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**Public Lands Council**

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~December 2011~

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## HIGHLIGHT

### Fiscal Year 2012 Omnibus Spending Bill Passes

A \$915 billion omnibus spending bill to fund the federal government through September 2012 is expected to be signed by President Obama by Friday, December 23. Addressing the 9 remaining spending bills for fiscal year (FY) 2012 (including the Interior, Environment and Related Agencies bill), this omnibus package includes important grazing provisions that will carry through to future budgets. Thanks to the tireless work of Interior Appropriations subcommittee chair, Mike Simpson (R-Idaho) and his staff, PLC's three primary priorities were secured: the grazing rider language, bighorn sheep language and trailing permit language. Many more of our priorities were included as well, along with some negative aspects.

Positive grazing provisions include:

- Allows for a 2-year extension of the grazing rider (through FY 2013): this allows for permit renewals despite the NEPA backlog. It also allows permits to be transferred without undergoing NEPA, provided the permit remains under current terms and conditions.
- “Trailing” provision (through FY 2013): Will give BLM an exemption from environmental law, litigation and regulations until BLM can complete environmental review of trailing/crossing permits.
- Domestic Sheep/Bighorn Sheep Management (through FY 2012): Prohibits USFS from using funds to reduce domestic sheep grazing because of conflicts with bighorn sheep, unless the management is consistent with a State wildlife plan. BLM must consult with state fish & game agencies and follow state wildlife management plans to the extent that they don't conflict with Federal laws.
- BLM Exhaustion of Administrative Review (through FY 2013): Requires litigants to exhaust administrative review before litigating in Federal Court on grazing issues. Will reduce the workload for BLM employees responding to both administrative appeals and litigation at the same time; limits the scope of what can be litigated in court.
- Allows Forest Service to use an Administrative “objection” Process rather than post-decisional appeals. Except in emergency situations (in which case the Secretary may implement a proposed action immediately), this pre-decisional objections process will require that persons may bring a civil action challenging Forest Service decisions only if they raised the issue during the administrative review process and have exhausted the administrative review process. This will help prevent costly environmental litigation that oftentimes thwarts ranchers' ability to continue grazing.
- Agency Range Budget Funding Levels:
  - BLM Range Management is increased by \$10.5M above FY 11 enacted and \$15.9M above the President's request. Increased funding will help BLM manage grazing and catch up on grazing permit renewals.
  - Forest Service funding for grazing is increased by \$6m above FY 11 enacted and \$10m above the President's request. This will help the Forest Service catch up on the permit backlog. USFS was also allocated research funding, level with the President's request and intended to emphasize “localized needs” research, for projects such as research on grazing riparian areas or on forest restoration/thinning. In the past, Forest Service research has helped support active management with objective science.

Other Positive Provisions/Omissions:

- EAJA Reporting: Requires that the Environmental Protection Act (EPA), Forest Service, and BLM publicly disclose all the fees paid to environmental litigants under EAJA.
- NPDES Permits: Overturns the 2010 9<sup>th</sup> Circuit Court of Appeals decision requiring National Pollutant Discharge Elimination System (NPDES) permits for stormwater runoff on National Forest System roads used for timber harvesting and silviculture (and ranching).
- Wild Lands: Continues to block funding for implementation of the Wild Lands order.
- Wild Horse & Burro: Fully funds the wild horse and burro program, which is now capped at \$75M.
- NOT Included: Sen. Tester's Wilderness provision.

Concerning Provisions/Omissions:

- **Wolf Language:** The provision PLC hoped to see that would have prevented judicial review of a wolf delisting in Wyoming was not included.
- **LWCF Funding:** Land and Water Conservation Fund will be funded at \$355 million. With \$950,000 specifically marked for land acquisition in California, Nevada and Utah.
- **EPA/Corps Water Guidance/Regulations:** Unfortunately, language to block funding for an EPA/Corps of Engineers guidance/rulemaking on the definition of “waters of the U.S.” was not included. We will continue pushing for solutions, both legislatively and with the administration.

\*Note: A very narrow provision was made to allow several ranchers in the California Desert Conservation Area to voluntarily retire their permits. While PLC is wary of any language allowing “voluntary” permit retirement, this provision does NOT constitute a buy-out and was a special case that is not expected to affect other grazing permits.

PLC thanks Chairman Simpson and his staff for their hard work on this important bill. Its passage allows us to turn our attention toward finding more permanent fixes for matters such as the grazing permit renewal rider, the agency appeals process, and bighorn and domestic sheep management.

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## LEGISLATIVE UPDATE

### **Wyoming Attorney, Rancher Testifies at Endangered Species Act Hearing**

This month, the House Natural Resources Committee held an [oversight hearing](#) to examine how excessive Endangered Species Act (ESA) litigation impacts species recovery, job creation and the economy. Wyoming attorney and fifth-generation rancher, Karen Budd Falen, who defends ranchers in many ESA and other property rights cases, was a witness at the hearing. She said that rather than “saving species and conserving their habitats, the ESA is used as a sword to tear down the American economy, drive up food, energy and housing costs and wear down and take out rural communities and counties.” Budd Falen’s research, which she submitted to the Committee along with her [testimony](#), has revealed that environmental groups are abusing their ability to collect taxpayer dollars for the civil suits they bring under ESA—often over missed deadlines and other trivial reasons—costing the federal government and ranchers millions, annually. She accepted Committee Chairman Doc Hasting’s (R-Wash.) request for her written recommendations as to how to address this abuse of taxpayer dollars and producers, as well as her recommendations as to how to reform ESA to create positive incentives for landowners to protect endangered and threatened species.

PLC was happy to work with Budd Falen in preparing her testimony, and is currently working with her to prepare recommendations for ESA reform to the Committee. We look forward to future Committee hearings to further vet the strengths and weaknesses of ESA, an act whose authorization has been expired for over two decades.

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### **PLC, NCBA Leadership Pen Op-Ed Comparing Grazing Legislation**

PLC president, John Falen, and NCBA federal lands chair, Joe Guild, co-authored this op-ed, printed in NCBA’s *Beltway Beef* newsletter. We are working to get an expanded version into western publications.

#### **How to “Vitalize” Federal Lands Grazing**

*By Joe Guild, NCBA Federal Lands Committee chairman; and John Falen, Public Lands Council president*

*December 15, 2011*

The U.S. beef industry is diverse, with a presence in all 50 states. Despite that diversity, we all have common goals of raising healthy beef in an environment free of overly burdensome government interference and to pass down successful operations and healthy natural resources to future generations. These goals are threatened by the growing number of laws and regulations that govern what we do. Federal lands ranchers have unique challenges. In the West, where the federal government owns roughly half the land mass, more than 22,000 ranchers have the challenge of running our operations, in part, on federal land.

Much cost and uncertainty accompanies our partnership with the federal land management agencies. They have high environmental standards and paperwork obligations to live up to—more, in fact, than they are able to handle. Environmental activists groups never miss a chance litigate especially when grazing permits are concerned.

The same radical groups that file the endless stream of lawsuits against grazing on federal lands have hailed the recent introduction of H.R. 3234, the “Rural Economic Vitalization Act” (REVA). The bill claims it will “help” struggling federal lands ranchers by allowing third parties to buy out ranchers’ permits and permanently retire those lands from grazing. Radical environmental groups have come out in full support, calling the bill a “free-market” solution. Why? Because these well-funded groups know that with just a little more threat and intimidation of litigation, they can make “willing sellers” out of every ranching family on the range, thereby achieving their agenda of a livestock-free environment — all cloaked in “free-market” terms.

True, federal lands ranching families are facing a tough uphill battle, dealing with drought, strict regulations, agency regulatory paperwork backlogs, endless environmental litigation, and other struggles. They do have the option of selling their grazing permits—for grazing, not for retirement. Current law requires that grazing permits stay in use until the federal government decides otherwise. REVA would put this decision in the hands of individuals and make it easy for environmental groups to permanently shut down grazing, West-wide. This is not a picture of rural economic vitalization. This is the definition of destruction.

Honest-to-goodness “rural vitalization” would come from ranchers’ becoming more secure in their grazing permits as investments. Fortunately, some lawmakers have stepped up to promote the stability and longevity of the federal lands grazing program. Senator John Barrasso’s (R-Wyo.) Grazing Improvement Act of 2011 (S. 1129) would decouple ranchers’ long-term business plans from the bogged-down regulatory backlog that places their futures on hold. It would also make for a fairer fight in the appeals process, providing commonsense safeguards to ranchers against arbitrary agency decisions. Altogether, S. 1129 would greatly reduce the environmental litigation currently flooding the system.

S. 1129 would allow ranchers to think long term about what kind of land and resources they want to pass down to the next generation. REVA’s answer to alleviate ranching families’ struggles is simply to remove them from the picture. While there are many pressures on federal lands ranchers to get out of the business, we must not succumb to the defeatist attitude that the only solution is to end grazing on the federal estate. Too many families and rural communities count on us to forge ahead to find answers that keep grazing as a viable part of the western landscape. Join with us to stand up for federal lands ranching and to work with lawmakers like Senator Barrasso to strengthen this industry for generations to come.

While PLC is adamantly opposed to REVA, there is little chance the bill will get so much as a hearing in the House of Representatives; its introduction is, however, an opportunity to expose some of the misconceptions surrounding public lands grazing. Read more about the Grazing Improvement Act in the [May 2011 Capital Issues](#).

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## **Farm Dust Bill Passes House**

On December 8<sup>th</sup>, the U.S. House of Representatives passed [H.R. 1633](#), the Farm Dust Regulation Prevention Act, sponsored by Congresswoman Kristi Noem (R-S.D.) (see [letter of support](#) signed by 187 industry groups). The bill passed by a vote of 268-150, including 33 Democrats who recognized our producers' need for this common-sense legislation ([click here](#) to see the final vote tally. Democrats italicized). Currently, the Environmental Protection Agency (EPA) regulates dust in rural areas to the degree that many areas throughout California, Nevada and Utah are in "nonattainment" status. Recently the EPA threatened to increase the dust standard, even though there exists no evidence that dust in rural areas is a health threat. The new standard would have thrown dozens more rural areas across the west into "nonattainment," incurring fines and adding costs to producers. While EPA has decided against raising the standard for now, H.R. 1633 would provide protection from burdensome regulation, now and into the future. Specifically, the bill would exempt farm dust from the federal standard as long as it is regulated at the state or local levels of government, or until the EPA administrator can prove that the dust in rural America causes health concerns. This bill will alleviate the current regulatory costs to producers and preempt future burdens incurred by a stricter standard.

PLC thanks all the members who made phone calls and sent emails to their representatives, and thanks especially Ashley Lyon, Deputy Environmental Counsel at the National Cattlemen's Beef Association, for her tireless work to see this legislation through the House. PLC and NCBA will continue working to push for action in the Senate, where Senator Mike Johanns (R-Neb.) has introduced a [companion bill](#), S. 1528.

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## **ADMINISTRATION UPDATE**

### **PLC Submits Comments on Proposed Changes to Forest Service Appeals Process**

PLC and affiliates submitted [comments](#) this month in response to proposed changes to the U.S. Forest Service (USFS) appeal process (36 CFR Parts 212, 214, 215, 218, 222, 228, 241, 251, 254, and 292). Our primary focus was on the proposed changes to Part 214, which, according to a [letter](#) from USFS to PLC, were intended to "[clarify] the decisions eligible for administrative appeal, [simplify] the appeal procedure, and [shorten] the time to complete the appeal review." However, as we indicated in our comments, the proposed changes fall short of providing meaningful improvements to the appeal process. We requested that USFS adopt procedures similar to that of USDA's National Appeals Division (NAD) and Department of Interior's Office of Hearings and Appeals (OHA). Alternatively, we proposed USFS' shifting of its appeal process to either of those agencies altogether.

Among a few of the complaints registered in our comments:

- Currently, USFS does not allow for third-party review of appeals; the proposed rule would not change this feature. PLC supports providing this third-party review (as is the practice in NAD and OHA) to encourage unbiased outcomes.
- The proposed rule does not provide permittees, as appellants, the opportunity to review or confirm the evidence or record upon which agency decisions were based, providing a loophole through which documents within the agency's records can be withheld during the administrative appeal process.
- There is no opportunity under current regulation or the Proposed Rule to challenge the evidence and record of decision by the USFS regarding decisions on occupancy and use of NFS lands and resources.
- The proposed rule does not improve the existing inequitable treatment of non-permitted users of Forest System Lands (such as environmental groups) and permitted users. Currently, environmental groups may bypass the administrative appeal process and go directly to the courts with their grievances, while

permittees must follow the costly and time-consuming appeals process, putting them at a distinct disadvantage.

- While we agree with the need to define which decisions are appealable, we disagree with the proposed rule's exclusion of 36 CFR 214.4(a)(1) as an appealable decision. The proposed rule states that Annual Operating Instructions (AOI) do "not constitute a permit modification and [are] not an appealable decision." We disagree. AOIs should indeed be an appealable decision, should the Responsible Officer modify or *de facto* modify a grazing permit via the AOI.

PLC and affiliates agreed with certain aspects of the proposed rule, most of which are already present in OHA/NAD rules:

- We strongly support the stay procedures (36 CFR 214.13) as our members should not be negatively impacted by an agency decision while waiting for an appeal decision to be made.
- We agree with the intent of the Proposed Rule to require the exhaustion of administrative remedies before an administrative decision is considered "ripe" for judicial review in a Federal Court.
- We support the requirement that the Responsible Officer give notice of appeal rights (proposed rule 36 CFR 214.7) and identify the content of the appeal (proposed rule 36 CFR 214.9).
- We support the inclusion of intervention procedures (proposed rule 36 CFR 214.11).

It is unclear whether this Administration will be open to making the revisions we requested prior to finalizing the rule; likely, legislation will ultimately be necessary to make these changes. As we wrote in the [May 2011 newsletter](#), Senator John Barrasso's (R-Wyo.) [Grazing Improvement Act of 2011](#) (S. 1129) would bring great improvements to the appeal process, by providing for a hearing on the record for grazing decision appeals, and providing an automatic stay on appeals. Additionally, the bill would ease pressure on ranchers and the agencies by extending the life of a grazing permit from 10 years to 20 years, allowing permit renewals despite environmental paperwork backlogs, and allowing for categorical exclusions of grazing permits if the permit is to remain current grazing management.

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### **Wodder Nomination to DOI's Fish, Wildlife & Parks Post Thwarted**

Although Rebecca Wodder's nomination to become Assistant Secretary for Fish, Wildlife and Parks at the Department of the Interior passed through the Senate Committee on Environment and Public Works this month, it was stopped in the Committee on Energy and Natural Resources. Senators from both political parties had concerns with Wodder's stance on several issues, including her opposition to energy extraction (especially her opposition to hydraulic fracturing); her desire to expand "waters of the United States" under the Clean Water Act; and her opposition to hydroelectric dams. As reported in June's [Capital Issues](#), Wodder worked for the Wilderness Society for over 10 years before becoming CEO of American Rivers, an organization whose positions on climate change, dam removal and other issues render it in opposition to PLC's policies. The decision is now in President Obama's hands whether to re-nominate her during the second half of this session of Congress. A recess appointment is not likely, as the Senate is calling for "pro-forma" sessions during their recess to prevent such appointments.

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### **BLM, USFS Open Preliminary Comment Period on Sage Grouse Protection Plans**

This month, the BLM and the Forest Service (the agencies) unveiled their plan to implement sage grouse protections into land use and resource management plans (LUPs and RMPs) on 47 million acres of public land (see the December 9<sup>th</sup> [Federal Register entry](#) and the agencies' [press release](#).) They have requested comments on which issues should be considered as they prepare environmental impact statements (EISs) and supplemental EISs (SEISs). With the stated goal of preventing the listing of the bird under the Endangered Species Act (ESA)

(and a court-ordered deadline in 2015 to decide if the bird should be listed), the agencies have launched “expedited reviews” of up to 98 land-use plans in 10 Western states, which are expected to conclude in late 2014. In the meantime, BLM has plans to issue an instruction memorandum (IM) offering temporary protections (a draft of which PLC has obtained and [commented on](#).) The Forest Service may also be evaluating sage grouse conservation measures in up to 9 land and resource management plans in “high-priority” areas.

PLC will submit comments on how the agencies should proceed with EISs and SEISs by February 7<sup>th</sup>. EISs and SEISs will be coordinated under two regions: An Eastern Region and a Western Region. The [Eastern Region](#) includes BLM land use plans in the States of Colorado, Wyoming, North Dakota, South Dakota, and portions of Utah and Montana. The [Western Region](#) includes BLM land use plans in California, Idaho, Nevada, Oregon, and portions of Utah and Montana. Also see the [Federal Register entry](#) for potentially affected LUPs and RMPs.

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### **FWS, Western States Discuss Sage Grouse Conservation Strategy**

On December 9<sup>th</sup>, the same day the BLM and Forest Service posted the official request for comments regarding environmental impact statements (EISs) and supplemental EISs (SEISs) for future land use and resource management plan modifications ([see above](#)), the U.S. Fish & Wildlife Service and State of Wyoming issued a joint [press release](#). Excerpts follow:

Secretary of the Interior Ken Salazar and Wyoming Governor Matt Mead convened a meeting this month with representatives from eight western states to discuss ongoing efforts to conserve the greater sage-grouse and identify next steps in implementing a landscape level strategy that will benefit the species while maintaining a robust economy in the West. Participants discussed current strategies, challenges, and areas of collaboration for local, state, and federal governments to proactively address the needs of the species to ensure its long-term health and stability. During the meeting, the attendees discussed developing a new working agreement that puts in place conservation actions and commitments to meaningfully address both the threats to the survival of the greater sage-grouse and the need of Westerners to enjoy multiple uses of their land and have reasonable predictability regarding regulatory requirements.

A large ground-dwelling bird predominantly found in the West, the decline of the sage-grouse population has been a result of primary threats such as habitat loss and fragmentation due to energy development, wildfire, and invasive plant species. Based on a 12-month status review pursuant to the Endangered Species Act, the U.S. Fish & Wildlife Service determined that the listing of the species was warranted, but precluded by higher priorities. For a FWS fact sheet on the greater sage-grouse, please click [HERE](#).

Meeting participants included: Bob Abbey, Bureau of Land Management Director; Dan Ashe, U.S. Fish and Wildlife Service Director; Marlene Finley, U.S. Forest Service Deputy Regional Forester; Dave White, Natural Resources Conservation Service Chief, as well as senior representatives from the states of Colorado, Idaho, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

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### **Ariz., N.M. Get New BLM state directors**

The BLM announced this month new state directors in Arizona and New Mexico, to be sworn in mid-February. Combined, Raymond Suazo and Jesse Juen, both veteran agency employees, will oversee 25 million acres of public lands. Arizona’s new director, Suazo, has been acting as the state director, replacing Jim Kenna, who was tapped to lead BLM’s California office earlier this year. Suazo will oversee nearly 500 employees. Juen will oversee about 850 employees managing about 13 million acres of public lands in New Mexico, Texas, Oklahoma and Kansas. Juen is currently New Mexico’s associate director. He will replace Linda Rundell, who

recently retired. He also so served as deputy assistant director for BLM's National Landscape Conservation System office in Washington, D.C.

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### **FWS, NMFS Issue ESA “Significant Portion of Its Range” Guidance**

PLC and the National Endangered Species Act Reform Coalition (NESARC coalition) are currently reviewing a new [policy](#) released by the Fish and Wildlife Service and the National Marine Fisheries Service (Services) that would define the key phrase “significant portion of its range” in the Endangered Species Act (ESA). The ESA protects species “in danger of extinction throughout all or a significant portion of its range,” but does not define “significant.” The policy would clarify that the Services could list a species if it is endangered or threatened in a “significant portion of its range,” even if that species is not endangered or threatened throughout all its range. Under the proposed policy, a portion of the range of any given species would be defined as “significant” if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction. If a species is found to be threatened or endangered in a significant portion of its range, the entire species must be listed and protections of the ESA applied throughout its range. However, if the significant portion of the range is the exact same area inhabited by a “distinct population segment” of the species, only the distinct population segment would be listed. See more details in the Services' [press release](#).

PLC will submit comments through NESARC by February 7<sup>th</sup>, 2012.

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### **FWS Delays Listing of Dunes Sagebrush Lizard**

The listing of the dunes sagebrush lizard in the Southwest under the Endangered Species Act (ESA) has been [delayed](#) due to strong opposition from Congress. Adverse impacts on grazing and oil and gas development were predicted, had the lizard been listed. The U.S. Fish & Wildlife Service (FWS) said it would defer a decision on the sagebrush lizard for six months. The sagebrush lizard is primarily found in New Mexico and Texas.

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### **Forest Service Announces New Invasive Species Management Policy**

With its new internal directive, the [National Forest System Invasive Species Management Policy](#), the Forest Service intends to improve the coordination of the management of invasive species on aquatic and terrestrial areas of the National Forest System (NFS). The Forest Service's longstanding invasive species policy, dubbed too “siloeed,” will be replaced by this directive, whose broad objectives, policies, responsibilities, and definitions they hope will help foster an “integrated” approach “in the context of environmental issues such as adaptation to climate change, increasing wildfire risk, watershed restoration, fragmentation of habitats, loss of biodiversity, and human health concerns,” said Undersecretary of Agriculture Harris Sherman.

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## **JUDICIARY UPDATE**

### **Wyoming Asks for En Banc Review of Roadless Decision**

Wyoming has asked the 10<sup>th</sup> U.S. Circuit Court of Appeals to revisit its three-judge panel decision to uphold the Clinton-era “roadless rule” that bans most road building and logging on nearly 50 million acres of national forests. Wyoming's [petition](#) stated that the 10<sup>th</sup> Circuit “failed to consider the real effects of the roadless rule,” which creates *de facto* wilderness areas—an authority reserved solely by Congress. It also argues that the Forest Service violated the National Environmental Policy Act (NEPA) by altering the scope of the rule without

preparing a supplemental review. Further, according to the petition, the Forest Service is required to make decisions on a forest-by-forest basis, not through a blanket rule. An “en banc” hearing, or hearing by a full, 9-judge panel, could possibly clear the air of conflicting court decisions. There has been disagreement between the Ninth Circuit Court and a Wyoming District Court, where Judge Clarence Brimmer decided that the Forest Service’s management of roadless areas was beyond its authority.

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## **BLM’s Wild Horse Roundup, Castration Plan Litigated**

*Reprinted in part from E&E News*

Three groups have filed a lawsuit challenging the BLM’s plan to surgically geld hundreds of wild horses and remove more than 1,000 others from herd areas in central Nevada.

The [complaint](#) in the U.S. District Court for the District of Columbia says BLM's plan to reduce herd numbers by about 80 percent and create Nevada's first ever nonproducing herd is scientifically unsound and fails to consider the effects of domestic livestock on public rangelands. The lawsuit comes several months after groups pressured BLM to back off a similar plan to geld stallions in Wyoming, where it instead opted to treat mares with a short-term fertility drug.

BLM in a statement late last month called its Pancake Complex plan a "new way" of managing large herd areas. It consists of three to four gathers over the next six to 10 years and calls for smaller removals, increased use of fertility control and, in some herds, reducing the number of reproducing mares. It also calls for establishing a herd of non-breeding geldings, a move never before implemented in Nevada.

Horse numbers would be reduced from 2,200 to about 360 wild horses and 200 castrated stallions, the groups said.

The lawsuit argues BLM violated the 1971 Wild Free-Roaming Horses and Burros Act by failing to "protect and manage" horses as "living symbols of the historic and pioneer spirit of the West." It also contends BLM must conduct a more detailed environmental review, including an analysis of the relative impacts of domestic livestock and wild horses.

The groups said they are also concerned with BLM's plan to eliminate all wild horses from the 154,000-acre Jakes Wash herd area, which the agency in 2008 said contains insufficient food, water and space to support a herd.

BLM argues sterilizing wild horses is a humane and legal way to stem herd growth and prevent the animals from over-grazing sensitive Western landscapes.

The agency's [environmental assessment](#) estimates herds in the Pancake Complex have increased 20 to 25 percent annually since they were last gathered in 2006 and are currently about five times above sustainable levels. Livestock use has remained at or below permitted use levels, it said.

Failure to act would harm plant, soil and riparian resources and could possibly cause irreversible loss of native plant life, the agency warned.

## MORE NEWS

### **NEW\* Link to IBLA Decisions**

\*Last month's link required a password. Please give this new link a try.

To find the decisions of the Interior Board of Land Appeals over the last three months, [click here](#).

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### **American Sheep Industry Association News**

Go to [www.sheepindustrynews.org](http://www.sheepindustrynews.org)

### **Environmental Steaks**

See NCBA's monthly newsletter, [Environmental Steaks!](#)

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