude to my boyfriend, Florian Varin, and my mom, Shawn Bolger for their enthusiasm towards this topic and my research. This Article is dedicated to the memory of my dad, Christian Stangebye, who always had an admirable respect for all things wild.

level” management, which would ultimately make it more feasible that the wild horses and burros remain wild and free on the range

I.	INTRODUCTION.....	372
II.	ORIGINS AND PURPOSE OF THE WILD FREE-ROAMING HORSES AND BURROS ACT.....	377
A.	THE STATUTORY MEANING OF EXCESS WILD HORSES	378
III.	THE WILD HORSE MANAGEMENT INEFFICIENCIES.....	381
A.	FISCAL INEFFICIENCIES OF MANAGING REMOVED WILD HORSES ARE DEPLETING THE BLM’S RESOURCES TO MANAGE POPULATIONS OF WILD HORSES AND BURROS EFFECTIVELY	381
B.	ALTERNATIVE METHODS FOR MANAGING THE WILD HORSE AND BURRO POPULATIONS	382
C.	WILD HORSE SALES PROGRAM LINKED TO ILLEGAL HORSE SLAUGHTER VENTURES	385
IV.	THE STATUTORY REQUIREMENTS FOR BLM TO REMOVE WILD HORSES	387
V.	THE <i>CHEVRON</i> DEFERENCE GRANTED TO THE BUREAU OF LAND MANAGEMENT.....	388
VI.	CASE LAW	388
A.	COURTS THAT HAVE GRANTED THE <i>CHEVRON</i> DEFERENCE TO THE BLM’S PROPOSAL TO REMOVE NON-EXCESS WILD HORSES	394
VII.	CONCLUSION.....	399

“You occasionally see one, and it’s the thrill of a lifetime. But mostly all you ever see is a cloud of dust after they are gone. It’s their stubborn ability to survive that makes them so remarkable.”¹

-Velma Johnston, “Wild Horse Annie”

I. INTRODUCTION

Wild horses, with their beauty and resilience, have long been a symbol of the American West. The vision of the American mustangs galloping free on public land is a remarkable thrill that most Americans never experience in their lifetime; yet this national icon has historically invoked an emotional outcry from the American public demanding that the federal government protect and preserve the wild horses and burros on public land. However, what is often unrecognized by the public is the enormous challenge that the federal

1. *Quotable Quotes*, RETURN TO FREEDOM (Aug. 16 2013), <http://returntofreedom.org/2013/08/16/quotable-quotes/>.

government faces in managing the wild horses and burros on public land in an ethically and financially sustainable practice. In assessing the current status of the National Wild Horse and Burro Program, the Bureau of Land Management's ("BLM") management method is based on removing excess wild horses from the range and placing them in holding facilities for an indefinite period of time.² In effect, the BLM is currently managing over forty thousand wild horses as domesticated animals in captivity, and not as wild and free-roaming horses as the Wild Free-Roaming Horses and Burros Act ("the Act") originally mandated.³ However, there is not a quick fix to this problem because leaving the wild horses completely unmanaged is not an option. If the wild horses were left unmanaged on the public range, the wild horse population could double within four years; a population that the public range could not sustain.⁴ Thus, the management program proves to be highly complicated because the BLM is charged with preserving the wild horses and the BLM is responsible for protecting the range from overuse from other native species and domesticated livestock.⁵ The BLM is required to remove wild horses from the range when an overpopulation exists, and then care for the removed wild horses indefinitely or until the animal is privately adopted.⁶ This management practice of removal proves to be fiscally problematic because of the enormous expense of managing the wild horses off the range.⁷ Some of BLM's management expenses for "removed" wild horses include hay, feed, veterinarian expenses, staff expenses to care for the horses, and land expenses. The BLM spends approximately \$50 million per year to care for the

2. National Research Council of the National Academies, *Using Science to Improve the BLM Wild Horse and Burro Program*, NAT'L ACADEMIES PRESS vii (2013), <http://www.nap.edu/read/13511/chapter/1> [hereinafter *Using Science to Improve the BLM Wild Horses and Burro Program*]. After the BLM removes the wild horses from the public range, the agency is responsible for managing the horses in captivity for the duration of the wild horses' lives (unless the horse is euthanized due to health issues or old age, or the horse is adopted by a member of the public through the BLM's wild horse adoption program). *Id.* at 1-2. The equine management expenses take quite a financial toll on the BLM, particularly considering that the average horse's life span is between 18-22 years old. See generally Christine Barakat, *5 Ways to Help Your Horse Live Longer*, EQUUS (May 22, 2007), http://equusmagazine.com/article/livelonger_052207-8303.

3. Evan Garcia, *Bureau of Land Management: We Won't Euthanize 45,000 Wild Horses*, WTTW (Sept. 15, 2016, 4:44 PM), <http://chicagotonight.wttw.com/2016/09/15/bureau-land-management-we-won-t-euthanize-45000-wild-horses>.

4. *Id.*; see also *Myths and Facts*, U.S. DEP'T OF INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/myths_and_facts.html (last updated Sept. 13, 2016) [hereinafter *Myths and Facts*].

5. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1333(a) (2012).

6. Garcia, *supra* note 3.

7. Amy Lester, *Oklahoma Spending Millions of Taxpayer Dollars to House Wild Horses*, NEWS ON 6 (Jan. 25, 2011), <http://www.newson6.com/story/13908594/senator-tom-coburn-were-throwing-money-away>.

wild horses and burros that are managed off the range; which problematically, is nearly two-thirds of the BLM's annual budget for wild horse management.⁸ Currently, there are sixty-seven thousand wild horses managed on public lands in the United States; which according to the BLM's analysis of the public range is double the capacity of what the range can ecologically sustain.⁹ So, it is suffice to say that the wild horse program has become unsustainable as a matter of environmental and fiscal concern.

The BLM's management program has led to a dire straits kind of situation, in which the decades of status quo management of removing wild horses and placing them indefinitely in holding pastures has economically drained the BLM's allotted budget, and has left the BLM with limited choices as to how to manage the increasing populations of wild horses. In the fall of 2016, the National Wild Horse and Burro Advisory Board, an independent advisory board to the BLM, released their recommendation to euthanize or "sell without limitation" forty-five thousand wild horses that are managed in captivity by the BLM.¹⁰ This advisory opinion reflects the emergency situation of the unsustainable fiscal program that the BLM has developed through the status quo management policy of aggressive removal practices of wild horses that are deemed to be in excess of the Appropriate Management Level ("AML").¹¹ Fortunately, the BLM has rejected the advisory board's opinion by publicly stating that the agency will continue to care for forty-five thousand wild horses that are managed in captivity.¹² But with a limited fiscal budget and an ever-growing wild horse population, the situation seems to beg the question of what can be done to avoid the potential decimation or cull of these national icons.¹³

8. Garcia, *supra* note 3. The management practices of caring for horses in corrals and long-term holding pastures represent an increasing annual expense for the BLM because of increasing reproduction rates of corralled wild horses. Unfortunately, this leaves limited resources for the BLM to use for fertility control research and implementing a more sustainable management program for the wild horses that are on the range. See Garcia, *supra* note 3.

9. *Myths and Facts*, *supra* note 4. The BLM has stated that the "Appropriate Management Level" for wild horse and burro populations on the range is 26,715. This population number is based on the BLM's assessment of the multiple uses of the public range and how this impacts the viability and sustainability of the public land. *Myths and Facts*, *supra* note 4.

10. Garcia, *supra* note 3. The recommendation to sell the wild horses without limitation is particularly unethical because it would have allowed the federal government to sell horses to potential slaughter horse buyers. Garcia, *supra* note 3. Horse slaughter is currently illegal in the United States. See Brandon Loomis, *Kill Wild Horses? Federal Advisory Committee Says Too Many on Range and in Pens*, ARIZ. REPUBLIC (Sept. 13, 2016, 8:32 AM), <http://www.azcentral.com/story/news/local/arizona-investigations/2016/09/12/committee-recommends-selling-killing-wild-horses-public-lands/90282604/>.

11. Garcia, *supra* note 3.

12. Garcia, *supra* note 3.

13. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2. In an effort to improve the BLM's Wild Horse and Burro Program, the BLM requested the

This Article will first summarize the Wild Free-Roaming Horses and Burros Act's purpose and the relevant sections that address the BLM's management duties. Then this Article will identify and summarize the fiscal, scientific, and ethical inefficiencies that complicate the Wild Horse and Burro Program. In highlighting these management complications, this Article will discuss several strategies that could be implemented by the BLM to improve the Wild Horse and Burro Program, which are supported by the scientific community and various wild horse preservation groups. The highlight and explanation of the program's inefficiencies will underscore the importance of requiring the BLM to adhere to the Act's removal procedures.¹⁴

This Article argues that the courts' decision to grant deference to the BLM's decision to remove "non-excess" wild horses from the range has allowed the BLM to bypass its statutory obligations to protect and manage the wild horses by using excessive removal procedures and by disregarding the mandated procedure of removing wild horses.¹⁵

In general, the BLM's removal of wild horses is not supported by the Act, public opinion, or scientific fertility control research.¹⁶ Further troublesome is the fact that the BLM's management practices are placing the vitality and welfare of the wild horses and burros on public lands at risk.¹⁷ By requiring the BLM to manage the wild horses pursuant to the Act, there is a realistic opportunity for the BLM to use more of their fiscal resources and management efforts to pursue more effective wild horse fertility control, which would allow the wild horses to remain on the range as mandated by the Act. Finally, this Article will analyze the case law in which the BLM has argued that it has inherent authority to remove an entire herd of wild horses that have not been deemed as "excess" within the meaning of the Act, which allows

National Research Council (NRC) to conduct an independent review of BLM's management program. The overall purpose of the NRC review was to improve the fertility control and herd management of the wild horses and burros to find a more sustainable method of managing the ever-increasing population of wild horses.

14. See 16 U.S.C. § 1332(f) (2012); 16 U.S.C. § 1333(b)(1) (2012).

15. See *In Def. of Animals v. Salazar*, 675 F. Supp. 2d 89, 97 (D.D.C. 2009) (holding that the BLM's gather plan didn't violate 16 U.S.C. § 1333 when the BLM removed 90% of the horse herd, which included non-excess horses, to temporary holding corrals to sort through which horses would be released back to the range, and thus not "excess" of the AML). See also 16 U.S.C. §§ 1331-1333 (2012).

16. See, e.g., *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2; see 16 U.S.C. §§ 1331-1333 (2012); see also *In Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1074 (9th Cir. 2014) (Rawlinson, J., dissenting) ("However, if the BLM is not managing the excess animals pursuant to § 1333(b)(2), no other portion of the Act authorizes capture of excess horses for the purpose of removal. And absolutely nothing in the Act authorizes the capture of non-excess horses.").

17. See generally Associated Press, *Fertility Drugs, Nature Better Than Horse Roundups*, DENVER POST, <http://www.denverpost.com/2013/06/04/fertility-drugs-nature-better-than-horse-roundups/> (last updated June 6, 2016, 6:03 PM).

the BLM to sort through and eventually release “non-excess” wild horses back to the range.¹⁸ The claim that BLM has inherent authority to remove non-excess horses is explicitly contrary to Congress’s intent of managing the wild horses and burros at a “minimum feasible level.” The minimum feasible level management requirement states that the wild horses are not managed as domesticated livestock.¹⁹ Ultimately, before a wild horse removal, the BLM has a statutory requirement to determine which animals are “in excess” of the prescribed Appropriate Management Levels.²⁰ BLM’s statutory authority to remove wild horses is specifically limited to animals that the BLM has determined to be “excess” within the meaning of Section 1333 of the Act.²¹ This Article argues that the courts should not grant the *Chevron* deference when the BLM proposes a “gather” of an entire herd of wild horses, to make it more logistically possible for the BLM to determine which horses shall be “excess.”²² Ultimately, this granted deference opens the door to allowing the BLM to manage the wild horses with casual disregard to their statutory duties of protecting the wild horses. The BLM should follow the “order and priority” for removing the wild horses as required by the Act.²³ By requiring the BLM to follow the strict removal procedures within the Act, the BLM is more likely to follow the mandated “minimal feasible level” management, which would promote a more sustainable population management program, and ultimately make it more possible that the wild horses and burros remain wild and free on the range.²⁴

18. See generally *In Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054 (9th Cir. 2014).

19. 16 U.S.C. § 1333(a) (2012).

20. See 16 U.S.C. § 1332(f) (2012); 16 U.S.C. § 1333(b)(1) (2012). The BLM is required to determine the Appropriate Management Level, which is the population of wild horses and burros that can exist that promotes the range’s health and multiple-uses of the range. 16 U.S.C. § 1333(b)(1).

21. See *In Def. of Animals*, 751 F.3d at 1067 (holding that the BLM did not abuse its discretion under the Act to remove an entire herd for sorting and releasing the non-excess horses back to the range). However, the dissenting opinion reasoned that there is “absolutely no textual support” under the Act to allow the BLM to “capture the entire herd of wild horses,” in which the BLM has determined there exists an excess population, but disregards the “order and priority” required by the Act by also gathering non-excess wild horses for sorting. *Id.* at 1074 (Rawlinson, J., dissenting).

22. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *In Def. of Animals*, 751 F.3d at 1073-74 (Rawlinson, J., dissenting).

23. 16 U.S.C. § 1333 (b)(2)(A)-(C).

24. 16 U.S.C. § 1333(a).

II. ORIGINS AND PURPOSE OF THE WILD FREE-ROAMING HORSES AND BURROS ACT

Wild horses have long been subject to scapegoating and abuse on public and private land.²⁵ In the western states, it was common practice to brutally capture and sell wild horses for slaughter.²⁶ During the 1950s, the leader of Wild Horse Organized Assistance, Velma Johnston (commonly known as “Wild Horse Annie”) began a grassroots campaign for wild horse protection after witnessing severe abuse against the wild horses.²⁷ Ms. Velma Johnston is attributed with creating public awareness and support for wild horse rights.²⁸ Johnston’s grassroots campaign ultimately led to the Wild Horse Annie Act, which aimed to regulate and protect the wild horses on the public range by making it illegal to chase or capture wild horses.²⁹ On September 9, 1959, President Dwight D. Eisenhower signed the “Wild Horse Annie Act.”³⁰ However, this Act did not protect wild horses from abuse on private land, and it proved difficult for law enforcement to regulate the safety of wild horses.³¹ In the 1960s, the wild horse population in the United States was estimated to have dropped to seventeen thousand.³²

The drastically low wild horse and burro population led to the passage of the Wild Free-Roaming Horses and Burros Act.³³ Congress unanimously approved the Act in December 1971.³⁴ The Act’s purpose was to protect the wild horses and burros from “capture, branding, harassment, or death.”³⁵ The Act is a “land and resource management statute” that requires the protection

25. *Velma Johnston (Wild Horse Annie)*, WILD HORSE EDUC. (June 27, 2014), <http://wildhorseeducation.org/velma-johnston-wild-horse-annie/>.

26. *Id.*

27. *Id.* Ms. Johnston was driving home from work one day in Reno, Nevada, and noticed a slaughter truck on the road that was dripping blood. She followed the truck, and eventually found that wild horses were on their way to the processing plant. Following this experience, Ms. Johnston began campaigning for wild horse rights. *Id.*

28. *Id.*

29. WILD HORSE EDUC., *supra* note 25.

30. 18 U.S.C. § 47 (1982).

31. *Id.*

32. Max Bearak, *Wild Horses and Hard Choices*, N.Y. TIMES (Oct. 11, 2011, 8:01 AM), http://green.blogs.nytimes.com/2011/10/11/wild-horses-and-hard-choices/?_r=0.

33. *Id.*

34. *Id.*

35. 16 U.S.C. § 1331 (2012) (“Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.”).

of wild horses and burros on both Forest Service and BLM lands.³⁶ The Secretary of the Interior is required to manage the wild horses and burros in such a way “that is designed to achieve and maintain a thriving natural ecological balance on the public lands.”³⁷ The BLM is charged with protecting “unbranded and unclaimed” horses and burros on public lands.³⁸ The Act mandates that the wild horses and burros shall be managed on the public range, and that they will be managed on enough land to sustain an existing herd.³⁹

The BLM is required to manage the wild horses and burros in accordance with the “multiple-use” management practice, which requires the BLM to manage the wild horses and burros and other natural animal and plant species in balance to ensure that the range is used in a sustainable way.⁴⁰ Thus, the BLM does not exclusively manage the range for the wild horses. The Secretary “shall consider the recommendations of qualified scientists in the field of biology and ecology,” including federal employee recommendations and independent scientists.⁴¹ Further, the Act states that any changes in “forage allocations” on the federal public lands should be taken into consideration for the “needs of other wildlife species which inhabit such lands.”⁴²

A. THE STATUTORY MEANING OF EXCESS WILD HORSES

In 1978, Congress amended the Act in response to the increased population of wild horses on the range, which created the definition of “excess” animals.⁴³ The effect of the 1978 amendment limited the protection of the wild horses in an effort to protect the natural resources and forage that the wild horses consumed.⁴⁴ The amendment required the BLM to conduct a yearly population inventory to estimate how many wild horses and burros live on the range.⁴⁵ The purpose of the AML is “to protect the range from the

36. In *Def. of Animals v. U.S. Dept. of Interior*, 909 F. Supp. 2d 1178, 1192-93 (E.D. Cal. 2012); *see also* 16 U.S.C. § 1333(a).

37. 16 U.S.C. § 1333(a).

38. 16 U.S.C. § 1332(b), 1332(f).

39. 16 U.S.C. § 1332(c).

40. *Id.*

41. 16 U.S.C. § 1333(a).

42. *Id.*

43. 16 U.S.C. § 1332(f). The provision for “excess animals” requires the Secretary to remove wild horses or burros “to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” *Id.*

44. In *Def. of Animals v. U.S. Dept. of Interior*, 909 F. Supp. 2d 1178, 1192-93 (E.D. Cal. 2012).

45. 16 U.S.C. § 1333(b)(1). For information on how the BLM conducts the “annual population inventory” of wild horses, *see Estimating Horse Populations on the Range*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT. (Oct. 15, 2015), http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management/Estimating_Populations_on_the_Range.html [hereinafter *Estimating Horse Populations on the Range*]. The

deterioration associated with overpopulation.”⁴⁶ The AML is the number of wild horses and burros that can be managed on the range, in such a way that there is a balance with other resources, such as cattle and native species on the range.⁴⁷ Essentially, the statutory purpose of the AML is to allow the BLM to practice a more rigorous population control program.⁴⁸ Thus, the BLM can use the AML as a documented population report to “trigger” a removal of excess horses from the range to correct a “population imbalance.”⁴⁹

To remove wild horses and burros that are “excess,” the Secretary may use helicopters to move herds into designated areas, and use trailers to transport the captured horses.⁵⁰ However, there is an express limitation on the BLM’s authority in that they shall not relocate wild horses or burros to public land areas where they do not “presently exist.”⁵¹ Further, the Secretary may remove or destroy excess wild horses or the BLM may be authorized to sterilize or exercise other population control methods.⁵²

Under the Act, if the BLM determines that there is an “excess” population of wild horses on the range, the BLM has a specific “order and priority” that it must adhere to remove “excess” wild horses and burros.⁵³ Section 1333(b)(2) provides that first, the BLM must euthanize all “old, sick, or lame

BLM must maintain population estimates to determine if there are excess wild horses. *Id.* Wild horses over 1 year are considered adults and thus included in the population count. *Id.* Historically the direct count method was used to determine how many horses or burros were in a given area. *Id.* In 2008, the BLM stopped using this method because the results were inaccurate. *Id.* Currently the BLM uses two different population recording methods, the “simultaneous double-count” method and the “photographic mark-resight” method.” *Estimating Horse Populations on the Range*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT. (Oct. 15, 2015), http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management/Estimating_Populations_on_the_Range.html The simultaneous double-count method is used in areas with “open terrain” and involves two independent observers record a particular areas and then collaborate their results to determine the animal population. *Id.* The photographic mark-resight method is used in areas with “steep terrain or tall vegetation.” *Id.* This method “uses aerial photographs to identify individual bands of horses based on unique markings of band members.” *Id.*

46. 16 U.S.C. § 1333(b)(1).

47. *Wild Horse and Burro Quick Facts*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT. (Sept. 14, 2016), http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/quick_facts.html [hereinafter *Wild Horse and Burro Quick Facts*].

48. *Id.*

49. In *Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1063-64 (9th Cir. 2014); see also 16 U.S.C. § 1333(b)(2). Once the BLM has determined that an excess population of horse and burros exists on the range, the BLM “shall immediately remove excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. § 1333(b)(2).

50. 16 U.S.C. § 1338(a) (2012).

51. 16 U.S.C. § 1339 (2012).

52. 16 U.S.C. § 1333(b)(1).

53. 16 U.S.C. § 1333(b)(2) (“Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.”).

animals” in a humane process.⁵⁴ Next, the BLM will be authorized to remove “excess” wild horses and burros from the range, and then place them in private facilities where the horses may be adopted by qualified individuals.⁵⁵ And last, the BLM shall have the authority to destroy excess wild horses where it’s impossible to adopt them to a qualified individual.⁵⁶ Destruction of the excess wild horses must be done in the most humane manner.⁵⁷ In sum, the BLM has the authority to destroy excess wild horses if the Secretary decides that such action is the only logistically feasible way to remove the excess animals from the given area.⁵⁸ However, Congress has never actually “appropriated funds for extermination” of wild horses.⁵⁹ Notably, the provision also mandates that no wild horse or burro can be sold for slaughter.⁶⁰

The Act also contains a sale provision for “excess” wild horses.⁶¹ The BLM is authorized to sell “excess” horses or burros that are older than ten years old or any animal that has been unsuccessfully adopted at least three times.⁶² If the animal meets either criterion, the method of sale provides that the excess animals can be sold “without limitation, including through auction to the highest bidder, at local sale yards or other convenient livestock selling facilities.”⁶³ This policy proved complicated, because the BLM could not regulate or prevent wild horses from being sold for commercial profit to be slaughtered, which is illegal under the Act.⁶⁴ However in 2004, after allegations of the BLM allowing the sale of more than 1,700 wild horses to kill-buyers in Mexico, the BLM changed this policy to prohibit any individual from purchasing more than four horses or burros within a six-month period

54. 16 U.S.C. § 1333(b)(2)(A) (“The Secretary shall order old, sick, or lame animals to be destroyed in the most humane manner possible.”).

55. 16 U.S.C. § 1333(b)(2)(B) (“The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals . . .”).

56. 16 U.S.C. § 1333(b)(2)(A).

57. *Id.*

58. *Id.*

59. *In Def. of Animals v. U.S. Dept. of Interior*, 909 F. Supp. 2d 1178, 1190 (E.D. Cal. 2012).

60. 16 U.S.C. §§ 1338(a)(4).

61. 16 U.S.C. § 1333(e)(1)-(2).

62. 16 U.S.C. § 1333(e)(1).

63. 16 U.S.C. § 1333(e)(2).

64. 16 U.S.C. § 1338 (stating that it’s illegal to sell wild horses and burros for slaughter purposes) *see also Investigative Report of Bureau of Land Management Wild Horse Buyer*, U.S. DEP’T OF THE INTERIOR: OFFICE OF INSPECTOR GENERAL 4 (Oct. 23, 2015), https://www.doi.gov/sites/doi.gov/files/WildHorseBuyer_Public.pdf [hereinafter *Investigative Report of Bureau of Land Management Wild Horse Buyer*].

unless the Assistant Director for Renewable Resources and Planning allows an exception.⁶⁵

III. THE WILD HORSE MANAGEMENT INEFFICIENCIES

Since the inception of Wild Free-Roaming Horses and Burros Act, the BLM has had the challenge of managing the wild horse program in such a way that is economically feasible and environmentally sustainable while ensuring that the historic wild horses thrive on a BLM-managed range.⁶⁶ The following section summarizes and examines the difficulties that the BLM faces in its management program. The purpose of this examination is to highlight that the Wild Horse and Burro Program could be more efficient if the BLM only removes *excess* wild horses.⁶⁷ If the BLM were only removing “excess” wild horses, then there is a stronger likelihood that the BLM could focus more resources into population control research and implementation, rather than expending so much of their budget on maintaining corralled wild horses. Ultimately, this section examines how the BLM’s current management is most certainly an unsustainable fiscal commitment that is putting the vitality of the wild horses at risk.⁶⁸

A. FISCAL INEFFICIENCIES OF MANAGING REMOVED WILD HORSES ARE DEPLETING THE BLM’S RESOURCES TO MANAGE POPULATIONS OF WILD HORSES AND BURROS EFFECTIVELY

The BLM has determined that the ALM for all of the wild horses and burros on BLM’s managed lands is 26,715 horses and burros.⁶⁹ As of March 1, 2016, the BLM’s estimated population of wild horses and burros on the public range is 67,027.⁷⁰ This estimated population number has increased fifteen percent from the BLM’s 2015 population estimate.⁷¹ Given this population estimate, the BLM has stated that there are currently forty thousand wild

65. *Id.* at 3-6. The United States Department of the Interior conducted an independent report of the allegations that the BLM sold approximately 1,700 wild horses to kill buyers. *Id.* at 2-3. The report concluded that the BLM in fact sold the horses to Tom Davis, who subsequently sold the horses to various slaughterhouses in Mexico. *Id.* at 5-7.

66. *Wild Horse and Burro Quick Facts*, *supra* note 47.

67. See 16 U.S.C. § 1333(b)(2)(A)-(C).

68. See *The Wild Stallion Returns-Wild Horse Roundups: Why Are They Conducted?*, PBS (Dec. 22, 2010), <http://www.pbs.org/wnet/nature/clouds-legacy-the-wild-stallion-returns-wild-horse-roundups-why-are-they-conducted/64/> [hereinafter *Wild Horse Roundups: Why Are They Conducted?*].

69. *Id.*

70. *Wild Horse and Burro Quick Facts*, *supra* note 47.

71. *Wild Horse and Burro Quick Facts*, *supra* note 47.

horses and burros that are considered to be “excess” of the ALM.⁷² As of August 2016, there are more than forty-five thousand wild horses and burros that are maintained in BLM holding facilities.⁷³ The BLM had stated that in order for their current program to continue as status quo, the total funding for the Wild Horse and Burro Program would have to rise to approximately \$85 million by the fiscal year 2012.⁷⁴ Based on these figures, the status quo management program is fiscally unsustainable.⁷⁵ For example, from fiscal year 2007 to 2008, the expense of maintaining removed wild horses in BLM’s captivity increased from \$21.9 million in 2007 to \$27 million in 2008.⁷⁶ In the fiscal year of 2008, the BLM spent three-fourths of their fiscal budget to maintain the care of the wild horses that the BLM removed and placed in its captivity.⁷⁷ The BLM spent more than \$27 million of their \$36.2 million budget on maintaining horses in captivity.⁷⁸

B. ALTERNATIVE METHODS FOR MANAGING THE WILD HORSE AND BURRO POPULATIONS

This fiscal inefficiency is preventing the BLM from more aggressively researching and implementing more effective population control methods like fertility control drugs.⁷⁹ Ultimately, this Article is not proposing that the BLM halt their round-ups entirely, but rather that the BLM should implement a more thorough fertility control program so the BLM can move away from the massive volume of continuous and ineffective removals of wild horses and burros.⁸⁰ In 2013, the BLM contracted the National Research Council (“NRC”) of the National Academies of Sciences to independently review the

72. *Wild Horse and Burro Quick Facts*, *supra* note 47.

73. *Wild Horse and Burro Quick Facts*, *supra* note 47.

74. *Factsheet on Challenges Facing the BLM in its Management of Wild Horses and Burros*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/wo/st/en/prog/wild_horse_and_burro/wh_b_information_center/blm_statements/new_factsheet.html (last updated Sept. 29, 2009) [hereinafter *Factsheet on Challenges Facing the BLM in its Management of Wild Horses and Burros*].

75. *Myths and Facts*, *supra* note 4.

76. *Myths and Facts*, *supra* note 4.

77. *Myths and Facts*, *supra* note 4.

78. *Myths and Facts*, *supra* note 4. The BLM’s current program expenses for the removal of excess wild horses and burros include the holding costs associated with the removed animals like feed, veterinary costs, and facility costs. *Myths and Facts*, *supra* note 4.

79. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2.

80. *Wild Horse Roundups: Why Are They Conducted?*, *supra* note 68. The BLM states that removal and population control of the wild horses is necessary. Without natural predators “the wild horses would die from starvation or dehydration as they compete for limited range and water resources with other wild animals and livestock.” *Wild Horse Roundups: Why Are They Conducted?*, *supra* note 68.

Wild Horse and Burro Program.⁸¹ The BLM specifically requested the NRC conduct a “technical evaluation” of the BLM’s management program; which included evaluating the growth rates of the herds and various population control methods that could be implemented by the BLM.⁸² The NRC’s 451-page report found that the BLM’s removal of almost a hundred thousand horses over the last decade may have actually perpetually increased the wild horse population and that the BLM’s status quo management operation will continue to be expensive and unproductive for the BLM.⁸³ However, the NRC stated that if the wild horses were left unmanaged on the public rangelands, the horse populations would become “resource-limited.”⁸⁴ Meaning that if we want the public range to be ecologically balanced and sustainable for multiple-uses, the BLM must implement population control of the wild horses.

The NRC found that the wild horse population repopulates at a rate of 15-20 percent each year.⁸⁵ The report indicated that the BLM management practices could be facilitating high horse population growth rates; the horse herds on the public range increase at a high rate because their populations are maintained below levels affected by “food limitation and density dependence.”⁸⁶ Meaning that the BLM’s ALM for certain herd management areas are too low, so the herd’s population and reproduction rate flourishes because of the abundance of space and food.

However, the NRC’s research showed that introducing more predatory species would not “typically” control population growth rates of wild horses.⁸⁷ The report concluded, “[t]he most promising fertility-control meth-

81. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2.

82. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 2.

83. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 13. *See generally* Associated Press, *supra* note 17 (The NAS report generally recommended that the BLM use fertility control for the wild horses to better prevent over population on the public range).

84. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2. This is because there are no significant predators on the range and the wild horses and burros repopulate at a 20 percent rate each year. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 63.

85. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 5.

86. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 5 (“Effects of increased population density are manifested through such changes as reductions in pregnancy, fecundity, percentage of females lactating, young-to-female ratios, and survival rates.”).

87. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 6.

ods for application to free-ranging horses or burros are porcine zona pellucida (PZP) vaccines, GonaCon™ vaccine, and chemical vasectomy.”⁸⁸ However, this alternative is costly and difficult to distribute to wild horses and burros on the range.⁸⁹ The administration of the fertility drugs is logistically difficult given that the wild horses are roaming thousands of acres and the drug has to be administered by shooting a dart into the mare.⁹⁰ Interestingly, there are various wild horse preservation groups that have successfully implemented pilot programs to administer PZP fertility control via dart.⁹¹ Collaborating more extensively with various horse organizations to administer the fertility control could more effectively fulfill the Act’s purpose to keep the wild horses on the range, rather than removing them to private holding corrals.⁹²

The American Wild Horse Campaign (“AWHC”) has proposed various ways to combat the difficulties of managing the horse populations more efficiently through creating more defined boundaries for wild horses that exclusively contain wild horses and the naturally occurring species in the boundary areas (rather than allowing privately owned cattle to be in the boundary areas as some of the HMAs are structured) and releasing mountain lions in these areas for population control.⁹³ The AWHC cites that the Montgomery Pass Herd near the California and Nevada border has been left unmanaged for twenty-five years and has maintained population levels of 150-200 horses, and attributes the success of this fertility control program due to the confined boundaries of the area and natural predators to keep the population controlled.⁹⁴ Additionally, the AWHC suggests that the BLM should create more ecotourism opportunities for tourists to view the wild horses in their natural environment, which in turn could generate revenue to more effectively care for their maintenance.⁹⁵

88. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 7.

89. *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at 7.

90. Garcia, *supra* note 3.

91. *PZP Pilot Project to Treat Wild Horses in Fish Springs Community*, AM. WILD HORSE CAMPAIGN, <https://americanwildhorsecampaign.org/media/pzp-pilot-project-treat-wild-horses-fish-springs-community> (last visited Mar. 27, 2017).

92. 16 U.S.C. § 1331 (2012).

93. *Self-Stabilizing Herds*, AM. WILD HORSE CAMPAIGN, <https://americanwildhorsecampaign.org/self-stabilizing-herds> (last visited Mar. 27, 2017). The AWHC cites that the Montgomery Pass Herd near the California and Nevada border has been left unmanaged for 25 years and have maintained population levels of 150-200 horses.

94. *Id.*

95. *Ecotourism*, AM. WILD HORSE CAMPAIGN, <https://americanwildhorsecampaign.org/ecotourism> (last visited Mar. 27, 2017).

C. WILD HORSE SALES PROGRAM LINKED TO ILLEGAL HORSE SLAUGHTER VENTURES

Pursuant to the Act, the BLM may remove excess wild horses and adopt them to qualified individuals.⁹⁶ Since 1971, the BLM has placed two hundred thirty thousand wild horses and burros in private ownership through the BLM's adoption program.⁹⁷ This number is quite low considering that the BLM has removed almost one hundred thousand wild horses over the last ten years.⁹⁸ The basic requirements for the adoption program is that as long as the animal is well cared for, the adopter will be eligible to receive title of the wild horse from the federal government.⁹⁹ However, the success of this program has been decreased due to the increasing expense of fuel and feed for horses, which has lowered the number of wild horses that are adopted.¹⁰⁰ Notably, wild horses require a skilled horseman to train them, which also makes the wild horses difficult to adopt.

Recently, the Adoption Program has experienced legal and ethical problems, which have highlighted how financially stressed the BLM is from its current management practices. From 2009 to 2012, Tom Davis, a Colorado rancher, purchased 1,794 wild horses from the BLM for \$10 per wild horse.¹⁰¹ Davis sold the wild horses to kill buyers that shipped the wild horses to Mexico for slaughter.¹⁰² The Wild Horse and Burro Program records indicated that Davis is the only individual who has purchased more than a thousand wild horses--the second highest volume purchaser was one individual

96. 16 U.S.C. § 1333(b)(2)(C) (2012).

97. *Adoption Program*, U.S. DEP'T OF INTERIOR BUREAU OF LAND MGMT. (May 5, 2015), http://www.blm.gov/wo/st/en/prog/whbprogram/adoption_program.html [hereinafter *Adoption Program*].

98. See generally Associated Press, *supra* note 17.

99. *Adoption Program*, *supra* note 97. The standard for proper care is quite minimal. The adoption program requires 20x20 feet of corral space per animal and having a facility with adequate access to feed, water, and shelter. See *Adopting or Purchasing a Wild Horse or Burro-Frequently Asked Questions*, U.S. DEP'T OF INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/wo/st/en/prog/whbprogram/adoption_program/how_to_adopt.html (last visited Mar. 20, 2017).

100. *Factsheet on Challenges Facing the BLM in its Management of Wild Horses and Burros*, *supra* note 74. The BLM has cited that adoptions of wild horses in 2005 were 5,701 and fell to 3,706 in 2008. *Factsheet on Challenges Facing the BLM in its Management of Wild Horses and Burros*, *supra* note 74.

101. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 4-5.

102. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 4-5. Tom Davis purchased the horses from the BLM for \$17,940 and then sold the wild horses to buyers who sent horses to slaughterhouses for approximately \$154,000. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 5. The BLM paid approximately \$140,000 transporting the wild horses to Davis. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 5.

who purchased 325 wild horses.¹⁰³ As part of normal protocol, the BLM directly delivered the purchased wild horses to Davis, which cost the BLM more than \$140,000 between 2008-2009.¹⁰⁴ However, Davis spent only \$17,940 on purchasing the wild horses.¹⁰⁵ In 2012, the BLM Office of Law Enforcement (“OLE”) conducted an investigation on Tom Davis to determine if purchased wild horses were wrongfully sold to slaughterhouses.¹⁰⁶ The OLE interviewed Davis twice but did not determine that Davis sent the wild horses to slaughter.¹⁰⁷ In 2015, the U.S. Department of the Interior conducted an independent investigation into the allegations that Tom Davis illegally sold the wild horses purchased from the BLM to Mexican slaughterhouses.¹⁰⁸ During the investigation, Davis admitted that a majority of the wild horses he purchased went to slaughter.¹⁰⁹ The report concluded that the BLM “did not follow current law” while managing the wild horse and burro program.¹¹⁰ In addition, the report concluded that the BLM failed to enforce its own policy of due diligence to limit wild horse sales and to prevent the sold wild horses from being sent to slaughter.¹¹¹ Following this investigation, the

103. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 4-5.

104. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 5.

105. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 5.

106. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 1.

107. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 1.

108. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 1.

109. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 2-3. The Department of the Interior directly interviewed Davis and asked how many of the 1,700 horses that David purchased from the BLM wild horse and burro program were sent to Mexico for slaughter, and David responded “[p]robably close to all of them.” *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 2-3. Davis stated that he purchased the horses that were not adoptable from the BLM, and that the BLM “had to get rid of and that he could get rid of them.” *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 3. Further, David said “I’d rather see me send them down there than I would see the Government send them down there.” *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 3. Ultimately, Davis knew the wild horses were transported directly to Mexico, but Davis never actually crossed the border with the horses, but rather sold the horses to buyers that were transporting the horses to Mexico. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 3.

110. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 2-3.

111. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 2-3.

Department of the Interior referred the investigation's finding to the U.S. Attorney's Office for the District of Colorado, but the Office declined to pursue criminal or civil charges against Davis.¹¹² The report was also submitted to the U.S. Attorney's Office for the District of New Mexico as a public health issue concerning the USDA-certified veterinarian signing the IHC without actually inspecting the horses, which is a false statement.¹¹³ With regard to the serious lack of regulation that occurred with Mr. Davis's wild horse ownership, the BLM did amend the Burns Amendment (December 2004) on January 4, 2013 to prohibit an individual from purchasing more than four wild horses or burros within a six-month period without "prior approval of the agency's Assistant Director for Renewable Resources and Planning."¹¹⁴

IV. THE STATUTORY REQUIREMENTS FOR BLM TO REMOVE WILD HORSES

Transitioning to the statutory requirements that the BLM has to fulfill to remove wild horses from the range; the National Environmental Policy Act ("NEPA") requires all federal agencies to prepare a "detailed statement," which requires the report to include the "environmental impacts" and include alternative plans for "other major Federal Actions significantly affecting the quality of the human environment."¹¹⁵ When it is required, an agency must prepare an Environmental Impact Statement ("EIS") in which the agency analyzes "the consequences, environmental impacts, and adverse environmental effects" of the agency's proposed actions.¹¹⁶ The agency's Environmental Assessment ("EA") may determine that an EIS is not required, and thus the agency must report a finding of no significant impact ("FONSI").¹¹⁷ Generally, NEPA does not require the EIS to be "based on a particular scientific methodology, nor does it require a reviewing court to weigh conflicting scientific data."¹¹⁸ The court can permit the agency discretion in allowing the agency to rely "on the reasonable opinions of its own qualified experts, even

112. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 7.

113. *Investigative Report of Bureau of Land Management Wild Horse Buyer*, *supra* note 64, at 7.

114. *Myths and Facts*, *supra* note 4; *BLM Issues New Policy Regarding Conditions on Wild Horse and Burro Sales*, U.S. DEP'T OF INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/wo/st/en/info/newsroom/2013/january/nr_01_04_2013.html (last updated Jan. 18, 2013). *See also* 16 U.S.C. § 1333(c), (d)(5).

115. 42 U.S.C. § 4332(2)(C) (2012).

116. *In Def. of Animals v. U.S. Dept. of Interior*, 909 F. Supp. 2d 1178, 1187 (E.D. Cal. 2012).

117. *Id.*

118. *Id.*

if the court might find contrary views more persuasive.”¹¹⁹ This statutory background is relevant to consider in light of how much discretion courts can grant the BLM in both its interpretation of the Act, as well as how the BLM assesses AMLs.

V. THE *CHEVRON* DEFERENCE GRANTED TO THE BUREAU OF LAND MANAGEMENT

Under the Administrative Procedure Act (“APA”), a court may review an agency’s action to determine whether the agency proposal is subject to judicial review.¹²⁰ The APA states that a court shall “hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹²¹ The applicable two-step inquiry to determine whether the agency’s action is unauthorized is prescribed by the *Chevron* test.¹²² The first prong requires the court to determine whether Congress has established a clear intent on the issue.¹²³ If the court finds that Congress has clear intent on the issue presented, then the court’s analysis is terminated.¹²⁴ However, the court will reject the agency’s proposal if it is in conflict with Congress’s intent.¹²⁵ If Congress’s intent is not clear within the statute, then the second prong requires the court to determine whether the agency’s proposal is “a permissible construction of the statute.”¹²⁶ Further, if Congress has intentionally and explicitly given the agency the authority based on the agency’s own interpretation, then the agency has authority to proceed based on its statutory construction.¹²⁷

VI. CASE LAW

Under the Act, the BLM has a “great deal of discretion” in its management of the wild horses and burros with regards to population control of the

119. *Id.*

120. 6-51 ADMINISTRATIVE LAW § 51.01 (2015).

121. *Colorado Wild Horse & Burro Coal., Inc. v. Salazar*, 639 F. Supp. 2d 87, 90-91 (D.D.C 2009) (quoting 5 U.S.C. § 706(2)(C) (2012)).

122. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) (the Supreme Court case that created the two-step inquiry to determine whether deference to an agency’s decision or action was proper in regards to the agency’s interpretation of an ambiguous term); *See generally Colorado Wild Horse & Burro Coal., Inc.*, 639 F. Supp. 2d at 91.

123. *Chevron*, 467 U.S. at 842-43.

124. *Id.* at 843.

125. *Id.*

126. *Id.*

127. *Id.*

herds and determining the AML for wild horses and burros on the range.¹²⁸ However, the BLM is specifically required by the Act to immediately remove the wild horses and burros that exceed the predetermined AML.¹²⁹

As discussed *supra*, when the BLM has determined that there is an excess wild horse population, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1333(b)(2) specifically requires the BLM to immediately remove the excess wild horses “from the range so as to achieve appropriate management levels.”¹³⁰ The BLM is required to remove the excess wild horses according to the “order and priority” within the Act until all of the excess wild horses have been removed from the range.¹³¹ The “order and priority” requires that (A) “old, sick, or lame animals” shall be destroyed “in the most humane manner possible”; (B) the BLM shall have the right to capture and remove excess wild horses and burros and place these animals in private maintenance and adopt them to qualified individuals; and (C) if there are excess wild horses and burros that cannot be adopted by a qualified individual, then the BLM has the authority to destroy these excess animals in “the most humane and cost efficient manner possible.”¹³² Note that nothing in the “order and priority” of animal removal applies to non-excess wild horses and burros.¹³³ The horses that are considered excess are animals that exceed the predetermined AML, which requires the BLM to remove the excess animals to maintain the range’s health.¹³⁴ This distinction is relevant because some courts have granted deference to the BLM in allowing them to remove an entire wild horse herd before the BLM determines which animals are considered in excess of the AML.¹³⁵ The courts have granted the deference based on the reasoning that Congress allotted ambiguities to the BLM’s horse and burro management duties, which allows the BLM to exercise their own discretion.¹³⁶ The court’s deference to the BLM’s decision to remove wild horses that are not in excess of the AML is problematic because it allows the agency to bypass the ethical considerations that are mandated in the Act to

128. Am. Horse Prot. Ass’n, Inc. v. Frizzell, 403 F. Supp. 1206, 1217 (D. Nev. 1975); *see also* 16 U.S.C. § 1333(a) (2012).

129. 16 U.S.C. § 1333(b)(1), § 1333(b)(2)(A)-(C); *see also Wild Horse and Burro Quick Facts*, *supra* note 47.

130. 16 U.S.C. § 1333(b)(2).

131. *Id.*

132. *Id.* at § 1333(b)(2)(A)-(C).

133. *Id.*

134. *See generally* 16 U.S.C. § 1333.

135. *See generally* In Def. of Animals v. Salazar, 675 F. Supp. 2d 89, 97 (D.D.C. 2009); *see also* In Def. of Animals v. U.S. Dept. of Interior, 751 F.3d 1054, 1074 (9th Cir. 2014).

136. *See In Def. of Animals*, 675 F. Supp. 2d at 97; *see also In Def. of Animals*, 751 F.3d at 1074.

keep the non-excess wild horses protected on the range where they are “presently found.”¹³⁷ Also, the horses and burros are to be managed as wild animals and not as livestock, so the BLM should manage at a “minimum feasible level.”¹³⁸ But allowing the BLM to remove and physically sort through an entire herd to determine which horses will be *excess* and, thus, permanently removed from the range, explicitly contradicts the Act’s language for managing at a “minimum feasible level.”¹³⁹

The court’s deference to the BLM’s decision to remove non-excess wild horses contradicts Congress’s intention for the Act, and allows the BLM to continue in a status quo management program of removing horses that is fiscally unsustainable.¹⁴⁰ Additionally, the deference allows the BLM to bypass its statutory obligations to manage and protect the wild horses from capture, which ironically was the original purpose of the Act.¹⁴¹ The following section will summarize several cases that support this Article’s argument that the courts should not grant the *Chevron* deference to the BLM when their removal proposal is to “capture” an entire herd of horses that are non-excess because this policy frustrates the purpose of the Act, and because the non-excess wild horses should not be subjected to removal and sorting by BLM’s contractors.¹⁴²

The Court’s reasoning in *Colorado Wild Horse & Burro Coalition, Inc. v. Salazar* demonstrates the correct statutory interpretation of the Act that the BLM must follow pursuant to the statutory guidelines of the Act for removal of excess wild horses.¹⁴³ In *Colorado Wild Horse & Burro Coalition, Inc. v. Salazar*, the BLM argued that its decision to remove a non-excess herd in the West Douglas Herd Area in Colorado was a “reasonable exercise of BLM’s discretion” and that the agency was entitled to the *Chevron* deference.¹⁴⁴ The court rejected the BLM’s argument and held that the BLM’s removal of the entire herd exceeded the “scope of authority that Congress delegated” to the BLM under the Wild Free-Roaming Horses and Burros Act, because the BLM had not determined the horses to be in excess of the AML.¹⁴⁵ The court

137. See 16 U.S.C. § 1331 (2012).

138. 16 U.S.C. § 1333 (b)(1), (2)(A)-(C).

139. See generally 16 U.S.C. § 1333; *In Def. of Animals*, 675 F. Supp. 2d at 97; see also *In Def. of Animals*, 751 F.3d at 1074.

140. *In Def. of Animals*, 751 F.3d at 1074; see *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at vii.

141. *In Def. of Animals*, 751 F.3d at 1074.

142. See generally 16 U.S.C. §§ 1331-1333; see *Colorado Wild Horse & Burro Coal., Inc. v. Salazar*, 639 F. Supp. 2d 87, 89 (D.C. 2009).

143. See *Colorado Wild Horse & Burro Coal., Inc.*, 639 F. Supp. 2d at 89.

144. *Id.* (plaintiffs advocating for wild horse rights successfully challenged the BLM’s decision to remove an entire herd from the West Douglas Herd Area in Colorado by arguing that the removal violated the Wild Free-Roaming Horses and Burros Act).

145. *Id.*

referred to § 1333(b)(2)(A)-(C), which provides the “statutory procedure for removing excess animals” and noted that there is no “procedure for removing non-excess animals.”¹⁴⁶ Interestingly, the BLM argued that there was nothing in the statute that prevented them from removing non-excess wild horses.¹⁴⁷ This is an interesting argument, because it specifically contradicts the BLM’s purpose to manage *wild* and *free* horses, not wild horses in captivity.¹⁴⁸

The BLM presented several interpretations of the Act in support of its argument that it had the inherent authority to remove non-excess wild horses. First, the BLM argued that they had the right to remove non-excess wild horses because § 1333(b) “requires the removal of excess animals whereas § 1333(a) permits the removal of non-excess animals.”¹⁴⁹ But the court rejected this argument and reasoned “that Congress clearly ‘intended to protect non-excess wild free-roaming horses and burros from removal.’”¹⁵⁰ Thus, the court explained, “it would make no sense for Congress to provide detailed procedures for removing excess animals but no procedure at all for removing non-excess animals.”¹⁵¹ The court reasoned “that the only plausible inference to be drawn from the omission of any procedure for removing non-excess animals is that Congress did not intend for BLM’s management authority to be so broad.”¹⁵²

The significance of this reasoning is that it substantiated that the BLM’s management policies must follow the mandated procedures of the Act and it shall not violate Congress’s original intent that the “wild free-roaming horses and burros shall be protected from capture”¹⁵³ The court concluded that it would be contradictory to the Act’s purpose to mandate protection to the wild horses, yet allow the BLM to capture and remove them from the wild when the horses are not in excess of the AML.¹⁵⁴ The BLM also argued that removing the wild horses would not “eliminate” them because “BLM intend[ed] to continue to manage the horses *not* in the wild but through private

146. *Id.* at 97.

147. *Id.* at 96-97.

148. *See generally* 16 U.S.C. § 1331 (2012).

149. *Colorado Wild Horse & Burro Coal., Inc.*, 639 F. Supp. 2d at 97 (BLM’s argument was based on its statutory interpretation of § 1333(a) and how this Section “permits the removal of non-excess animals.”).

150. *Id.* at 96-97.

151. *Id.* at 95-96.

152. *Id.* at 97.

153. *Id.* at 96 (quoting 16 U.S.C. § 1333(a) (2012)); *see also* 16 U.S.C. § 1331.

154. *Colorado Wild Horse & Burro Coal., Inc.*, 639 F. Supp. 2d at 96 (“It would be anomalous to infer that by authorizing the custodian of the wild [free roaming] horses and burros to ‘manage’ them, Congress intended to permit the animals’ custodian to subvert the primary policy of the statute by capturing and removing from the wild the very animals that Congress sought to protect *from* being captured and removed from the wild.”).

adoption or long-term care.”¹⁵⁵ The court reasoned that “Congress did not authorize BLM to ‘manage’ the wild horses by corralling them for private maintenance or long-term care as *non-wild* free-roaming animals *off* of the public lands.”¹⁵⁶ The court concluded that the BLM is required by the Act to manage the wild horses at a “minimum feasible level,” and that removing the wild horses would be drastically contrary to the minimal management required by the statute.¹⁵⁷

The court in *Friends of Animals v. United States BLM* also rejected the BLM’s free-reign interpretation of its inherent authority under the Wild-Free Roaming Horses and Burros Act to remove wild horses while disregarding statutory obligations under NEPA.¹⁵⁸ The plaintiffs, two wild horse advocate organizations, filed a motion for a preliminary injunction against the BLM’s December 19, 2014 plan to gather and remove 332 wild horses from the Pine Nut Herd Management Area.¹⁵⁹ The plaintiffs alleged that the BLM’s wild horse round up was in violation of the Administrative Procedures Act (“APA”) and in violation of NEPA.¹⁶⁰ The BLM’s removal plan was to permanently remove two-hundred horses and administer the remaining 132 horses with the fertility control drug called “porcine zone pellucide” (more commonly known as PZP) to all of the mares over a year old, and release them back to the Pine Nut Herd Management Area.¹⁶¹ The BLM had previously “determined that the appropriate herd management level (“APL”) for the Pine Nut herd [was] between 119-179 horses.”¹⁶² However, the BLM did not provide an Environmental Assessment (“EA”) for the wild horse round-up plan for December 19, 2014, but rather relied on data gathered for a round up that occurred in 2010.¹⁶³ The BLM relied on the 2010 EA to support its

155. *Id.*

156. *Id.*

157. *Id.* (quoting 16 U.S.C. §1333(a)) (BLM’s “management activities shall be at the minimal feasible level . . .”). For more information on the purpose of “minimum feasible management” see *Minimum Feasible Management*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT., http://www.blm.gov/nv/st/en/prog/wh_b/minimum_feasible_management.print.html (last visited Jan. 3, 2016). In light of the minimum feasible level, the BLM is required to manage the wild horses and burros as a wild species rather than domestic livestock. The agency may haul water to HMA in necessary times of drought, but they may not provide the wild animals with supplementary food. *Id.*

158. *Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 3:15-CV-0057-LRH-WGC, 2015 U.S. Dist. LEXIS 17575, at *12-13 (D. Nev. Feb. 11, 2015).

159. *Friends of Animals*, 2015 U.S. Dist. LEXIS 17575, at *1-2.

160. *Id.* at *2.

161. *Id.*

162. *Id.*

163. *Id.* at *2-3.

removal decision in 2014.¹⁶⁴ Hence, the BLM presented no new or supplemental data to support its management plan for 2014.¹⁶⁵

The court first analyzed the APA, which states that a federal court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶⁶ The standard of review is arbitrary and capricious.¹⁶⁷ In order to meet its burden, the BLM had to present a “rational connection between the facts found and the conclusions made.”¹⁶⁸ The plaintiffs argued that the BLM’s proposal was in violation of the requirement of NEPA.¹⁶⁹ The court’s obligation with respect to NEPA is to make sure that the agency has “considered the environmental consequence of its action.”¹⁷⁰ The court reasoned that the BLM made its roundup proposal without fulfilling its duty to conduct an adequate analysis under NEPA.¹⁷¹ Based on the BLM’s failure to adhere to the NEPA requirements, the court granted the plaintiff’s injunction and held that there lacked a “legal basis for the BLM to rely upon the 2010 EA and 2010 FONSI to support its current roundup decision.”¹⁷²

The court’s holding is significant because it requires the BLM to be accountable to its statutory obligations.¹⁷³ The BLM’s plan was held to be arbitrary because the scientific analysis and reports for the herd population were based on information from four years prior.¹⁷⁴ To allow a removal based on dated reports from four years prior to reflect the current population of the wild horse herd would contradict BLM’s duty to conduct a “current inventory of wild free-roaming horses and burros on given areas of the public lands.”¹⁷⁵ The purpose of the “current inventory” is to determine whether an excess population actually exists, which would trigger the BLM’s legal duty to remove the excess population based on the BLM’s inventory.¹⁷⁶ Without a “current inventory,” the BLM does not have the ability to determine whether

164. *Friends of Animals*, 2015 U.S. Dist. LEXIS 17575, at *3-4.

165. *Id.*

166. *Id.* at *5 (citing 5 U.S.C. § 706(2)(A); *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1124-25 (9th Cir. 2007)).

167. *Id.* at *5.

168. *Id.* at *6 (citing *Or. Nat. Res. Council Fund*, 492 F.3d at 1124-25).

169. *Friends of Animals*, 2015 U.S. Dist. LEXIS 17575, at *7.

170. *Id.*

171. *Id.* at *8.

172. *Id.*

173. *Id.*

174. *Friends of Animals*, 2015 U.S. Dist. LEXIS 17575, at *7-8.

175. 16 U.S.C. § 1333(b)(1) (2012).

176. *Id.*

there are excess wild horses.¹⁷⁷ The court's ruling in *Friends of Animals v. U.S. Bureau of Land Mgmt.* was also significant because the court "reigned" in the excessive authority that the BLM was claiming to have.¹⁷⁸ Congress specifically intended to protect non-excess wild free-roaming horses and burros from removal, and the BLM's removal authority was limited to those wild free-roaming horses and burros that it determined to be excess animals within the meaning of the Act.¹⁷⁹

A. COURTS THAT HAVE GRANTED THE *CHEVRON* DEFERENCE TO THE BLM'S PROPOSAL TO REMOVE NON-EXCESS WILD HORSES

However, some courts have allowed the BLM to "gather" entire herds of wild horses to determine which wild horses are in "excess" of the AML. The "gather" is essentially BLM contractors sorting through the horses to determine age and health and to administer fertility control. However, the Act specifically prohibits removing wild horses that are non-excess from the range.¹⁸⁰ But some courts have granted deference to the BLM's removal proposals to remove an entire herd because of the logistical complications of removing and sorting through excess wild horses on the range.¹⁸¹ This logistical complication cannot be denied, as wild horses will not tolerate human contact without restraint. However, on the same note, the court's deference allows the BLM to make a leaping statutory interpretation by allowing the BLM to remove an *entire* herd that is not excess of the AML. This deference is a contradictory interpretation that distinctly violates the Act because it disregards the "minimal feasible level" and Congress's original intent for the Act.¹⁸²

In *Def. of Animals v. U.S. Dep't of Interior*, the BLM successfully argued that it has the authority to remove an entire herd of wild horses by "gathering" the horses off of the range and sorting through them to determine which horses are excess, then releasing the non-excess wild horses back to

177. *Id.* ("The purpose of such inventory shall be to: make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals. . . .").

178. *See Friends of Animals*, 2015 U.S. Dist. LEXIS 17575, at *12-13.

179. *See* 16 U.S.C. § 1331 (2012); 16 U.S.C. § 1333(b)(2)(A)-(C) (2012).

180. *Colorado Wild Horse & Burro Coal., Inc. v. Salazar*, 639 F. Supp. 2d 87, 97 (D.C. 2009) (explaining that the purpose of the Act is to protect the wild horses and burros and that "the only plausible inference to be drawn from the omission of any procedure for removing non-excess animals is that Congress did not intend for BLM's management authority to be so broad").

181. *See In Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1063-66 (9th Cir. 2014).

182. 16 U.S.C. § 1333(a).

the range.¹⁸³ The following section will analyze this case from both the district court level and through its appeal to the 9th Circuit.¹⁸⁴ The BLM has argued that the “gather” of an entire herd does not contradict the Act, because the “gather” does not constitute a removal within the meaning of §1333(b)(2), which would subject the BLM to the “order and priority” of removing the wild horses.¹⁸⁵

Beginning with the district court analysis, *In Def. of Animals v. U.S. Dep’t of Interior*, the plaintiffs filed suit against the BLM to prevent a removal of wild horses at the Twin Peaks Herd Management Area in 2012 by arguing that the removal was “counter to the congressional mandate for preserving wild horses and burros as set forth in Wild Free-Roaming Horses and Burros Act” and that the EA was inadequate of NEPA’s required “hard look” that is required “prior to any significant environmental action.”¹⁸⁶ The BLM had determined through specific aerial counting inventory of the wild horse herd that there was an excess of 2,236 horses and 205 burros.¹⁸⁷ The AML for the Twin Peaks HMA “had previously been determined as constituting between 448 and 758 wild horses, and 72 and 116 burros.”¹⁸⁸ The BLM had conducted a direct count population inventory in September 2008, which established that there were approximately 1,599 horses and 210 burros.¹⁸⁹ Based on the above direct count in 2008, the EA estimated that there were 1,855 horses in excess of the AML, and 205 excess wild burros.¹⁹⁰ The EA specified that approximately 180 horses would be released after the removal.¹⁹¹ Following the “sorting” of wild horses, there would be approximately 450 horses and 72 burros returned to the HMA.¹⁹² The plaintiffs unsuccessfully argued that the BLM’s removal violated the Act because the wild horses are not removed pursuant to the “order and priority” of §1333(b).¹⁹³ The plaintiffs argued that the Act specifically required that the

183. See *In Def. of Animals*, 751 F.3d at 1063-66; see also *In Def. of Animals v. U.S. Dept. of Interior*, 909 F. Supp. 2d 1178, 1193 (E.D. Cal. 2012).

184. *In Def. of Animals*, 909 F. Supp. 2d at 1193; *In Def. of Animals*, 751 F.3d at 1054.

185. *In Def. of Animals*, 909 F. Supp. 2d at 1190; see also 16 U.S.C. § 1333(b)(2)(A)-(C).

186. *In Def. of Animals*, 909 F. Supp. 2d at 1183, 1186.

187. *Id.* at 1185-86.

188. *Id.* at 1184.

189. *Id.*

190. *Id.*

191. *In Def. of Animals*, 909 F. Supp. 2d at 1185.

192. *Id.* at 1185-86 (explaining that the sorting would be based on releasing the non-excess wild horses pursuant to a “sex ratio of 60:40 studs to mares in order to help curb future population increases in addition, some or all of the released mares (depending on the capture rates) would receive fertility control treatments (an immunocontraceptive known as Porcine Zona Pellucida, or PZP)”).

193. *Id.* at 1190. For the mandated specific order of removing excess wild horses see 16 U.S.C. § 1333(b)(2)(A)-(C).

BLM had to destroy all sick, lame or old horses in order to determine whether the “remaining healthy animals exceed[ed] viable limits.”¹⁹⁴ The court rejected this argument by noting that BLM shall be given a “high degree of discretionary authority” with respect to their management program.¹⁹⁵ The court reasoned that the BLM has the right to “capture” non-excess wild horses to determine their age and health for population determinations, which can be supported by the ambiguity of 16 U.S.C. § 1333(b)(1)-(2)(A)-(C).¹⁹⁶ This section of the Act requires the BLM to maintain a population inventory to determine if there are excess animals and the section also states “appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).”¹⁹⁷ Essentially the court granted deference to the BLM’s decision to “gather” the entire herd for sorting because the court held that this section allowed the BLM discretion to achieve its AML.¹⁹⁸ Further, the court held that capture is necessary to determine the age and health of the wild horses because a wild horse is unlikely to tolerate examination by a veterinarian.¹⁹⁹ However, the court’s reasoning directly contradicts that the management shall be at a minimum feasible level.²⁰⁰ The minimum feasible level is not achieved when the BLM removes non-excess wild horses with helicopters for many miles and then physically handles and feeds them in captivity, which directly contradicts the Act’s language.²⁰¹ The court reasoned that it would be a “Catch-22” if the BLM was not allowed to remove any excess wild horses until they euthanize the old and sick wild horses on the range.²⁰² However, this reasoning disregards the statutory requirement that the BLM cannot remove wild horses that are not deemed as *excess*.²⁰³ In conclusion, the court held that “removal” does not happen until the BLM deter-

194. *In Def. of Animals*, 909 F. Supp. 2d at 1190; see also 16 U.S.C. § 1333(b)(2)(A).

195. *In Def. of Animals*, 909 F. Supp. 2d at 1190 (quoting *Am. Horse Prot. Ass’n v. Frizzell*, 403 F. Supp. 1206, 1217 (D. Nev. 1975)).

196. *Id.* at 1191.

197. 16 U.S.C. § 1333(b)(1).

198. *In Def. of Animals*, 909 F. Supp. 2d at 1191.

199. *Id.*

200. 16 U.S.C. § 1333(a).

201. *Wild Horse Roundups: Why Are They Conducted?*, *supra* note 68. The wild horse removals involve helicopters flying at low altitudes, which can cause the wild horses a lot of physical stress, particularly young foals and mares in foal. *Wild Horse Roundups: Why Are They Conducted?*, *supra* note 68; see also 16 U.S.C. § 1333(a).

202. *In Def. of Animals*, 909 F. Supp. 2d at 1191 (quoting *In Defense of Animals v. Salazar*, 675 F. Supp. 2d 89, 97-98 (D.D.C. 2009)).

203. See 16 U.S.C. § 1333(b)(2)(A)-(C).

mines which wild horses are in excess, which can only be achieved by “gathering” the entire herd to determine which horses will be released back to the range.²⁰⁴

Based on the court’s analysis, the court draws a distinction between “capture” and “removal” by holding that the BLM has the authority to remove an entire herd to sort through and determine which horses shall be determined to be in excess of the AML.²⁰⁵ The court’s deference allows the BLM to avoid the mandated purpose of the Act by removing all wild horses from a HMA for sorting, which contracts the “minimum feasible level.”²⁰⁶ Ultimately deference should not be given to the BLM when it proposes such a removal, because it directly contradicts Congress’s express intent by requiring that the BLM protect the wild horses “from capture, branding, harassment, or death.”²⁰⁷

In 2014, the plaintiffs appealed to the Ninth Circuit Court based on the argument that the BLM’s gather violated the Act and NEPA by allowing the BLM to remove the entire herd of horses on the Twin Peaks HMA.²⁰⁸ The Ninth Circuit Court affirmed the district court’s decision by holding that the BLM was acting within its authority to remove the herd of horses and place them in “temporary holding facilities,” feed them, sort the horses and burros by sex and physical condition, “before deciding whether individual animals should be euthanized because of injury or age, put up for adoption, or returned to the HMA.”²⁰⁹ In general, the Ninth Circuit Court granted deference to the agency’s “expertise” knowledge in allowing the BLM to remove the entire herd because it was more logistically feasible than following the procedure mandated by §1333(b)(2), which requires the “order and priority” for removal of excess animals.²¹⁰ The plaintiffs argued that the BLM violated the mandated “order and priority” for removal of excess horses when it removed the entire herd.²¹¹ However, the court agreed with the BLM’s interpretation of “remove” within §1333(b)(2), which is only applicable to “permanent removal of animals from the HMA, and not the temporary gathering of animals on the HMA to determine which animals should be euthanized and which

204. *In Def. of Animals*, 909 F. Supp. 2d at 1191.

205. *Id.*; see also 16 U.S.C. § 1333(b)(2)(A)-(C).

206. See 16 U.S.C. § 1333(a) (“All management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.”).

207. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984); see also 16 U.S.C. § 1331 (2012).

208. *In Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1059-60 (9th Cir. 2014).

209. *Id.*

210. *Id.* at 1059 (quoting 16 U.S.C. § 1333(b)(2)).

211. *Id.* at 1064.

animals should be made available for adoption.”²¹² In allowing this interpretation of “remove,” the court allowed the BLM to construe a temporary gathering, which is not a removal, and therefore the BLM is not restricted to the order and priority provision of §1333(b)(2). In conclusion, the Ninth Circuit Court held that the BLM’s action “fell within the discretion which courts have recognized the BLM has to remove excess animals from an HMA.”²¹³ Essentially the court granted deference to the BLM by allowing them to remove all of the excess horses because the BLM had “determined that the most effective way to fulfill its statutory mandate” was to remove all the horses and then make a selection of which horses would be returned to the HMA; which, contradicted the “order and priority” of removing excess wild horses.²¹⁴

In the dissenting opinion, Judge Rawlinson sharply disagreed with the majority’s interpretation of the BLM’s statutory requirements.²¹⁵ Judge Rawlinson explained how the majority opinion incorrectly allowed the BLM to remove the entire herd, which is contradictory to 16 U.S.C. §1333(a), because the section requires the wild horses and burros to be managed at a “minimum feasible level.”²¹⁶ The dissent disagreed with the deference granted by the majority opinion “[b]ecause the BLM’s interpretation and application of the Act ignored the text, intent and purpose of the statute” and therefore “absolutely no deference” should have been granted to “the agency action taken in reliance on that interpretation.”²¹⁷ There is nothing in the Act that allows capture of non-excess wild horses, and the majority opinion disregarded the specific provisions in the Act for the “order and priority” in which the BLM may remove the *excess* wild horses.²¹⁸ The dissenting opinion recognized that allowing the BLM to remove the entire herd explicitly contradicts Congress’s intent because there are specific provisions for removing excess horses.²¹⁹ Judge Rawlinson’s argument was largely based on §1333(b), which only authorizes the BLM to remove “excess” wild horses and burros.²²⁰ Judge Rawlinson further analyzed the “order and priority” of §1333(b)(A-C), which first requires that “old, sick, or lame” wild horses “be

212. *In Def. of Animals*, 751 F.3d at 1064.

213. *Id.* at 1065; *see also* 16 U.S.C. § 1333(b)(2)(A-C).

214. *In Def. of Animals*, 751 F.3d at 1065.

215. *Id.* at 1073.

216. *Id.* at 1075.

217. *Id.*

218. *Id.* at 1074 (“However, if the BLM is not managing the excess animals pursuant to § 1333(b)(2), no other portion of the Act authorizes capture of excess horses for the purpose of removal. And absolutely nothing in the Act authorizes the capture of non-excess horses.”).

219. *In Def. of Animals*, 751 F.3d at 1073; *see also* 16 U.S.C. § 1333(b) (2012).

220. *In Def. of Animals*, 751 F.3d at 1074.

destroyed in the most humane manner possible.”²²¹ Second, the BLM may remove additional excess horses from the range and place them in private maintenance for adoption.²²² Finally, the excess horses that have no possibility to be adopted by a qualified private individual may be destroyed in the “most humane and cost efficient manner possible.”²²³ Further, Judge Rawlinson reasoned that there is “absolutely no textual support” under the Act to allow the BLM to “capture the entire herd of wild horses” that are not all excess of the AML, and then disregard the “order and priority” required by the Act for removing excess wild horses.²²⁴ In addition to violating the “order and priority” of removing wild horses, the gathering of non-excess wild horses violates the “minimum feasible level.”²²⁵ In conclusion, the dissenting opinion argued that the court’s deference to the BLM’s removal policies allows the BLM to manage the wild horses inconsistent with Congress’s original purpose to “protect the wild horses from capture and/or harassment.”²²⁶

VII. CONCLUSION

In conclusion, the court’s deference to the BLM’s proposal to remove non-excess wild horses should not be continued because it’s contrary to the Act and further complicates the unsustainable horse management program.²²⁷ The deference granted by the courts should fail the *Chevron* two-step inquiry because there is language within the Act that expressly states Congress’s intent to keep the wild horses and burros free and wild on BLM’s range.²²⁸ Ultimately, Congress mandated clear intent to protect wild horses and burros on public land, so that the animals are able to remain free from capture or harassment.²²⁹ The deference granted to the BLM in the cases discussed *supra* violated Congress’s intent and contradicted the specific language in the Act for removal of excess wild horses and burros, which allows the BLM to disregard its duty to actually promote the welfare of wild horses on the

221. *Id.* at 1074-75 (“The record in this case reflects that the BLM has previously identified injured wild horses on the range without first capturing them. Therefore, no legitimate basis existed for cavalierly chasing the horses with helicopters for miles before capturing them, including horses who were admittedly non-excess.”).

222. *Id.*

223. *Id.* at 1074 (quoting 16 U.S.C. § 1333(b)(2)(C)).

224. *Id.*

225. *In Def. of Animals*, 751 F.3d at 1074.

226. *Id.*

227. See 16 U.S.C. § 1332(f) (2012); 16 U.S.C. § 1333(b)(1) (2012); see also *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at vii.

228. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984); 16 U.S.C. § 1331.

229. *In Def. of Animals*, 751 F.3d at 1075; see also 16 U.S.C. § 1331 (2012).

range.²³⁰ There is a danger that the deference granted to the BLM will devastate the population of wild horses because the BLM can no longer fiscally support the removed wild horses and, thus, making the wild horses susceptible to unregulated sales or euthanasia.²³¹ Given the drastic fiscal deficiencies of the Wild Horse and Burros Program, the BLM should restrict the amount of removals, and pursue a more rigorous fertility control strategy.²³² In doing so, the BLM would be able to fiscally focus on managing the wild horses on the range, rather than having an expensive and unsustainable program that has domesticated more than forty-seven thousand wild horses that were originally wild on the range.²³³ In conclusion, the courts can influence the success of the Wild Horse and Burro Program by rejecting the BLM's removal proposals that violate the Act's removal procedures (like removing non-excess wild horses).

230. See 16 U.S.C. §§ 1331, 1333(b)(2)(A)-(C); see also *In Def. of Animals*, 751 F.3d at 1073.

231. *No Charges Filed After Gov Watchdogs Finds BLM Illegally Sold Wild Horses to Slaughter*, RT (Oct. 28, 2015, 4:03 PM), <https://www.rt.com/usa/319912-blm-sold-wild-horses-slaughter/>.

232. See *Using Science to Improve the BLM Wild Horse and Burro Program*, *supra* note 2, at vii.

233. *Factsheet on Challenges Facing the BLM in its Management of Wild Horses and Burros*, *supra* note 74.