

March 21, 2022

**Via Email & Certified Mail**

Angela Richman, Acting Superintendent  
Theodore Roosevelt National Park  
U.S. National Park Service  
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**Re: Roundups and Removals of Wild Horses Under the Jurisdiction of the Theodore Roosevelt National Park**

Dear Acting Superintendent Richman:

On behalf of our clients, Chasing Horses Wild Horse Advocates (“Advocates”), we are writing to express serious concerns about the Theodore Roosevelt National Park’s (“TRNP” or “the Park”) management of wild horses. Advocates is specifically concerned about the Park’s recent roundups and removals of these animals, which have been undertaken without public notice or the concomitant environmental analysis required by federal law.

The TRNP’s wild horses are a celebrated public resource that attract hundreds of thousands of visitors to the Park each year. Wild horses are an enduring symbol of the American West and therefore synonymous with the values the TRNP protects. As such, the public (including Advocates) has a vested interest in understanding how the Park is managing this herd, including why certain horses are removed from the Park, how those decisions are reached, and what the Park is doing to ensure that the TRNP herd’s historic significance will be protected for future generations to appreciate.

Unfortunately, the TRNP has not been entirely transparent about its management of wild horses. Although the Park considers these horses to be “livestock,” it has never explained *why* they are designated as such, especially since these animals have been roaming free in this area since well before the Park’s establishment. The distinction is important. To the extent the Park believes these horses to be “livestock,” the National Park Service’s (“NPS”) regulations obligate the Park to notify the public *before* roundups and removals occur. By contrast, if these horses are in fact “wild,” which they are, the TRNP must take certain measures to protect their genetic diversity and may not remove them from the Park without undertaking certain analyses mandated by federal law.

Nor has the Park’s management of wild horses complied with the agency’s duties under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347. While the Park conducted some cursory NEPA analysis over 40 years ago, much has changed since. Regardless,

there is no indication that the TRNP’s recent roundups even fall within the ambit of its 1978 NEPA analysis because the Park has never tiered its site-specific decisions to that 40+ year-old programmatic document.

For these reasons, as explained in further detail below, Advocates harbors serious reservations about the TRNP’s management of this cherished public resource. It is their hope that this letter may open a dialogue between the Park and the public about what the TRNP is doing to safeguard wild horses for future generations. However, the protection of these particular horses is of paramount importance to Advocates. Thus, if the Park is unwilling to correct the legal violations described herein, Advocates will explore all available options to obtain the TRNP’s compliance with federal law—including, if necessary, litigation.

## **BACKGROUND**

Established in 1947 “to honor the memory of Theodore Roosevelt,” the TRNP protects North Dakota’s “Badlands,” a landscape “that had a profound effect” on the future President’s conservation ethos. *See* NPS, *Foundation Document: Theodore Roosevelt National Park* at 3 (April 2014), <https://bit.ly/3sPRgkK> [hereinafter *Foundation Document*]; *see also* 16 U.S.C. §§ 241-247 (TRNP enabling legislation). The Park’s “purpose statement,” therefore, provides that: “[TRNP] memorializes Theodore Roosevelt and pays tribute to his enduring contribution to the conservation of our nation’s resources by preserving and protecting the scenery, wildlife, and wilderness qualities of the North Dakota Badlands—the landscape that inspired Roosevelt and still inspires visitors today.” *Foundation Document, supra* at 6.

Today, the Park encompasses 70,477 acres and is characterized by “striking contrasts.” *Id.* at 4. While certain parts contain the “gently rolling mixed grass prairies of the Northern Great Plains,” others are marked by “fantastically broken terrain,” i.e., the sheer cliff faces emblematic of North Dakota’s Badlands. *Id.* And, although the Park may seem “inhospitable” to outside observers, it is in fact “home to a variety of plants and an abundance of Northern Great Plains wildlife, including iconic animals of the West” such as elk, bison, and, of course, wild horses. *Id.*

Wild horses have inhabited the lands in and around the TRNP since long before the Park’s establishment. *See* NPS, *Horse Background and History*, <https://bit.ly/3FJxuvE> (last visited March 21, 2022) [hereinafter *Horse Background*]. Indeed, bands of wild horses were an integral part of Theodore Roosevelt’s experience when he visited the Badlands. *See* *Foundation Document, supra* at 6. After the Park was established, however, NPS made a concerted effort to roundup and remove all wild horses from the park. *Id.* In 1970 though, the TRNP adopted a new policy regarding wild horses whereby the Park would maintain a limited population as a representation of “Theodore Roosevelt’s experiences [t]here during the open-range ranching era.” *Id.*

Although wild horses found on federal lands managed by the U.S. Bureau of Land Management (“BLM”) and the U.S. National Forest Service are protected by the Wild Free-Roaming Horses and Burros Act in recognition of their role as “living symbols of the historic and pioneer spirit of the West,” 16 U.S.C. § 1331, NPS merely classifies the horses on the TRNP as “livestock” meant “to represent a historic scene reminiscent of Theodore Roosevelt’s time in

the Badlands of North Dakota.” NPS, *Frequently Asked Questions About Horses*, <https://bit.ly/3mXYyPh> (last visited March 21, 2022) [hereinafter FAQs]; *see also* 36 CFR § 2.60(a)(3) (prohibiting “livestock of any kind in a park area,” except “[a]s designated, when conducted as a necessary and integral part of a recreational activity or required in order to maintain a historic scene.”). Notably, however, the Park has never explained why these free-roaming animals, which existed in the Badlands before the Park did, have been classified as “livestock” rather than “wildlife.”

In 1978, the wild horse herd in the TRNP numbered between 70 and 75 individuals. NPS, *Environmental Assessment for Feral Horse Reduction* at 2 (1978), <https://bit.ly/3aEOQLW> [hereinafter Wild Horse EA]. Because the TRNP’s “Resource Management Plan for feral horses provide[d] for the maintenance and management of about 40-horse herd,” NPS decided to gather and remove “excess” wild horses from the TRNP. *Id.* (“In order to maintain the herd at the prescribed number of approximately 40, and to prevent the populations from increasing to a point that would be more difficult to manage, it is now necessary to reduce the number by some 30 to 35 animals, and to periodically reduce their numbers in future years.”).

In conjunction with its gather decision, the agency prepared an Environmental Assessment (“EA”) pursuant to NEPA. The EA briefly compared three alternatives: (1) removing all wild horses from the Park, i.e., “herd removal”; (2) a no-action alternative; and (3) a “comprehensive management” approach, which “include[d] maint[aining] of population numbers at a prescribed level”—specifically, the approximately 40 individuals described above. Wild Horse EA at 1.

During its evaluation of the potential impact of different herd reduction strategies, NPS invited Milton Frei, a BLM Range Conservationist specializing in wild horses, to comment on NPS’s proposed action. *See* BLM, *Wild Horse Herd Evaluation Report for Theodore Roosevelt National Park* (1977). *See* Wild Horse EA at 15-28.<sup>1</sup> In broad terms, Mr. Frei observed that “[t]he habitat in [the TRNP] can best be described as *excellent* for wild horses,” meaning “that *the park could support a much larger population* of wild horses without adverse impacts upon the soil or vegetative resources as well as other wildlife species.” *Id.* at 17 (emphases added). He also noted that the NPS’s determination regarding the “‘optimum numbers’ of wild horses” on the TRNP is, “for the most part, an arbitrary and administrative decision” by the NPS. *Id.* at 19. Still, recognizing NPS’s desire to bring the horse population down to this “arbitrary” number, Mr. Frei recommended a number of fertility-based reduction strategies, including “vasectomies for dominant stallions” and “the injection of a sclerosing agent such as iodine.” *Id.* at 24. NPS’s final EA discussed these alternatives only briefly in passing. *See id.* at 3 (“Other alternatives for reduction such as direct reduction, fertility control, and immobilization would be accomplished on a very limited scale with direct impact on only the affected animals.”). At no point in its NEPA analysis, for example, did NPS actually evaluate the impact that those fertility control methods would have on the herd.

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<sup>1</sup> Mr. Frei’s report is included in the Wild Horse EA as an addendum. Thus, for convenience, Advocates cites to the report as it appears in the Wild Horse EA.

Since 1978, it appears that roundups of wild horses have occurred on a sporadic basis—as often as every year, or “every three to four years,” “utilizing helicopters to herd horses to a handling facility.” NPS, *Horse Management*, <https://bit.ly/2YXjrlF> (last visited March 21, 2022) [hereinafter *Horse Management*]. Horses removed from the park are sold at online auctions by the General Services Administration (“GSA”). *Id.* Beginning in 2009, NPS allowed Colorado State University to research “the effectiveness of GonaCon® (an immunocontraceptive agent) for controlling reproduction in feral horses at the park.” *Id.* Finding the results of that study promising, in 2020, the Park began administering GonaCon to every female horse (>8 months of age) within the TRNP “to reduce foaling rates and minimize the number of animals that must be captured and sold annually” by the Park. NPS, *Categorical Exclusion for Applying Contraceptive to Limit Horse Demonstration Herd Reproduction* at 1 (Sept. 8, 2020), <https://bit.ly/3qejqEe> [hereinafter *GonaCon CE*].<sup>2</sup>

Because NPS does not make certain important information about its management of wild horses publicly available, in November 2021, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C § 552, Advocates filed a request for documents and information to NPS regarding the TRNP’s management of wild horses. Specifically, Advocates sought, *inter alia*, information about: (1) when and why the TRNP’s wild horses were designated as “livestock” under NPS’s regulations; (2) how the Park determined that excess numbers of horses existed such that gathers became necessary (e.g., wild horse censuses); (3) how the Park was maintaining the historic significance of this herd; and (4) what kind of NEPA analysis the Park has conducted in support of its recent roundups. The Park’s “final” response on February 11, 2022, was stunning. Those disclosures (or, the lack thereof) revealed that the Park was not undertaking censuses before or after gathers, that its roundups were not accounting for the horses’ historic significance, and that its horse management program continued to be guided solely by the 44-year-old Wild Horse EA.

Roughly one month later, on March 16, 2022, the Park announced that it was beginning to prepare a new management plan for wild horses. *See* NPS, *Scoping Notice Regarding Livestock Management Plan* (March 2022), <https://bit.ly/3MXU2wt> [hereinafter *Scoping Notice*]. However, the *Scoping Notice*, including its initial alternatives, indicates that the agency does not intend to address the important issues discussed below. For instance, the *Scoping Notice* seems to indicate that no further explanation regarding the horses’ classification is forthcoming. Nor does the notice mention that the Park’s management objectives for these animals must ensure that they represent an historically accurate herd. Although Advocates is encouraged by Park’s long-overdue decision to prepare a management plan for wild horses, they remain concerned that the direction of the Park’s wild horse management regime—including gathers conducted before the plan is complete—fails to comply with the Park’s obligations under NEPA and the Organic Act. These concerns are discussed in more detail below.

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<sup>2</sup> Despite ostensibly being aware that “[m]any organizations and individuals have [an] interest in horse management at [the TRNP],” *Horse Announcement Archives, supra*, the Park undertook this herd-wide contraceptive program without affording prior notice to the public and exempted its decision from any NEPA review under a categorical exclusion. *See* *GonaCon CE* at 2.

## DISCUSSION

### **I. The Park's Ad Hoc Classification of Wild Horses as 'Livestock' Runs Contrary to the Plain Meaning of the Agency's Regulations**

NPS, and the National Park system as a whole, were established by Congress in 1916 through the Organic Act. *See* 54 U.S.C. § 100101 *et seq.* Unlike other federal land management statutes (e.g., the Federal Land Policy and Management Act, 43 U.S.C §§ 1701(a), 1702(c)) that require a balance between conservation and extractive uses, the Organic Act focuses exclusively on the preservation of the nation's park lands and the specific resources found therein. In relevant part, the Organic Act provides that NPS:

[S]hall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

54 U.S.C. § 100101(a).

Given the Organic Act's strict preservation mandate, NPS's regulations implementing the Act broadly prohibit the removal of any wildlife, dead or alive, from the boundaries of a National Park. *See* 36 C.F.R. § 2.1; *see also id.* § 2.2 (NPS regulations concerning wildlife, which include a prohibition against "taking" and/or intentionally "disturbing" wildlife found within a park unit). According to NPS, "[w]ildlife means *any* member of the animal kingdom and includes a part, product, egg or offspring thereof, or the dead body or part thereof, except fish." 36 C.F.R. § 1.4 (emphasis added). Notably, NPS's regulations pertaining to wildlife take do *not* draw any distinction between native and non-native (i.e., invasive) species, although the latter may be removed from a park unit under specified conditions. *See* NPS, *Management Policies* at 48 (2006), <https://bit.ly/3tvupvi> [hereinafter *Mgmt. Policies*].

NPS's regulations, however, contain an exception for "livestock" animals. The "pasturing or grazing of livestock of any kind in a park area" is generally prohibited, but may be permitted "as a necessary and integral part of a recreational activity or required in order to maintain a historic scene"—so long those animals have been "designated" as such by the responsible park official. 36 C.F.R. § 2.60(a)(3).

Although NPS has never formally designated the wild horses of the TRNP as "livestock," the agency manages these animals as though they were livestock. *See* Wild Horse EA at 2 ("Since the horses cannot be classified as a native wildlife species, they are managed as a livestock display, significant because of the presence of feral horses in this area during Theodore Roosevelt's time."); *see also id.* at 8 ("[F]eral horses are historic livestock displays that should be managed separately and apart from native wildlife species."); FAQs, *supra* ("[P]ark horses are maintained as a demonstration herd to represent a historic scene reminiscent of Theodore Roosevelt's time in the Badlands of North Dakota.").

The TRNP’s classification, however, runs counter to the plain language of the NPS’s implementing regulations. Although those regulations do not define “livestock,” that term generally refers to domesticated animals. *See Livestock*, Webster’s New Collegiate Dictionary (7th ed. 1967) (“[A]nimals kept or raised for use or pleasure.” (emphasis added)); *see also* 43 C.F.R. § 4100.0-5 (BLM regulations defining “livestock” as “species of domestic livestock - cattle, sheep, horses, burros, and goats.” (emphasis added)). By contrast, here, there is no indication that the wild horses found in the TRNP are domesticated in any way; that is, they have never been fed, sheltered, or cared for in any way by the Park. And, while these horses may be descendants of domesticated animals, the Park itself refers to the modern population as “feral”—a term that, by definition, means these horses are no longer “domesticated or cultivated.” *See Feral*, Webster’s New Collegiate Dictionary (7th ed. 1967) (“[O]f, relating to, or suggestive of a wild beast”); *see also* Wild Horse EA at 2; Foundation Document at 36 (characterizing the TRNP herd as “feral”). Moreover, as mentioned above, wild horses have roamed free across North Dakota’s Badlands (and, specifically, the Park area)—without human intervention—since well before the TRNP even existed. *See* Horse Background, *supra*; *see also* Castle Report, *infra*, at 1-6.

For all these reasons, the Park’s unexplained classification of wild horses as “livestock” cannot be squared with the plain meaning of NPS’s regulations and therefore cannot be sustained under basic principles of administrative law. *See Chicago Transit Auth. v. Adams*, 607 F.2d 1284, 1289 (7th Cir. 1979) (“Words are to be given their ordinary meaning absent persuasive reasons to the contrary.”); *see also In re Old Fashioned Enterps., Inc.*, 236 F.3d 422, 425 (8th Cir. 2001) (“Although substantial deference is due an agency’s interpretation of its regulations, no deference is due if the interpretation is contrary to the regulation’s plain meaning.” (citing *Shalala v. St. Paul–Ramsey Med. Ctr.*, 50 F.3d 522, 528 (8th Cir.1995)); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (“As a general interpretative principle, ‘the plain meaning of a regulation governs.’” (quoting *Wards Cove Packing Corp. v. Nat’l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002))).

Notably, the TRNP’s “livestock” classification is at odds with how wild horses are managed at the Assateague Island National Seashore—one of the only other units of the National Park system that manages for wild horses. At Assateague, NPS maintains a herd of 80-100 wild horses across 48,700 acres. NPS, *Environmental Assessment of Alternatives for Managing the Feral Horses of Assateague Island National Seashore* at 7, 28 (2008). Like the TRNP, the Assateague herd pre-dates the park’s establishment and are descendants of domestic stock. *Id.* at 5, 62. Unlike the TRNP, however, the “feral horse population [at Assateague] is managed, in general, as a *wildlife resource*.” *Id.* at 7 (emphasis added). This, of course, flatly undermines the TRNP’s assertion that horses must be “managed as a livestock display” because they “cannot be classified as a native wildlife species” under the agency’s regulations. *See* Wild Horse EA at 1.

The distinction between “livestock” and “wildlife” is more than semantics. By classifying wild horses as livestock, the TRNP has denied these animals certain protections under its agency-wide *Management Policies*, a document that sets forth “mandatory” management

directives. While this document appropriately delineates “native” from “nonnative” species,<sup>3</sup> even the latter benefit from certain safeguards against their removal from a given park. For example, where NPS seeks to remove nonnative species, it must ensure their removal is “prudent and feasible,” and that the given species satisfies any number of removal criteria, including that it “disrupts the genetic integrity of native species” or “disrupts the accurate presentation of a cultural landscape.” *Id.* at 48. Assuming a nonnative species meets these removal criteria, NPS’s *Management Policies* dictate that the responsible park engages in a comprehensive planning process—including “public review and comment, where appropriate”—to achieve this goal. *Id.*

The TRNP’s removal of wild horses has not complied with any of these directives. As explained, Advocates’ recent FOIA request sought records “regarding how NPS determines that an excess number of horses exist on the TRNP such that roundups and removals of those horses are necessary.” The dearth of responsive records indicates that the TRNP’s roundups are, at best, conducted on an ad hoc basis and lack any coherent guiding principle. For example, the agency’s response indicates that it is not tracking the kinship of the horses under its jurisdiction, or monitoring the herd for potential impediments to their reproductive capacity or their genetic diversity (e.g., risks associated with inbreeding).

Instead, the Park’s management regime is evidently driven by a singular desire to achieve a herd size that the agency itself has deemed “somewhat arbitrary” in its now-obsolete Wild Horse EA, *id.* at 6. The Park owes more to the public under federal law and its own regulations and policies. At the very least, it must explain why its decision to manage wild horses as livestock rather than wildlife is a rational reading of the agency’s implementing regulations. It should also explain why the agency’s removal procedures depart from the mandatory guidance laid out in its *Management Policies*. Without these explanations, any further roundups and removals predicated on the Park’s counterintuitive regulatory interpretation and/or undertaken without observance of its agency-wide policies are unlawful. *See, e.g., Chicago Transit Auth.*, 607 F.2d at 1289.

## **II. Even While Managing Wild Horses as ‘Livestock,’ the Park’s Recent Roundups Violate Its Implementing Regulations and Management Policies**

As the Organic Act makes clear, each National Park has been established for the purpose of protecting certain prescribed values unique to each park unit. *See* 54 U.S.C. § 100101(a). Those values are typically defined by the park’s enabling legislation, *e.g.*, 16 U.S.C. § 241 *et seq.* (TRNP enabling statute), and further honed by each park’s respective *Foundation Document*, which lays out “the park’s purpose, significance, fundamental resources and values, other important resources and values, and interpretive themes,” *Foundation Document, supra* at 2.

As explained above, the TRNP’s *Foundation Document* states that the Park “memorializes Theodore Roosevelt” and pays tribute to his conservation legacy by preserving

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<sup>3</sup> Whereas “[n]ative species are defined as all species that have occurred, now occur, or may occur as a result of natural processes on lands designated as units of the national park system,” nonnative species, like wild horses, are those “that occupy or could occupy park lands directly or indirectly as the result of deliberate or accidental human activities.” *Mgmt. Policies, supra* at 43.

“the landscape that inspired Roosevelt and still inspires visitors today.” *Id.* at 6. Wild horses are, of course, a critical part of that landscape. Hence, the TRNP’s *Foundation Document* recognizes that these wild horses “were an important part of the cultural landscape when Theodore Roosevelt lived in the area and they are a very popular visitor attraction today.” *Id.* at 10; *see also* Wild Horse EA at 6 (“[T]he present herd adds authenticity to the historical interpretation of the park.”); *see also id.* at 7-8 (explaining that the Park’s “need for” a wild horse herd “has been demonstrated by strong local support for such a herd, and the historical significance of wild (feral) horses in the badlands and throughout the West.”).

Naturally, NPS’s *Management Policies* regarding nonnative species are geared towards promoting the values which each park was established to protect. For example, where nonnative species are “maintained to meet specific, identified management needs,” like cultivating a historic setting, the nonnative “species used must be known to be historically significant, to have existed in the park during the park’s period of historical significance, to be a contributing element to a cultural landscape, or to have been commonly used in the local area at that time.” *Mgmt. Policies, supra* at 47.

The TRNP is well aware of which types of horses best represent those that “existed in the park during the park’s period of historical significance,” or were “commonly used in the local area at that time.” *Id.* In the late 1980s, the Park commissioned a 300+ page study that investigated “the origins and history of feral horses in [North Dakota’s] Badlands,” and recorded “the genealogy of the extant herd.” *See* Castle McLaughlin, *The History and Status of the Wild Horses of Theodore Roosevelt National Park* at viii (Dec. 1989), <https://bit.ly/365UtUy> [hereinafter *Castle Report*]. Based on extensive archival research and numerous interviews, the report ultimately recognized that the horses found in the TRNP were descendants of two closely related stocks (“ranch” and “Indian”), which, together, represent a type of “original” Badlands horse. *Id.* at 244; NPS, *Natural Resources Management Plan and Continued Environmental Assessment* at 46-47 (1984) (referring to the TRNP horses as “a historic badlands horse herd, with the animals being direct descendants of the horses which were found here when the park was founded”).<sup>4</sup> This historical lineage traces all the way back to the horses surrendered by Sitting Bull in the late 1800s. *See* *Castle Report* at 70. Because this lineage represents a concrete connection to the historic value of the Park, the *Castle Report* recommended that the TRNP take care to manage the herd in a way that preserves this historical lineage. *See id.* at 250-52.

Yet, as mentioned above, the TRNP’s response to Advocates’ FOIA request reveals that the Park has little regard for whether today’s herd faithfully depicts the stock that existed “when Theodore Roosevelt lived in the area,” *Foundation Document, supra*, at 10. For instance, during its spring 2021 roundups, the Park sought “to capture mostly female horses that are between 1 and 2 years old” in part because they “adapt more quickly to adoption.” *See* NPS, *Horse Announcement Archives*, <https://bit.ly/3MQLHKT> (last visited March 21, 2022) [hereinafter *Archives*]. Notably absent from its capture criteria was any consideration of whether removing all 1–2-year-old females would further dilute the TRNP’s historically significant lineages, or

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<sup>4</sup> Wild horses from this historical lineage have sometimes been referred to as “Nokota” horses. *See* Castle McLaughlin, *A Brief History of the Nokota Horse*, <https://bit.ly/368jdf2> (last visited March 21, 2022).

even what impact these narrowly focused roundups would have on the herd's phenotypic expression. *See id.*

Rather than undertake evidence-based roundups targeted to maintain the herd's historic significance and genetic lineages, the Park's recent focus has been purely quantitative. Modern roundups blindly strive to achieve the 1978 Wild Horse EA's target population of "approximately 40 horses." Wild Horse EA at 1. But that outdated analysis, which seemingly continues to guide gathers some 40+ years later, fails to account for the Park's duty to ensure that the modern herd represents that which "existed in the park during the park's period of historical significance," Mgmt. Policies, *supra* at 47. Indeed, there is no discussion there of the Park's stewardship duty towards the remnants of this historic, yet disappearing, breed; to the contrary, despite recognizing that some horses still remain in the Park which are "representative of [those] found here in the late 1800's," Wild Horse EA at 8, the Wild Horse EA nevertheless views any horse as a "sufficient" stand-in for the Nokota, *see id.* at 11 ("Maintaining a herd of not less than 35-40 head will provide a display of horses sufficient to present the public with an opportunity to see horses roaming free, much as they must have done during Roosevelt's time.").

The Park's narrow focus on achieving a numeric herd target—one which the Park itself has described as "somewhat arbitrary," *id.* at 6—without analyzing and/or explaining why its gathers will not impair the historic value of the TRNP herd by diluting important lineages cannot be squared with the Park's duties under the Organic Act. *See Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 195 (D.D.C. 2008) (finding that a NPS decision which departed from its *Management Policies*, "with no supporting analysis or explanation, is quintessentially arbitrary"); *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 100 (D.D.C. 2006) ("Merely describing an impact and stating a conclusion of nonimpairment is insufficient [under the Organic Act], for this merely sets forth 'the facts found' and 'the choice made,' without revealing the 'rational connection'—the agency's rationale for finding that the impact described is not impairment."); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 30 (D.D.C. 2010) (rejecting NPS management decision that offered "little or no basis for understanding why an identified impact fails to rise to the level of an impairment").

Even setting aside the Park's failure to maintain a historically authentic herd, the TRNP's gather procedures have also failed to comply with the requisite notice procedures found in NPS's implementing regulations. Because the Park currently manages these animals as "livestock," the agency's regulations regarding livestock impoundment apply. *See* 36 C.F.R. § 2.60(c). Those regulations provide that before the Park disposes of livestock with a known owner—like the members of the public on whose behalf the agency manages Park resources—the TRNP must provide at least "five (5) days" of advanced notice. *See id.* § 2.60(c)(2)(i); *see also* Mgmt. Policies at 48 (recommending that removals of nonnative species be preceded by consultations with "interested groups" and "public review and comment, where appropriate").

Yet, here, the Park has only announced its intent to dispose of excess wild horses on the day gathers are scheduled to occur. *See, e.g.,* Archives, *supra* (notifying the public for the first time on March 22, 2021 that a gather would be conducted that day, and the captured horses would "be transferred to private owners" through the GSA). The Park cannot have it both ways; it cannot characterize wild horses as "livestock" but then choose to ignore the procedures that

apply to livestock. To the extent the Park continues to manage these animals as such, the Park's gathers must comply with its own regulations and policies regarding livestock removals.

### **III. The Park's Current Management Regime Lacks Valid NEPA Analysis**

Broadly speaking, NEPA ensures that federal agencies take “a ‘hard look’ at the environmental consequences of proposed federal action[s].” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Although the Act “itself does not mandate particular results,” it does prescribe “the necessary process” agencies must follow to assure the public it has engaged in the requisite environmental analysis—before action is taken. *Id.* at 350; *see also Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) (holding “that an EIS must be prepared before any irreversible and irretrievable commitment of resources” (citations and footnote omitted)).

For any major federal action significantly affecting the environment, NEPA obliges agencies to examine the environmental impacts of that action, as well as a comparison of less damaging alternatives thereto. 42 U.S.C. § 4332(2)(C). The agency's findings must be detailed in an EIS, prepared in consultation with other federal agencies with special expertise relevant to the proposed action's environmental impact, and circulated for review and comment by the public. *Id.*

Where it is unclear whether a major federal action entails a “significant” environmental impact (and, therefore, whether an EIS is required), an agency may first prepare an Environmental Assessment (“EA”). 40 C.F.R. § 1501.5(a)-(b). Sometimes called a “mini-EIS,” *Fund for Animals, Inc. v. Thomas*, 932 F. Supp. 368, 370 (D.D.C. 1998), an EA must, *inter alia*: (1) “provide sufficient evidence and analysis” to determine whether an EIS is required; (2) analyze and discuss alternatives to the proposed action; and (3) incorporate the recommendations of sister agencies with relevant expertise. *See* 40 C.F.R. § 1501.5. Although EAs are typically “a less substantial document,” they are nevertheless “intended to aid decisionmaking and fulfill the purposes of an EIS, albeit to a lesser degree.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991).

For broader, long-term actions, like land-use plans or general management plans, NEPA's implementing regulations allow the agency to employ a tiered-analysis approach. *See* 40 C.F.R. § 1501.11 (NEPA regulations regarding tiering). After the agency has prepared an EIS or EA analyzing the environmental effects of and alternatives to a given program or land-use plan, the agency may “summarize and incorporate by reference the issues discussed in th[at] broader document” when analyzing the environmental impacts associated with site-specific actions implementing that program or plan. *Id.* § 1501.11(b); *see also W. Org of Res. Councils v. Zinke*, 892 F.3d 1234, 1238-39 (D.C. Cir. 2018) [hereinafter *WORC*] (Whereas a programmatic NEPA document “ensures that the agency assesses the broad environmental consequences attendant upon a wide-ranging federal program,” later, site-specific NEPA documents “analyz[e] the incremental impacts of each specific action taken as part of a program.”). In essence, tiering acts as a labor-saving device that allows an agency to avoid repeating an analysis completed for a land-use plan each time the agency implements that plan. *Id.* § 1501.11(a); *see also Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 511-12 (D.C. Cir. 2010).

Importantly, however, tiering does not allow an agency to ignore relevant environmental issues, including significant new circumstances or information; if the analysis underlying a broad plan is “outdated” or fails to address an issue that is relevant at the implementation stage, the agency “generally cannot rely on [that] analysis to support its actions” at the implementation stage. *WORC*, 892 F.3d at 1238 (citing 40 C.F.R. § 1502.9(c)(1)(ii)); *see also* Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,036 (1981) (“[I]f the [EIS or EA] concerns an ongoing program, [EISs or EAs] that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of [a] supplement.”).

At the TRNP, wild horse gathers have been conducted under the analytical umbrella of the Park’s 1978 Wild Horse EA, which prescribed a herd size of “approximately 40” individuals. *See* Wild Horse EA at 2. There is no question that this EA is a programmatic analysis; it sought to evaluate the management objectives outlined by Park’s “Resource Management Plan for feral horses,” and its implementation is not limited by any temporal boundary stated in the EA. *See id.* (stating a generic need “to periodically reduce [wild horse] numbers in future years”); *see also id.* at 17 (Mr. Frei’s report referring to the action under consultation as “the wild horse management plan for [the TRNP].”). Since then, however, the Park has never conducted any site-specific environmental analyses for its individual roundups, much less tiered any such analyses to the 1978 Wild Horse EA, as required by NEPA’s implementing regulations. *See* 40 C.F.R. § 1501.11(b).

In any case, the 44-year-old Wild Horse EA cannot legally support the Park’s current gather decisions. To the extent that EA even analyzed range conditions and/or the Park’s carrying capacity for wild horses, which it did only cursorily, that analysis is now extremely stale. As the Park is well aware, the natural processes that govern range conditions and herd capacity are inherently dynamic, which is precisely why the Park chooses to rely on adaptive management approaches when dealing with natural resources. *Mgmt. Policies, supra* at 27 (encouraging park managers “to use an adaptive management approach” as “a means [of] providing flexibility in the face of changing natural conditions”). As such, the 1978 Wild Horse EA is “outdated” and, therefore, can no longer serve as valid NEPA analysis to support the Park’s recent gather decisions. *C.f. WORC*, 892 F.3d at 1238; *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011) (For purposes of NEPA compliance, relying “on data that is too stale to carry the weight assigned to it may be arbitrary and capricious.” (citation omitted)); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (finding that six-year-old data, without updated habitat surveys, was too stale); *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 703–04 (9th Cir. 1993) (holding that the Forest Service violated NEPA where it relied on “stale scientific evidence” without addressing more recent, contradictory population data).

The Wild Horse EA’s validity—and the Park’s reliance thereon in recent gathers—is further undermined by the presence of “significant new circumstances or information,” *and* “substantial changes” to the Park’s wild horse management regime. 40 C.F.R. § 1502.9(d). With respect to the latter, for example, the 1978 Wild Horse EA found that “management factors” such as “forage and water” dictated that the Park “maintain the herd size at approximately 40

horses,” *id.* at 2; by contrast, however, the Park’s 2014 *Foundation Document*, which “provide[s] basic guidance for planning and management decisions,” states that “[t]he ideal population range within the park—based on forage allocation—is 50 to 90 horses,” *id.* at 36 (emphasis added).<sup>5</sup> While the Park’s ever-shifting population target seems to indicate that the TRNP has no clear management direction for these animals, it also demonstrates, at minimum, that “new circumstances or information” have upended the Wild Horse EA’s target herd size. 40 C.F.R. § 1502.9(d)(1)(i)-(ii). As such, that EA is no longer a valid basis for discharging the Park’s duty under NEPA and must, therefore, be supplemented before further gathers may occur.

Since 1978, moreover, there have been significant scientific advances related to wild horse management. In 2011, for instance, BLM commissioned the National Academy of Sciences (“NAS”) to review its wild horse and burro management program “to assess the effects of management actions, such as treating animals with contraceptives or removing animals from the range, and to evaluate BLM’s tools for measuring the effects.” NAS, *Using Science to Improve the BLM Wild Horse and Burro Program: A Way Forward* at 14 (2013) [hereinafter NAS Report]. The NAS made a number of findings directly relevant to the Park’s management of wild horses; for example, relying on extensive science that post-dates 1978, the report found that a larger herd is necessary to maintain the appropriate “effective population size,” i.e., the number of breeding horses in a herd necessary to maintain the herd’s genetic diversity. *Id.* at 161-163. Relatedly, the NAS Report found that by keeping herd size artificially low, land managers (like the Park) are in fact causing wild horse populations to increase at higher rates, thereby leading to additional gathers than might otherwise be necessary. *Id.* at 81. It also includes information about the effects of fertility control on genetic diversity and on what management actions can/should be taken to manage multiple herds as a metapopulation and to preserve the genetic diversity in each. *Id.* at 148-49. Given the comprehensive nature of the NAS Report and its direct bearing on federal wild horse management practices, at least one court has already found that an agency’s failure “to consider and analyze” the NAS Report’s findings violates NEPA. *See Am. Wild Horse Pres. Campaign v. Zinke*, No. 1:16-cv-00001-EJL, 2017 WL 4349012 at \*\*7-10 (D. Idaho Sept. 29, 2017).

With respect to the TRNP specifically, the Park’s recent decision to utilize modern equine contraceptives to control the TRNP’s herd size also represents “significant new circumstances or information” that were not considered by the 1978 Wild Horse EA. 40 C.F.R. § 1502.9(d). As explained above, in 2009, the Park began to experiment with administering GonaCon, “an immunocontraceptive agent,” to control “reproduction in feral horses at the park.” Horse Management, *supra*. Evidently, NPS considered the experiments successful—although it did not inform the public of the experiments’ results—because, in 2020, the Park began to administer GonaCon to “all female feral horses (>8 months of age) . . . to reduce foaling rates and minimize the number of animals that must be captured and sold annually . . . .” GonaCon CE at 1-2.

Although BLM’s comments on the Wild Horse EA recommended that the Park explore “vasectomies for dominant stallions” and “the injection of a sclerosing agent such as iodine” to

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<sup>5</sup> Elsewhere, the Park has stated that “the current population goal for the [wild horse] herd is 35-60 head.” FAQs, *supra*.

control herd growth, Wild Horse EA at 24, the EA itself gives only a passing mention to fertility control methods, *e.g.*, Wild Horse EA at 3. Regardless, GonaCon did not even exist in 1978. *See* U.S. Dep’t of Agric., *Contraceptives: The Birds and the Bees* (June 2, 2020), <https://bit.ly/30xvQ03>. Thus, there can be no doubt that the advent of GonaCon and the Park’s subsequent decision to administer this drug to all female horses in the TRNP constitutes both “significant new circumstances or information,” and “substantial changes” to the Park’s wild horse management program. 40 C.F.R. § 1502.9(d)(1)(i)-(ii). Likewise, as documented in the NAS’s seminal 2013 report, myriad additional information is now available about many forms of fertility control; this information, which did not exist when NPS issued its EA 44 years ago, constitutes substantial new information that must be taken into consideration as part of a lawful NEPA process. *Id.*; *see also Am. Wild Horse Pres. Campaign*, 2017 WL 4349012 at \*11 (holding that BLM violated NEPA where it failed “to explain the basis for its decision to manage [a certain wild horse herd] as an entirely non-reproducing herd in light of those significant impacts and the NAS Report’s findings”).

Taken together, the foregoing indicates that the 1978 Wild Horse EA is no longer a tenable basis to support further gathers until it has been supplemented with additional site-specific analysis, and/or replaced entirely. The Park’s recent decision to do the latter inherently acknowledges this fact. Importantly though, the Park’s announced plan to replace its wild horse management plan—which came only after years of prodding by Advocates and other members of the public—implicates NEPA’s bedrock prohibition against uninformed agency action. *See, e.g., Robertson*, 490 U.S. at 351 (“NEPA merely prohibits uninformed—rather than unwise—agency action.”). “Agency action” in this context includes any commitment by the Park of irreversible and irretrievable resources; because the Act requires agencies to include in each EIS a statement regarding “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented,” 42 U.S.C. § 4332(C)(v), courts have held that this “[o]bviously . . . only makes sense if the EIS is prepared *prior to the* commitment of resources.” *Conner*, 848 F.2d at 1446 n.13 (emphasis added); *see also Env’tl. Def. Fund v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979).

In practical terms, courts have found that agencies violate this requirement by entering into contracts implicating the resources at issue in an agency’s ongoing NEPA process. For example, in *Metcalf v. Daley*, the U.S. Court of Appeals for the Ninth Circuit found that the National Oceanic and Atmospheric Administration had prematurely committed “irreversible and irretrievable” resources by entering into co-management contracts with a tribe that sought to hunt a limited number of whales during the agency’s NEPA process to determine the environmental impacts of that same hunt. 214 F.3d 1135, 1143-44 (9th Cir. 2000); *see also Andrus*, 596 F.2d at 852-53 (finding that Department of Interior had violated NEPA by entering into water option contracts before it completed an EIS concerning the water diversion project that would fulfill those contracts).

Here, as explained above, the Park is now engaging in the NEPA process to develop a feral horse management plan. *See generally* Scoping Notice, *supra*. To the extent the Park enters into interim contracts to facilitate the removal of wild horses from the TRNP (*e.g.*, helicopter-pilot engagements, adoption or veterinarian contracts) despite its ongoing NEPA review and the blatant deficiencies of its extant Wild Horse EA, each of the Park’s gather decisions will be

unlawful, absent site-specific NEPA analyses. *Metcalf*, 214 F.3d at 1144; *see also Andrus*, 596 F.2d at 852. Accordingly, the Park must refrain from additional gathers until its NEPA process is complete and/or it must conduct independent NEPA analyses subject to public comment for any gathers undertaken in the interim.

### CONCLUSION

Wild horses are an enduring symbol of the rugged American West and, specifically, North Dakota's Badlands. It is therefore unsurprising that these resilient animals captured Theodore Roosevelt's imagination some nearly 150 years ago, and that they continue to inspire visitors to the TRNP to this day. For this reason, wild horses are an integral part of the TRNP's legacy and deserve to be managed as such.

But the Park's management regime has not been up to the task. Although Advocates is encouraged by the Park's decision to finally give wild horses a management plan, fundamental changes to Park's approach are necessary. To any rational observer, *wild* horses are in fact wildlife and the Park must explain why it continues to treat them differently. Regardless of their designation, however, the Park must also ensure that horses belonging to the historical lineages observed by Theodore Roosevelt remain in the Park. And, finally, the Park must assure the public that it has taken a "hard look" at all of the modern environmental impacts associated with managing the Park's wild horses. Advocates remains optimistic that the Park's forthcoming EIS will properly address those impacts; however, gathers conducted before then will lack valid NEPA support. As such, Advocates encourages the Park to analyze and invite public comment on interim roundups. Without this, those roundups will be vulnerable to challenge.

Advocates appreciates the Park's time and attention to this matter, and welcomes the opportunity to discuss these issues further with the Park. The TRNP's wild horses are, however, of the utmost importance to Advocates; thus, to the extent that additional roundups and removals are conducted without first rectifying the issues identified here, Advocates will be forced to explore all options for correcting the Park's legal violations, including by seeking judicial review in federal court.

If the Park has any questions about the issues discussed here, or would like to arrange a meeting with our clients, please do not hesitate to contact me.

Sincerely,

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