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To Whom It May Concern:

These comments on the Bureau of Land Management's ("BLM") Environmental Assessment of the *Spay Feasibility and On-Range Behavioral Outcomes Assessment and Warm Springs HMA Population Management Plan* (hereafter "EA" or "Population Management Plan"), are submitted on behalf of the American Wild Horse Campaign and the Animal Welfare Institute.

The American Wild Horse Campaign (AWHC) is a national, nonprofit organization dedicated to preserving the American wild horse in viable free-roaming herds for generations to come, as part of our national heritage. Our grassroots efforts are supported by a coalition of over 60 historic preservation, conservation, horse advocacy and animal welfare organizations.

The Animal Welfare Institute ("AWI") is a national, nonprofit charitable organization founded in 1951, dedicated to alleviating the suffering inflicted on animals by humans. AWI engages policymakers, scientists, industry professionals, non-governmental organizations, farmers, veterinarians, teachers, and the public in its broad animal protection mission. AWI works to minimize the impacts of all human actions that are detrimental to wildlife including by mitigating the use of inhumane methods to manage free-roaming wild horses and burros.

I. OVERVIEW

AWHC and AWI strongly oppose the Proposed Action described in the "Spay Feasibility and On-Range Behavioral Outcomes Assessment and Warm Springs HMA Population Management Plan" described in the Environmental Assessment (DOI-BLM-ORWA-B050-2018-0016-EA). Rounding up 100 percent of the wild horses in the HMA with helicopters, while planning to permanently remove more than 685 horses and surgically sterilize 100 mares, is inhumane and fiscally irresponsible.

AWHC and AWI ask that the BLM eliminate the proposed "spay" study from the Proposed Action for the Warm Springs HMA. AWHC has successfully led the BLM to abandon past efforts to surgically sterilize wild mares. In 2016, AWHC challenged a proposed study of ovariectomy via colpotomy as well as other surgical sterilization techniques in Oregon, leading

BLM to abandon that experiment. The preliminary injunction motion and supporting materials in that case are attached here and merit BLM's robust consideration, because this experiment is virtually indistinguishable in its repeated focus on an inhumane and severely risky surgical sterilization technique, as well as in the arbitrary imposition of another unconstitutional restriction on the public's right to observe and document this important government activity. Nevertheless, undeterred by public opposition and legal defeats, BLM continues its effort to use permanent sterilization as a routine wild horse population management tool.

We conclude that the BLM should not proceed with the study and proposed action because the "spay" (ovariectomy) procedure and Population Management Plan are inhumane, untested (in the case of removing mares' ovaries), and uneconomical. Instead, the BLM should consider how to implement a comprehensive on-the-range management program in the Warm Springs HMA utilizing the proven PZP immunocontraceptive vaccine.

The BLM's refusal to acknowledge the successful use of humane fertility control to maintain wild horse populations at sustainable numbers without removals of horses from the range is inexplicable and arbitrary. The agency's proposed mass removal of wild horses from this HMA will not only contribute to the millions of taxpayer dollars that it costs to stockpile wild horses in short- and long-term holding facilities but will also seriously compromise the welfare of these animals. Furthermore, continuing to round up and remove wild horses only makes the problem worse because it fuels high population rates for horses left on the range. As the 2013 National Academy of Sciences ("NAS") report has found, "Removals are likely to keep the population at a size that maximizes population growth rate, which in turn maximizes the number of animals that must be removed and processed through holding facilities." (Attachment 1, p. 94).

AWHC and AWI oppose the helicopter roundup of 100 percent of the wild horses in the Warm Springs HMA. There is no justification for the BLM to use our tax dollars on another roundup in the HMA. At a time when the BLM stockpiles nearly 46,000 wild horses in holding facilities and the NAS recommends use of fertility control as "a more affordable option [than] continuing to remove horses to long term holding facilities," this proposed action represents a continuation of the BLM's "business as usual practices" that the NAS found would be "expensive and unproductive for the BLM and the public it serves." (Attachment 1).

Instead of large-scale removals and surgically removing the ovaries of mares, the BLM should manage this population on the range at the current level, using PZP fertility control to reduce population growth rates and reduce the population size over time. If removals occur, they should be incremental in smaller numbers over time to increase the chances of horses being adopted and to minimize the burden to taxpayers of warehousing horses in holding facilities.

The PZP vaccine is a scientifically proven and cost-effective approach for reducing wild horse population growth rates and numbers over time. It is widely supported by mainstream humane and wild horse protection organizations. However, the vaccine must be used on a sufficient scale to impact population growth rates. (Attachment 1, p. 99-112).

As described in more detail below, it is AWHC's and AWI's position that:

- The BLM’s plan to remove federally protected wild horses from the Warm Springs HMA lands violates federal law including the National Environmental Policy Act and Animal Welfare Act.
- The BLM must prepare an Environmental Impact Statement (“EIS”) rather than an Environmental Assessment (“EA”) because at least five distinct National Environmental Policy Act (“NEPA”) “significance” factors are triggered, any one of which requires preparation of an EIS.
- The BLM must take the requisite “hard look” at the environmental impacts of its action, which will result in significant short-term and long-term effects to federally protected wild horses left on the range, the family bands of wild horses that reside in this area, the genetic diversity of these wild horses, and the potential measures that could mitigate the impacts resulting from the BLM’s action.
- The BLM must abandon its proposal to conduct an ovariectomy experiment on wild horses from the Warm Spring HMA.
- Should the BLM pursue this “study,” the agency must abandon its arbitrary restriction on public observation and documentation of its ovariectomy experiment, because a ban on recording the experiments lacks any logical basis and infringes on observers’ constitutional rights.

For these reasons, AWHC and AWI strongly urge the BLM to prepare an EIS and to engage in a meaningful analysis of the reasonable alternatives to, and impacts of, surgically removing the ovaries of over 100 mares as well as the rounding up and permanent removal of wild horses from the range to reach and maintain low AML in the Warm Springs HMA.

II. BACKGROUND

A. NEPA

Congress enacted NEPA more than four decades ago “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment” 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has found that NEPA is “intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). NEPA is intended to “ensure that [federal agencies] . . . will have detailed information concerning significant environmental impacts” and “guarantee[] that the relevant information will be made available to the larger [public] audience.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

In NEPA’s implementing regulations, there are two specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of a particular federal action—an

EA and an EIS. *See* 42 U.S.C. § 4332(c). These procedural mechanisms are designed to inject environmental considerations “in the agency decisionmaking process itself,” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Pub. Citizen*, 541 U.S. at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, “NEPA’s core focus [is] on improving agency decisionmaking,” *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a “hard look” at potential environmental impacts and environmentally enhancing alternatives “as part of the agency’s process of deciding whether to pursue a particular federal action.” *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983). The alternatives analysis “is the heart” of the NEPA process. 40 C.F.R. § 1502.14. NEPA’s implementing regulations require that the decisionmaking agency “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.* Importantly, the NEPA process “shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made.*” 40 C.F.R. § 1502.2(g) (emphasis added); *see also Id.* § 1502.5 (requiring that NEPA review “shall be prepared early enough *so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made*”) (emphasis added), *Metcalf v. Daley*, 214 F.3d 1135, 1141-42 (9th Cir. 2000) (“the comprehensive ‘hard look’ mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.”).

An EIS must be prepared by an agency for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Under NEPA’s implementing regulations, “significance” requires consideration of both context and intensity. 40 C.F.R. 1508.27. “Context” refers to the scope of the activity, including the affected region, interests, and locality, varying with the setting of the action, and include both short and long-term effects. 40 C.F.R. 1508.27(a) (2018). “Intensity” refers to the severity of impact, including impacts that may be both beneficial and adverse; unique characteristics of the geographic area, such as proximity to wetlands, wild and scenic rivers, or ecologically critical areas; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act; and whether the action threatens a violation of federal law imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27. Where an action is not expected to result in a significant environmental impact, the agency must still prepare an EA and a FONSI. *Id.* §§ 1508.9, 1501.3.

B. The Wild Horse Act

In 1971, Congress enacted the Wild Horse Act (“WHA”) out of concern that wild horses were “disappearing from the American scene.” 16 U.S.C. § 1331. Declaring that “wild horses are

living symbols of the historic and pioneer spirit of the West,” and “contribute to the diversity of life forms within the Nation and enrich the lives of the American people,” Congress directed that wild horses “shall be protected from capture, branding, harassment, [and] death” and “be considered in the area where presently found, as an integral part of the natural system of the public lands.” *Id.* To implement that mandate, Congress declared that BLM shall “protect and manage wild free-roaming horses and burros as components of the public lands,” and provided that “[a]ll management activities shall be at the minimal feasible level.” 16 U.S.C. § 1333(a).

Under the Act, BLM manages wild horses on public lands within HMAs, which are “established for the maintenance of wild horse . . . herds,” 43 C.F.R. § 4710.3-1, in the areas they used in 1971. 43 C.F.R. § 4700.0-5(d). The Wild Horse Act further requires BLM to manage wild horses “in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” 16 U.S.C. § 1333(a). To do so, for each HMA, BLM must: (1) maintain a current inventory of wild horses in each HMA, (2) “determine [the] appropriate management level”—i.e., the AML—of wild horses that the HMA can normally sustain, and (3) determine the method of achieving the designated AML and managing horses within it. 16 U.S.C. § 1333(b)(1); 43 C.F.R. §§ 4710.2, 4710.3-1. An AML is “expressed as a population range within which [wild horses] can be managed for the long term” in an HMA without resulting in rangeland damage. BLM, *Wild Horse Handbook*, at 17. The lower limit of the AML range is “established at a number that allows the population to grow (at the annual population growth rate) to the upper limit over a 4 to 5 year period, without any interim gathers.” *Id.*

Section 3 of the Wild Horse Act grants BLM the authority to manage and protect wild horses by permanently removing “excess” horses from public lands, but only after BLM specifically determines that: (1) “an overpopulation [of wild horses] exists on a given area of the public lands,” and (2) “action is necessary to remove excess animals.” 16 U.S.C. § 1333(b)(2). An “excess” wild horse is defined as one that “must be removed from an area *in order to preserve and maintain a thriving natural ecological balance . . . in that area.*” 16 U.S.C. § 1332(f) (emphasis added). Once BLM makes a formal “excess determination,” it may remove only those “excess animals from the range so as to achieve appropriate management levels.” 16 U.S.C. § 1333(b)(2). According to BLM’s wild horse manual, “[w]ild horses or burros should generally not be removed below the AML lower limit.” BLM, *Wild Horse Manual MS-4720*, available at http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.27968.File.dat/MS-4720.pdf, at 4; *see also* BLM, *Wild Horse Handbook*, at 17 (wild horse removals should be conducted to “maintain population size within AML”); *see also* *Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174 (10th Cir. 2016). Removal of wild horses below the agency’s legally established AML may be warranted only “in emergency situations based on limited forage, water or other circumstances.” BLM, *Wild Horse Manual*, at 5. Before taking action to remove wild horses below AML if BLM determines that emergency circumstances exist, BLM must conduct an adequate NEPA analysis subject to public participation and provide a compelling “[r]ationale to justify a reduction below the AML lower limit.” *Id.*

C. The First and Fourteenth Amendments

The First Amendment of the United States Constitution, adopted in 1791, protects the right to freedom of expression free from government interference. U.S. CONST. amend. I (Congress shall make no law . . . abridging the freedom of speech”). The Supreme Court has interpreted this Amendment as applying to the executive and judicial branches as well, not just Congress. *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 143 (1951); *Watkins v. United States*, 354 U.S. 178, 188 (1957), *West Virginia [State] Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In addition, the Fourteenth Amendment, adopted in 1868, applies these First Amendment protection of freedom of speech to the states through the selective incorporation doctrine, and thus state governments are prohibited from violating the First Amendment’s free speech guarantee without due process of law. *Gitlow v. New York*, 268 U.S. 652 (1925).

“[T]he Supreme Court has long recognized a qualified right of access for the press and public to observe government activities” protected by the First Amendment. *See Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). This right is rooted in the fact that “[o]pen government has been a hallmark of our democracy since our nation’s founding” and that constitutionally protected “transparency has made possible the vital work of . . . countless [] investigative journalists who have strengthened our government by exposing its flaws.” *Id.* at 897. The American public has the right to freedom through publication and dissemination of information; including the recording of government activities. Because “[t]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press[,] . . . courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.” *Id.* at 900. The judiciary’s scrutiny is especially important because “[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Id.*

Further, the Supreme Court has held that “[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

III. DISCUSSION

A. BLM Must Prepare An EIS For This Action

It is clear that BLM is required to prepare an EIS for this action because the EA will be legally insufficient. BLM failed to adequately evaluate each of the “significance” factors listed in 40 C.F.R. § 1508.27(b). An actual analysis of these factors reveals that the environmental impacts of the BLM’s proposal would inevitably be significant, thus requiring BLM to prepare a detailed EIS. 42 U.S.C. § 4332(C); *see also Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1167 (W.D. Wash. 2015) (finding agency violated NEPA and vacating EA where agency failed to prepare an EIS and failed to take a hard look at significant issues).

First, as to “context,” the BLM must prepare an EIS due to the breadth and scope of the project. The Proposed Action will span 10 years and impact 474,547 acres that make up the Warm Springs HMA with the conduct of multiple roundups, removals, and other inhumane

management practices of wild horses. Because this action will take place over many years and many thousands of acres of public lands, BLM's decision to prepare an EA here, in lieu of an EIS, is contrary to NEPA and its implementing regulations.

Moreover, as to "intensity" multiple NEPA "significance" factors are triggered by the proposed action, although the presence of only one significance factor *requires* preparation of an EIS. *See Pub. Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) ("If the agency's action is environmentally 'significant' according to any of these criteria [set forth in 40 C.F.R. 1508.27], then DOT erred in failing to prepare an EIS."); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 20 (D.D.C. 2007) (explaining that "courts have found that the presence of one or more of [the CEQ significance] factors should result in an agency decision to prepare an EIS") (citations omitted); *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 218 (D.D.C. 2003) (same).

"An action may be 'significant' if one of these factors is met." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008). Furthermore, "[a] determination that significant effects on the human environment will in fact occur is not essential" for an EIS to be required; "[i]f substantial questions are raised whether a project *may* have a significant effect upon the human environment, an EIS must be prepared." *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (emphasis added); *see also Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985) (an agency "must supply a convincing statement of reasons why potential effects are insignificant.").

The following significance factors are triggered here. Accordingly, the BLM is required to prepare an EIS on this extreme proposed action.

- **40 C.F.R. § 1508.27(b)(1)** – This factor addresses the "[i]mpacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."

The BLM identifies the purpose and need of the proposed study as "to assess the feasibility of using ovariectomy via colpotomy (spaying) to reduce the annual population growth rate of a wild horse herd." The BLM claims that this study, though physically taxing on mares, will provide the agency with a more detailed quantification of morbidity and mortality rates and behavioral outcomes that can be used in future wild horse management efforts. The BLM acknowledges that there is extreme risk with this procedure and that it may have devastating physical and behavioral consequences for wild mares that are subject to it and serious adverse consequences for the behavior of wild horse herds. Therefore, it is clear that this experiment will have serious adverse consequences for individual horses and for the wild horse herds to which they belong, which easily meet the threshold of "significance" under NEPA. Moreover, to the extent that BLM believes that this experiment may allow the agency to seriously alter its regime of wild horse population management by reducing the population growth rate, even to the extent that BLM construes this as a beneficial impact for BLM's wild horse program or rangeland health (despite the devastating consequences for individual horses and the adverse behavioral impacts on herds), that impact would easily meet the threshold of significance as well.

- **40 C.F.R. § 1508.27(b)(4)** – This factor addresses “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”

A project is highly controversial under NEPA if a “substantial dispute exists as to [the] size, nature, or effect” of the project *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir.1997). The “spay” experiment in this EA is extremely controversial, as will be further discussed below. Use of ovariectomy via colpotomy on wild mares and pregnant mares is experimental and return of ovariectomized mares to the range will have unknown impacts. The American public and many scientists and equine veterinarians have repeatedly voiced their opposition on the use of ovariectomy by colpotomy each time that the BLM has brought it up in the past and have specifically stated that BLM’s experiments lack merit because of the serious adverse consequences of this procedure. For example, Dr. Robin Kelly, an equine veterinarian with decades of experience, has stated that ovariectomy by colpotomy has a “major risk of complications and significant pain,” and notes that the veterinary consensus is that any ovariectomy should be performed using more sophisticated methods and tools. (Attachment 2, p. 56 Kelly Decl. ¶ 4). Dr. Kelly specifically notes the “extreme risks of bleeding, infection, abortion, and death,” and notes that “[t]his procedure is outdated, and every board certified Veterinarian I have spoken with voiced extreme concern that this was even being considered for use on any mare when more humane options are available.” (*Id.*, p. 57 ¶ 6). Additionally, in 2015, a research review panel of the NAS reviewed BLM’s substantially similar research ovariectomy via colpotomy research proposal and warned that conduct of the procedure on wild (vs. domestic) horses could cause the “mortality rate to be higher than the 1% reported in the published literature” and stated that proposals for less invasive sterilization methods “would be safer – with less risk of hemorrhage and evisceration – and probably less painful.” (Attachment 3, p. 7).

That same NAS review panel concluded that BLM’s prior, and substantially similar, proposal to experiment on ovariectomy by colpotomy “contain[ed] no science or experimentation related to technique,” and that “the only novelty in this proposal is that the procedure would be performed on free-ranging rather than domestic horses.” (Attachment 3, p.7). Because wild horses and domestic horses are the same species, and differentiate chiefly by behavior, the NAS panel “did not consider this difference to be a matter of research.” *Id.* Accordingly, it is clear that there is a substantial dispute over the nature of this experiment—i.e. whether it has any valid scientific basis—as well as the experiment’s effects in terms of risks to individual horses and adverse behavioral impacts on individuals and herds. Therefore, the implementation of this procedure, and the physical and behavioral effects of the procedure, will be highly controversial.

- **40 C.F.R. § 1508.27(b)(5)** – This factor addresses “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”

In this EA, the BLM is again considering ovariectomy by colpotomy when there is very little known about the procedure, its effectiveness, its physical and behavioral effects on wild mares, and its side effects on herd behavior. The level of uncertainty and unknown risk is demonstrated by the BLM’s choice to implement this “spay” study instead of a program using the well-tested PZP vaccine. The risks are clearly unknown by the BLM, or a study of this magnitude would not

be necessary. In contrast, PZP is a very well tested immunocontraceptive vaccine that has a proven success rate in wild horse management.

- **40 C.F.R. § 1508.27(b)(6)** – This factor addresses “[t]he degree to which the action may establish a precedent for future Action with significant effects or represents a decision in principle about a future consideration.”

With this EA, the BLM is adopting the new, and significantly untested, approach of ovariectomy by colpotomy. This study, and the attached Population Management Plan, could set precedent for how future actions proceed (whether or not they are subject to separate NEPA review) in numerous regards including, but not limited to:

- The use of the ovariectomy by colpotomy procedure on mares in different stages of pregnancy even though it is an extremely risky and inhumane procedure that will result in abortions for some of the mares.
- The release of ovariectomized mares back on the range even though the BLM has never before released ovariectomized mares to the range as a population management strategy.
- The reduction of the number of wild free-roaming horses to the low AML of 111, even though AMLs are unsupported by science and make it impossible to maintain a genetically viable herd.
- The reduction in the number of wild free-roaming, reproductively intact horses and the management of that population has never before been done in an HMA. There is no research regarding the impacts of maintaining a significant portion of the wild horse population as nonreproducing. (See Attachment 1).

Indeed, in this EA BLM’s stated purpose for the “spay” experiment is to “assess the feasibility of using ovariectomy via colpotomy (“spaying”) to reduce the annual population growth rate of a wild horse herd.” (p. 4). As such, BLM has conceded that this experiment could set a precedent or represent a decision in principle that may be applied later in BLM’s management of wild horse populations. Besides being counter to scientific recommendations, the BLM’s decisions in this EA could set dangerous precedents for management of federally protected horses across the West.

- **40 C.F.R. § 1508.27(b)(10)** – This factor is triggered if “the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”

BLM’s proposed ovariectomy experiment threatens a serious violation of the WHA. As described above, one of Congress’s primary goals in enacting the WHA was to protect wild horses from various types of adverse impacts, including those that harm their wild and free-roaming behaviors. 16 U.S.C. § 1331. There can be no legitimate dispute that ovariectomy by colpotomy risks serious adverse impacts to the wild and free-roaming behaviors of individual horses and the herds to which they belong. Accordingly, this experiment threatens a violation

of the WHA. Additionally, the WHA mandates that “[a]ll management activities shall be at the minimal feasible level.” 16 U.S.C. § 1333(a). Ovariectomy by colpotomy falls far short of this legal requirement. Not only is ovariectomy by colpotomy far more invasive, inhumane, and risky than other non-surgical methods of fertility control such as PZP, but it is also far more invasive and inhumane than the techniques that veterinarians use on domestic horses in the rare circumstances that ovariectomy is clinically necessary. (Attachment 2, p. 53 Kelly Decl. and p. 60 Corey Decl.). Because ovariectomy by colpotomy is a far more invasive and inhumane surgical procedure than other methods of fertility control, it cannot be said to constitute the minimal feasible level of management in accordance with a statute that aims to protect wild horses. Finally, and fundamentally, because this experiment’s *purpose* is to measure how much pain the mares will endure, how often pregnant mares will be injured or die, and how often their foals will be aborted—i.e. *the purpose of the experiment is to take an action that foreseeably will harm horses and measure the severity of that harm*—BLM’s “spay” experiment is inherently inconsistent with the fundamental Congressional intent in the WHA to “protect” wild horses. See 16 U.S.C. § 1333(a). Accordingly, for various reasons, this experiment threatens a violation of the WHA.

In short, an EIS is required when even *one* of these factors is implicated. Because at least *five* significance factors are triggered here, it is wholly inconsistent with NEPA and its regulations for BLM to prepare only an EA. Therefore, it would be a patent NEPA violation if BLM refused to prepare an EIS here. For all of these reasons, an EIS is required for this action.

B. BLM Must Analyze All Reasonable Alternatives

Irrespective of whether an EIS or EA is appropriate under the circumstances, pursuant to NEPA, BLM must analyze all reasonable alternatives to the proposed removal of approximately 685 more horses from the Warm Springs HMA and removing the ovaries of nearly 100 mares.

The “heart” of the NEPA process is an agency’s duty to consider “alternatives to the proposed action” and to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). The Council on Environmental Quality regulations require the action agency to: (a) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (b) devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; (c) include reasonable alternatives not within the jurisdiction of the lead agency; (d) include the alternative of no action; (e) identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference; and (f) include appropriate mitigation measures not already included in the proposed action or alternatives. *Id.*; *see also* 43 C.F.R. § 46.415(b).

“A ‘viable but unexamined alternative renders [the] environmental impact statement inadequate.’” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999)

(quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)). “The purpose of NEPA’s alternatives requirement is to ensure agencies do not undertake projects “without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.” *Envtl. Defense Fund, Inc. v. U.S. Army Corps of Engrs.*, 492 F.2d 1123, 1135 (5th Cir. 1974). The courts, in the Ninth Circuit and elsewhere, have consistently held that an agency’s failure to consider a reasonable alternative is fatal to an agency’s NEPA analysis. *See, e.g., Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992) (“The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate.”).

If the agencies reject an alternative from consideration, they must explain why a particular option is not feasible and was therefore eliminated from further consideration. 40 C.F.R. § 1502.14(a). The courts will scrutinize this explanation to ensure that the reasons given are adequately supported by the record. *See Muckleshoot Indian Tribe*, 177 F.3d at 813-15, *Idaho Conserv. League*, 956 F.2d at 1522 (while agencies can use criteria to determine which options to fully evaluate, those criteria are subject to judicial review), *Citizens for a Better Henderson*, 768 F.2d at 1057.

The BLM must consider more than two alternatives in this EA. The current alternatives are (1) a no action alternative and (2) the “proposed action” which includes the rounding up of 100 percent of the horses in the HMA, performing ovariectomies via colpotomy on 100 mares, and the permanent removal of at least 685 wild horses from the HMA. After the proposed “spay” study, and if the study is successful, the BLM plans to ovariectomize more mares and remove more horses from the HMA, thereby taking the wild horse population to a number that is hardly sustainable.

Simply put, BLM’s evaluation of alternatives must address a full range of alternatives, including plainly reasonable alternatives such as PZP use within the HMA and a reduction in livestock grazing within the HMA. Since there is no current PZP program, the BLM should consider using PZP within this HMA without the need to first surgically experiment on wild mares for four years. Further, an in-depth analysis of reducing livestock will support a more detailed consideration of wild horse and livestock effects on greater sage-grouse habitats within the HMA. The BLM must consider and adequately analyze how a reduction in livestock grazing, instead of mass removal of wild horses, could help meet long-term goals to protect the greater sage-grouse habitats in this HMA.

Perhaps most confusing is that rather than adopting an approach to support a PZP program in this HMA, the BLM chose to implement an approach that aggressively pursues helicopter roundups of 100 percent of the wild horses and permanent removal of 685 horses with the long-term goal of permanently removing more horses in order to reach the low AML. The BLM does note that it will implement PZP use in the population management plan if the ovariectomy study is found to be unsuccessful. However, BLM’s refusal to consider alternatives such as implementing a PZP program in lieu of a “spay” study and mass roundup, or in combination with smaller roundups, is irresponsible and uneconomical. It appears that instead of simply implementing a PZP program, that is proven to be successful in other HMAs, BLM instead adopted a very different tactic of fundamentally modifying its entire wild horse management approach.

Further, the BLM must analyze alternative methods for sterilizing wild horses including more modern ovariectomy via laparotomy as well as less invasive procedures including oviductal ligation and laser ablation of the UTJ (papilla). The latter two methods – which the 2015 NAS review panel said “would be safer – with less risk of hemorrhage and evisceration – and probably less painful” – have the added advantage of causing the behavioral changes that will have a profound effect on wild herd integrity.

Finally, the EA should consider an alternative for performing the colpotomy procedure under the standard veterinary practices employed when the procedure is used on domestic horses. These practices include: a sterile environment, adequate anesthesia, and adequate post-operative care including restricted movement and adequate pain relief.

In summary, the BLM must take seriously its obligation to make the NEPA process meaningful by evaluating all reasonable alternatives to the proposed action, rather than using the NEPA process to justify a foregone conclusion – the decision to once again remove hundreds of horses from public lands without even considering implementing PZP use in the HMA. For all of these reasons, and in order to satisfy the obligations of NEPA and its implementing regulations, the BLM must consider the above alternatives.

C. BLM Must Adequately Analyze The Impacts Of Its Action

The EA must adequately analyze the impacts of BLM’s proposed action on the wild horses themselves. In particular, BLM must analyze the risks of pain, mortality and abortion for mares involved in the inhumane study of ovariectomy by colpotomy and the deaths and injuries resulting from helicopter roundups and inhumane storage in holding facilities. In addition, the BLM must analyze the post-roundup effects of placing the horses in holding facilities. Further, the BLM must also thoroughly analyze the impacts that using radio collars or tags will have on wild horses and the impacts to wild herds of releasing ovariectomized mares on the range. Finally, the BLM must consider the impacts of its imposed restrictions to public viewing of the study.

1. Ovariectomy by Colpotomy

The current proposed ovariectomy study is not a sustainable, economically responsible, or socially acceptable option for the future management of wild horses. The sterilization of wild mares is not a new discussion between the public and the BLM. In its EA for similar experiments, the BLM acknowledged that the public has been a part of the discussion on mare sterilization for years and that public opposition to permanent wild horse sterilization “stem[s] from the appreciation and admiration most people have for the horse . . . [and their] immense cultural value as symbols of grace, beauty, companionship, and courage.” (Attachment 4, p. 42). Thus, one of BLM’s principal goals with these studies has been to determine whether the experimental sterilization methods are a “socially acceptable” way to manage wild horse populations. *Id.* at 47.

The WHA requires the BLM to manage wild horses and burros in a manner that protects their wild and free-roaming behavior. While Section 3(b)(1) as modified by the Public Rangelands Improvement Act of 1978 does specify options for population management that include sterilization, it states that such determinations must be made in conjunction with other wildlife agencies and experts independent of government, such as those recommended by the NAS.

In 2011, the BLM requested and paid for an NAS/National Resource Council (“NRC”) scientific review of its Wild Horse and Burro Program. In February 2011, then BLM director, Bob Abbey, announced that the NAS/NRC review was a cornerstone of the agency’s “accelerated reform,” stating that the NAS/NRC findings would “determine how the BLM should proceed in light of the latest scientific research.” In the study scope, as defined by BLM, the NAS/NRC was specifically asked to evaluate ovariectomy as an option to managing wild horses. (Attachment 5).

In its final report entitled “Using Science to Improve the BLM Wild Horse and Burro Program: A Way Forward,” June 2013 (Attachment 1), the NAS/NRC concluded that ovariectomy was “inadvisable.” For example, it stated

The possibility that ovariectomy may be followed by prolonged bleeding or peritoneal infection makes it inadvisable for field application.” (*Id.*, p.130).

and

Surgical ovariectomy and ovariohysterectomy are commonly used in domestic species, such as cats and dogs (including feral cats and dogs), but seldom applied to other free-ranging species.” (*Id.*, p. 114).

Despite the scientific recommendation from the NAS/NRC against ovariectomy (even laparoscopic) as a method to control population growth, despite the public urging the BLM not to pursue removing the ovaries of mares, despite the overwhelming controversy, the BLM is nevertheless pursuing this dangerous, precedent-setting and extreme plan to sterilize wild horses.

In addition, the 2015 “NRC Review of Oregon Proposals” (Attachment 3), also commissioned by the BLM, found:

Domestic mares are typically cross-tied (after ovariectomy via colpotomy) to keep them standing for 48 hours post-surgery to prevent evisceration through the unclosed incision in the anterior vagina. That protocol would not be possible in free-roaming mares because they cannot be held still for so long. Therefore, there is some concern that the investigator may see more fatalities after surgery than the 1% quoted in the protocol, based on domestic mares.

As stated above, the 2015 NAS research review panel suggested that the less invasive sterilization techniques proposed in the last round of research “would be safer—with less risk of hemorrhage and evisceration –and probably less painful.” (Attachment 3, p. 7).

AWHC detailed the health and behavioral concerns of ovariectomizing mares in its comments (and attachments) on the BLM's EA for the Mare Sterilization Research Project, which was also supposed to take place at the Hines Corrals in 2016. We incorporate these comments and relevant attachments by reference here and are including those comments at Attachment 6.

The present experiment will implement the ovariectomy by colpotomy procedure on 24-38 mares that will be reintroduced into a herd on the range as well as an additional 70 mares that are being ovariectomized (and removed from the range) strictly to assess, monitor, and record any complications from the procedure. Currently, the BLM plans to perform the procedure on mares that are in three stages of pregnancy (i.e., not pregnant, early-term, and mid-term). This barbaric procedure should not be performed on any mares, but especially not on those mares who are either in early- or mid-term pregnancies because there is an extremely high risk to the unborn foal and the expectant mother.

In the present EA, the BLM has failed to adequately consider the risks of ovariectomy by colpotomy for both the study and use in the Warm Springs HMA. These risks include:

- Impacts on physiology due to reduction of estrus and alteration of hormones.
- Impacts on the wild behaviors of individual horses and herds.
- Risk of infection under conditions that may not be entirely sterile.
- Risk of harm due to sedation and restraint in wild horses.
- Risks of hemorrhage, evisceration, colic and infection due to inability to provide the required post-operative care.
- The risk of post-operative pain in these mares and the BLM's inability to provide adequate post-operative pain relief.
- The risks to pregnant mares. Including but not limited to abortion, stress, and hemorrhage.
- The feasibility of the proposed procedures for use on the range, including cost, and lack of a sterile environment for surgery.

Several equine veterinarians experienced with this procedure have acknowledged and warned about the overall impacts of ovariectomies.

In "TheHorse.com," Dr. Michael Ball (Attachment 7) describes the risks of ovariectomy in domestic horses:

Regardless of the method used for ovariectomy, this procedure is generally a painful one and the use of peri-operative analgesics is important. The horses often are hospitalized for 3-7 days and very carefully monitored in the immediate post-operative period for any signs of hemorrhage, which is a serious complication that can occur.

Dr. Robin Kelly, whose northern California-based equine veterinary practice has included care of 240 wild horses and burros at the Montgomery Creek Ranch sanctuary in Elk Creek, writes in a statement (Attachment 8, p. 3) about the BLM's cancelled 2016 mare sterilization experiments planned for this same herd in Oregon and her concerns about the BLM's inability to provide post-operative care to wild mares who will be ovariectomized:

The postoperative care/management proposed for these [BLM] mares is minimal compared to significant post operative recommendations for domesticated mares. These recommendations include keeping mares tied in a tie stall/tie line to prevent them from laying down/rolling to reduce risk of postoperative hemorrhage or herniation of bowel thru the vaginal incisions that must be left open for second intention healing. These measures are advised since excessive post-operative hemorrhage or herniation of bowel thru the vaginal incisions would not be survivable.

Domesticated mares would be treated with a more aggressive antibiotic choice for 7-10 days post operatively (monitoring daily for complications). Insufficient anti-microbials could result in peritonitis (also likely not survivable). . . . The wild mares will not be provided with post-surgical pain relief, according to the study description, and presumably [will be] turned out in a communal paddock with no restraint.

The BLM must consider that providing the required confinement for safe recovery from this invasive surgical procedure is not possible in free-roaming mares, raising the risk of fatality. The wild mares targeted in this action will also not be provided with any of the critical follow-up care required of this procedure, including stall confinement, a period on cross-ties to prevent lying down or rolling, careful monitoring for hemorrhage, pain relief and antibiotic treatment. This lack of any credible post-operative care plan or procedure is appalling and may violate the Animal Welfare Act. The BLM must further consider how these oversights will lead to other health risks related to ovariectomy of horses, including abortion by pregnant mares as well as premature menopause that can impact to various body functions including bone conditions.

Additionally, referring specifically to the introduction of ovariectomized mares into wild herds, Dr. Kelly states:

I am concerned about the use of this procedure in the wild, due to the concerning potential disruption of the normal social behaviors of post ovariectomized mares and how this will affect their role within the herd once they return to their families. According to the reproductive specialist I consulted, while estrogen is secreted by multiple tissues, progesterone is only produced by the ovaries. Since progesterone is the hormone that prevents mares going into estrus, ovariectomized mares frequently act like they are in heat all the time. Putting ovariectomized mares back on the range could create social havoc within wild herds. Stallions instinctively know which mares are fertile/receptive and which are not. The stallion's job is to breed and impregnate mares after they deliver. If he has a number of ovariectomized mares in his harem who act like they are in estrus continuously but cannot become pregnant, or some of the time would not accept his 'advances,' the stallion's social behaviors could be severely disrupted or "over used" inappropriately. In addition, ovariectomized mares may act sexually but may not want to breed, raising the potential for serious kick injuries to stallions and mares if a stallion attempts to breed an unreceptive mare. Ovariectomized mares may also lose their status within the mare band. 'Lead' mares would be unlikely to retain that position post-ovariectomy. Social ostracism is certainly possible for these post-operative [mares] if they are no longer accepted by the herd.

Dr. Allen T. Rutberg, a faculty member at the Tufts/Cummings School of Veterinary Medicine and a wildlife biologist and researcher who has extensively studied wild horse behavior, describes the detrimental effects of sterilization on the natural free-roaming and social behaviors of these herds (Attachment 9):

Wild horses typically live in reproductive bands consisting of adult mares, their dependent offspring, and one or more stallions who[se] lives revolve around trying to protect mares from harassment by other stallions and securing exclusive reproductive access to the mares for themselves; ...[m]ares, meanwhile, simultaneously bond to one another and compete with each other for access to water, food, and other resources for themselves and their foals. Neither geldings nor spayed mares participate in these fundamental processes of wild horse behavior.

“Spaying” is not an appropriate management tool for wild horses due to the behavioral changes and social disruption it will undeniably cause when implemented on the range, as well as the health risks this surgical procedure poses for mares and their unborn foals.

A NAS research panel also expressed deep concerns about ovariectomy via colpotomy and recommended against BLM spending research funds on the previous planned procedures. (Attachment 3). The NAS panel noted this procedure could result in higher fatalities than reported in scientific literature. *Id.* The NAS panel also stated that BLM’s experiments “contain no science or experimentation related to technique” and that “the only novelty in this proposal is that the procedure would be performed on free-ranging rather than domestic horses.” *Id.* Because wild and domestic horses are the same species, and differentiated chiefly by behavior, the NAS panel “did not consider this difference to be a matter of research.” *Id.* Thus, the NAS found no scientific merit in the BLM’s experiment with this procedure. Because the current experiment regarding ovariectomy by colpotomy is substantially similar to BLM’s prior, now-abandoned experiment, this criticism from the NAS panel remains valid, meaning that there is no scientific merit to BLM’s current proposal.

According to Dr. Kelly, this ovariectomy by colpotomy “is extremely risky due to its blind nature . . . [and i]t is inherently difficult for a surgeon to avoid severing other organs, including the bowel, and causing severe infection and internal bleeding during this blind approach.” (Attachment 2, p. 56 Kelly Decl. ¶ 4. This procedure is especially risky for pregnant mares, because “ovariectomy via colpotomy is likely to cause the abortion of the pregnant mare’s fetus and result in the death of the mare.” *Id.* Due to these risks, “[t]he veterinary community avoids ovariectomy via colpotomy as a method for spaying mares.” *Id.*

The protocol from Colorado State University does not adequately mitigate the risks and impacts to mares involved in these experiments. As equine veterinarian Pamela Corey highlights in her statement (Attachment 10):

- The surgery is done blindly through the vagina into the abdominal cavity and this has numerous risks of error, many of which can be fatal to the horse. The plan is to observe the mares from a distance after surgery and administer an NSAID, Banamine, if necessary.

- The examination by rectum with or without ultrasound by an equine veterinarian is one of the top 3 reasons for veterinary malpractice cases as it has a significant risk of complications namely rectal tearing, sometimes with peritonitis. Each of the wild mares will require at least two of these rectal exams.
- The anesthetic protocol includes ketamine, a dissociative anesthetic that can cause the horse to lose consciousness. The horses will be kept in the standing position during the surgery. Risks to horse and human handler exist if a horse collapses in the stocks.
- One dose of antibiotic (4 day duration) and a NSAID will be given before the mare is released to a pen for observation. It is a known effect of flunixin (Banamine) that it may mask pain. Repeated dosing can cause harm to other organs (stomach, kidneys) and may hide more serious problems in the animal. Some post op problems that may be masked for a prolonged period of time by repeated use of flunixin can ultimately end in euthanasia. This type of post op “care” is considered and termed “herd management” as opposed to individualized medical monitoring. In unhandled horses this would be viewed as leading to substandard welfare outcomes because the individual may not receive sufficient or appropriate pain management.
- Most mares are expected to experience what’s termed in the protocol as Pain Category C: “Animal use subjects them to no more than momentary or slight pain or distress and they do not receive pain-relieving drugs.” The use of anesthesia including detomidine and ketamine directly negates this categorization. The use of a surgical incision and visceral manipulation including ecraseur use will cause pain. (See Category D)
- There is no explanation for the numbers placed in either pain category C (the majority) or category D (a small number or the total.) Category D describes pain associated with surgery as follows: “Category D: Animal use subjects them to procedures where pain or distress is appropriately relieved with anesthetics, analgesics and/or tranquilizer drugs or other methods for relieving pain or distress which would otherwise be more than slight or momentary.” **This pain classification is gravely flawed in the protocol.**
- Morbidity, meaning serious complications, may include the following potential risks with colpotomy: pain and discomfort; injuries to the cervix, bladder, or a segment of bowel; delayed vaginal healing; eventration of the bowel; incisional site hematoma; intraabdominal adhesions to the vagina; and chronic lumbar or bilateral hindlimb pain. Evisceration is also a possibility. Most of these complications may go unseen because participants will be “observing post op horses from a distance.”
- Mortality is expected and euthanasia planned. There is little mention of what type of potential complications from spontaneous abortions might be seen. These could be reasonably expected from some of the mares that are in the early stages of pregnancy. The protocol declares that if any occur they will be without complication. This is an assumption without basis considering this is an experimental procedure.

- There are potential risks to human handlers from these untrained horses during the course of complications letting the large number of procedures.

None of these issues are adequately addressed or analyzed in the EA.

Even the BLM acknowledges that this procedure will cause complications—including injury, death, and abortion—and yet the agency is still planning to conduct this experiment on 100 wild mares for the express purpose of determining how much pain the mares will endure, how often pregnant mares will be injured or die, how often their foals will be aborted, and what behavioral changes will be observed. This experiment is therefore fundamentally inconsistent with Congress’s intent to “protect” wild horses. Moreover, the scientific consensus as expressed by the NAS and the veterinary community is that ovariectomy by colpotomy is not suitable for use on wild horses and that this experiment lacks any scientific merit.

As Dr. Corey concludes: “This is an experiment that belongs to another era or a third world country. Veterinary medicine should strive to be more advanced in 2018 and should consider the welfare implications of the known risks and complications. I am appalled that this experiment will have any component of medical teaching to veterinarians. These risks aren’t acceptable to the majority of horse owners. Equine veterinarians would rarely suggest this as a field surgery and equine specialty hospitals exist for this purpose and pride themselves on providing state of the art veterinary medical and surgical care to horses. American Wild horses should not endure outdated medical procedures in conditions that will cause suffering. That veterinarians can condone this experiment shows a divide in beliefs regarding the acceptable use and welfare of the species we spend our lives helping and healing. These animals deserve better.”

As such, the BLM should not move forward with the proposed study involving the wild mares in the Warm Springs HMA. Ultimately, the BLM should drop plans to surgically sterilize wild mares and focus instead on non-surgical methods of fertility control that preserve the natural behaviors that distinguish wild-free roaming horses from domestic horses and are protected under federal law.

2. Roundups and Removals

AWHC and AWI ask that using helicopters to roundup wild horses be eliminated from the proposed action for the Warm Springs HMA. The EA fails to provide a complete analysis of the impacts of capture, removal and warehousing of the horses permanently removed from outside the HMA. Information should include mortality rates and causes of death or injury for horses: during roundup activities, prior to arrival at initial holding facilities, in short-term holding facilities and in long-term holding facilities. The EA must consider that the use of helicopters to roundup wild horses leads to death and serious injury to these federally-protected animals.

From December 28, 2009 through February 4, 2010, the BLM captured 1,922 wild horses in the Calico Mountain Complex. These roundups were some of the most closely watched in decades, and therefore represented the best that the BLM could offer in terms of helicopter capture procedures. Yet, as a direct result of the helicopter stampede, 86 horses died. Many

more sustained injuries as a direct result of the helicopter stampede, transport to short-term holding, or confinement in “feedlot”-type holding pens. Sadly, an additional 40 heavily pregnant mares spontaneously aborted. (Attachment 11).

Helicopters should only be used as a last resort. Instead, water/bait trapping should be used as the preferred capture method. Helicopters have many unintentional negative impacts to the environment, to the wild horses, and to taxpayers. For example, Cattoor Livestock Roundup Inc. was recently awarded \$999,610 for the Wyoming Red Desert Complex Wild Horse Roundup. (Attachment 12), and BLM spent \$4.2 million of its FY2017 budget on roundups and removals. (Attachment 13). Therefore, the BLM should not move forward with the plan to use helicopters to round up 100 percent of the existing horses in the Warm Springs HMA.

3. Radio Collaring and Tagging

AWHC and AWI ask that radio collaring or affixing tags to wild horses be eliminated from the proposed action for the Warm Springs HMA. The EA must consider the impacts of radio collars and tags on wild horses.

The use of radio collars that release upon “remote detonation” raises humanitarian and safety concerns and the potential impacts on horses have not been adequately evaluated in the EA. Past field studies on wild horses fitted with radio collars have resulted in injuries and deaths. Pen trials cannot accurately simulate field conditions and cannot provide valid or sufficient data on the impacts that radio collars would have on horses on the range.

Therefore, the BLM should consider less invasive methods of gathering data, including field observation and the use of GPS-tracking microchips implanted under the skin or glued into tails, to gather data without endangering horses.

If radio collars are to be used, then a breakaway design must be chosen, and all collars must first be tested and found safe in a controlled field trial conducted in an area much smaller than the expansive Warm Springs HMA. Such a field trial should only be implemented via bait trapping, not helicopters, and the collars should be adjusted or removed in an emergency by bait trapping, not helicopters. As stated above, helicopter roundups are costly and traumatic. Finally, and realistically, a radio collar study should be conducted in a smaller HMA than Warm Springs, where the identity of individual horses and social bands is well-known and documented.

4. Restrictions on public viewing under the First and Fourteenth Amendments

BLM’s denial of unrestricted access to observe and document its wild horse sterilization experiments because of Colorado State University (“CSU”) policies clearly violates the First and Fourteenth Amendments.

A. The Colorado State University Policies

In the proposed EA, the BLM states that public viewing of the surgery “would be permitted and managed by the BLM.” (p.26). However, the BLM also claims that certain CSU policies must be adopted due to the BLM’s contract with CSU. (Appendix E). This contract states that the BLM must comply with the host university’s “rules, regulations, and policies regarding professional conduct, health, safety, use of services and facilities, use of animals...as well as other policies generally applied to Host University [] personnel.” None of these have to do with observation by the general public.

BLM claims that one of these contractually obligated policies comes from the CSU Laboratory Animal Resources Employee Handbook. Specifically, this policy pertains to the use of cell phones and other electronic devices policy states that personal cell phones are allowed at the manager’s discretion and that other electronic devices with recording capabilities are not allowed in the “vivarium” without the approval of the Associate Director or Director. (Appendix F, p. 31). This policy clearly only applies to CSU employees and not the general public. As noted on page three of the handbook, there are multiple references that the handbook, and its included policies, apply to the employee in the course of his/her employment. (Appendix F). Additionally, the “vivarium” mentioned in the policy is part of CSU’s complex. The handbook describes the animal vivarium as 48,000 square feet of space within the Office of the Vice President of Research at Colorado State University. (Appendix F, p. 5).

Further, the BLM claims that the CSU Veterinary Teaching Hospital’s Photography and A/V Recording Policy also applies and requires that any member of the public must surrender cell phones and recording devices while they are in the working barn. (Appendix G). This does not apply to the study in this EA. Indeed, this policy clearly states that it only applies in the CSU Veterinary Teaching Hospital, which has a physical address of 300 W. Drake Rd., Fort Collins, CO 80525. Whereas, according the EA, the area where the animals are to be treated is located in the working barn portion of the Oregon Wild Horse Corral Facility in Hines, Oregon. (p. 26 and 34). These are clearly not the same location and therefore the CSU Recording Policy cannot apply.

Additionally, CSU’s policies do not even operate as the blanket restriction that BLM now seeks to impose on the recording of these experiments. Instead, the policies allow for the recording to document the care of animals, provided the focus is on the animals themselves and includes staff who have provided consent. However, BLM has neither provided any evidence that CSU staff do not consent to recording, nor any method for the public to request that such consent be requested, nor has it imposed any narrowly tailored restriction on recording such as an agreement to blur faces or otherwise obscure the identities of those participating in these experiments. Such techniques are standard methods of protecting the privacy of individuals and could be implemented here easily.

Even if the policies could apply to the EA, the BLM’s reliance on the policies to restrict public observation is a clear violation of the First and Fourteenth Amendments as discussed below.

B. Public Observation Generally

Even if the CSU documents had any applicability here (which they do not), the BLM's application of these policies to the general public is a clear violation of the public's First and Fourteenth Amendment rights. BLM's wild horse population management has historically been open to the press and public, because public access plays an important role in shaping wild horse management. The First Amendment protects individual rights to observe government activity, and any access restrictions must be narrowly tailored to serve an overriding government interest. See *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). Because BLM cannot meet this stringent standard, its denial of public access to observe and document its sterilization experiments violates the First Amendment.

The fact that BLM intends to perform this experiment in a corral rather than on public lands does not diminish the public's First Amendment rights. In an analogous context, the Ninth Circuit held that moving executions from public spaces into the more private, regulated forum of prisons did not defeat the First Amendment right to view executions. *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 873–876 (9th Cir. 2002). Like executions, wild horse population management has historically occurred during “fully open events.” *Id.* at 875. And like the shift from public executions to lethal injection at issue in *Woodford*, BLM's movement toward managing wild horse populations through surgical sterilization shifts to a more medically-based procedure in a more controlled environment.

Additionally, the fact that BLM intends to release 28-34 mares that have endured ovariectomy via colpotomy only enhances the need for the public to be able to observe and document this experiment. Because these mares may suffer adverse physical and behavioral effects, both short- and long-term, public observation and documentation of what these horses have had to endure is critical to a genuine public understanding of this procedure and its consequences for these federally protected wild horses.

When BLM moves horses from the public range into traps or temporary holding facilities, its policy is to provide “[o]pportunities for the public/media to visit temporary holding facilities and view the shipping activities.” (Attachment 2, p. 87). Similarly, even at the Hines Corral, BLM intends to allow public observation of mares during BLM's surgical experiments but is arbitrarily limiting the public from recording those experiments. (Appendix I). The BLM is also arbitrarily limiting the number of observers allowed in the space to five at a time, with shifts of 2-4 hours if there are more than five people that are interested in observing. (Appendix I). This is a restriction without any basis in logic. Ginger Kathrens, founder and Executive Director of the Cloud Foundation, noted that “at least 15 people were able to stand near the chute” during her BLM-led tour of the Hines Corral. (Attachment 2, p. 14). As the Ninth Circuit found in *Woodford*, “a tradition of at least limited public access” was sufficient to conclude that “historical tradition strongly supports the public's First Amendment right” to observe executions. 299 F.3d at 875-76. Therefore, BLM's provision of access to view wild horse population management, even at restrictively regulated sites where horses undergo stressful activities, demonstrates that the public has a First Amendment right to observe BLM's wild horse population management experiments at the Hines Corral.

Further, there is no legitimate basis for BLM to assert that public observation or recording could

impair these experiments, nor has BLM made any effort to make such an assertion. For example, Dr. Robin Kelly, who has 34 years of veterinary experience and has actually performed reproductive surgery on wild horses in the presence of observers, explains that she “do[es] not believe that observers would in any way affect the ability of a qualified veterinarian to safely and effectively perform a procedure on a wild horse, as long as the horse is properly sedated and pain is effectively controlled.” (Attachment 2, p. 57 Kelly Decl. ¶ 8). Dr. Kelly also notes that allowing observers who are not affiliated with the BLM or the research staff would “provide for recordings and/or unbiased, first-hand reports that would be useful to the public in determining whether these procedures are an appropriate way to care for wild horses.” *Id.*

Additionally, Dr. Pamela Corey, who also has decades of related experience, notes that in her practice, which regularly involves surgery on horses in the presence of observers, “bystanders do not in any way affect my ability to safely and effectively perform surgery on a properly sedated horse.” (Attachment 2, p. 62 Corey Decl. ¶ 3). Dr. Corey also notes, “observers or recording devices would not increase the risk of errors during surgery, nor increase the risk of injury to horses or veterinarians.” *Id.* The only time Dr. Corey has requested that observers alter their behavior is when she has “had to ask small children to take a step back while observing, as not to injure themselves...”

Similarly, Dr. Allen Rutberg, a researcher with over 20 years of experience studying wildlife contraception and wild horse management, attests to the fact that during his “extensive field research on free-roaming deer and wild horses,” observation, still photography, and videotaping by journalists and the public has been “commonplace” and that he has “never had an incident where an observer disrupted the research protocol or posed a threat to animal or researcher safety.” (Attachment 2, p. 91-92 Rutberg Decl. ¶ 4-5).

Nor does observation of ovariectomy via colpotomy increase the risks of that procedure. For example, Dr. Leon Pielstick, “a veterinarian who has worked with BLM since 1975,” (Attachment 14) previously invited nine observers to observe and record him sterilizing a horse and four wild burros using this technique. (Attachment 2, p. 96-98 Netherlands Decl., ¶¶ 3-8). Despite the fact that “[t]he observers were not quiet” and that “chatter among the observers, and even laughter, is regularly audible” in the recording, Dr. Pielstick never indicated that the observers’ behavior posed any distraction to him or any risk to the animals. *Id.* ¶ 8. Thus, even the behavior of a veterinarian that BLM itself relies on, confirms that BLM’s protestations about observation creating distractions and risks are groundless. Moreover, the BLM itself confirms that recording should not disrupt surgical procedures because the agency itself has published several narrated videos of the procedure being performed in other locations; such as the video that was published on the ePlanning page with this EA.

BLM’s decision to allow public observation but to restrict the public from recording the experiments lacks any basis in logic or law and is a flagrant violation of the public’s First Amendment rights to observe government activities. As discussed above, “any access restrictions must be narrowly tailored to serve an overriding government interest.” *Leigh*, 677 F.3d at 898. The recording of the ovariectomy procedure by a member of the public will neither interfere the procedure by Colorado State University personnel nor unduly interfere with access or use by other members of the public. As supported by the veterinarian testimony above, an

observer holding a cell phone or small camera, and even talking, will not disrupt the procedure or other members of the audience from viewing. None of BLM's stated reasons for denying any access to observe and document the upcoming sterilization experiments in the Hines Corral constitutes a compelling justification to thwart public observation of this important governmental activity, and under binding precedent, such conclusory allegations simply cannot carry BLM's legal burden of proving with "specific, on the record" evidence that its restrictions are "essential." See *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 13 (1986). Therefore, the imposed restrictions clearly fall short of the stringent standard and violate the First and Fourteenth Amendments.

In particular, BLM's effort to rely on CSU's internal policies to justify its arbitrary restriction of recording fails as a matter of law. As a preliminary matter, BLM has failed to state any compelling reason for this arbitrary restriction, as required under the First Amendment and applicable case law. Similarly, because the Fourteenth Amendment restricts states from interfering with constitutional rights, a policy from a state institution such as CSU cannot serve as a basis for an unconstitutional restriction on the public's right to observe and document government activities. BLM has attempted to circumvent the public's constitutional right to observe and document government activities by entering into what BLM characterizes as a "legally binding contract" that ostensibly requires the agency to defer to the university's policies. However, BLM may not contract away the public's constitutional rights.

Nor is there any indication that BLM's blanket restriction on recording is narrowly tailored to serve any particular interest. Instead, BLM has acted in an unexamined and unwarranted deference to CSU's policy. Notably, CSU's policy is not actually as restrictive as BLM's restriction in this situation. CSU's policy instead *allows* public recording of procedures for various purposes. BLM has made no apparent effort to either identify what compelling interest is served by its total restriction of recording, nor to explain how that total restriction of recording is narrowly tailored to serve that interest.¹

Moreover, BLM's restriction on recording is simply illogical. As various veterinary professionals have attested in sworn declarations, public observation and recording of surgical procedures is not an obstacle to their successful implementation. Indeed, BLM's own experience confirms this, as BLM has recorded *this same procedure* previously. Similarly, a veterinarian upon whose expertise BLM has previously relied, Dr. Leon Pielstick, has performed this procedure while being recorded by a group of observers. Moreover, CSU's own policies, on which BLM now arbitrarily relies to restrict the public's right to observe and document this experiment, in fact allow for recordings to occur, indicating that there is no logical basis for BLM's current decision to restrict all recordings.

At bottom, it is clear that BLM would prefer that the public not be able to record this experiment because ovarioectomy via colpotomy is a brutal procedure that the agency knows the public will

¹ Although AWHC and AWI do not agree that protecting the privacy of those involved in these experiments is a compelling government interest, AWHC and AWI would agree to blur the faces or other identifying features of the humans involved in the procedures in any recordings. To the extent BLM views the protection of privacy as a compelling government interest, such an agreement to blur faces and other identifying human features would be far more narrowly tailored than BLM's current blanket restriction on recording.

not accept. This is the same reason that BLM has offered the public only its own recordings that attempt to sanitize this procedure by limiting the range of camera angles and failing to provide a thorough and honest portrayal of this procedure. However, as BLM repeatedly stressed in its prior attempt to experiment with this inhumane and unethical method of sterilization (which BLM abandoned after AWHC and other advocacy groups sued to protect the public's First Amendment rights), determining whether this experiment is socially acceptable is a critical issue that BLM must address in any consideration of this procedure. And as AWHC and others repeatedly explained when BLM previously attempted a similar experiment, the best way to determine whether a procedure is socially acceptable to the public is to show the public the unvarnished truth of what that procedure actually entails for wild horses. As such, not only is the public's unrestricted ability to observe and record these procedures protected by the constitution, it is also in BLM's own interest.

Further, the Ninth Circuit has noted, that BLM's documentation of the experiments will not satisfy the public's Constitutional right to view the procedures because an "official's perception of the [] process may be vastly different –and markedly less critical –than that of the public." *Woodford*, 299 F.3d at 884, merely providing the government's version of events cannot cure injuries caused by a restriction that "eliminates independent, public eyewitness observation of several crucial steps of the . . . process." *Id.* at 883; *see also* Attachment 2, p. 17 Kathrens Decl. ¶¶ 32–33; p. 37 Bolbol Decl. ¶ 9. Therefore, by providing the public with an open and honest account of what this experiment entails, public observation and recording can help the BLM understand that the public will not accept the implementation of this inhumane method of sterilization.

D. Issues For In-Depth Analysis in the Environmental Assessment

The following information must be provided, considered and analyzed in the EA:

1. PZP

Humane and cost-effective strategies for managing wild horse populations on the range through reversible, non-hormonal fertility control must be used more vigorously and without implementing removals.

The BLM must consider management of the wild horse population at current levels utilizing Catch Treat and Release ("CTR") methods for the vaccination of all mares over 1 year of age with the PZP-22 or native PZP fertility control vaccine. The use of PZP fertility control is scientifically established, cost-effective and widely accepted in the mainstream wild horse advocacy and scientific communities. (Attachment 1, p. 99-112). The BLM must analyze and incorporate in this analysis that research also indicates that a two-shot protocol (PZP-22 followed by a native PZP booster) conveys three years or more of infertility in mares. (Attachment 1, p. 102). Of the recommended fertility control alternatives, the NAS in 2013 concluded that the only method available for use now, without further research, is the PZP birth control vaccine. (Attachment 1, pgs. 81 and 6). As such, the use of PZP to manage this herd is clearly a viable alternative.

The EA must also incorporate data showing that the PZP fertility control vaccination has been available for decades, has a 30-year proven history of being safe and effective in managing wild horse populations, and is fully supported by the public and animal welfare organizations. (Attachment 1). The BLM must analyze and explain why the agency has failed to utilize PZP in a manner and at a level that will make a difference in population rates in the Warm Springs HMA.

Further, the BLM must include and analyze all current peer-reviewed literature on the use of PZP as a management tool, including its effectiveness in reducing and maintaining herd numbers, its effects on herd behaviors, its safety, and the cost of its implementation compared to roundups and removals. For example, an economic model published in a peer review article predicted that BLM could attain its population goals and save \$8 million in one HMA by using PZP fertility control and reducing and eventually eliminating removals. Even the NAS warned that the BLM's continuing practice of roundup and removals is "expensive and unproductive for the BLM and the public it serves." The cost savings of comprehensive PZP use is substantial.

In sum, AWHC and AWI believe that the BLM must analyze an alternative that exclusively implements PZP, or PZP use with a limited regime of removals by bait trapping, for use in this EA.

2. Reduce livestock grazing

The current wild horse population should be maintained without removals by implementing reductions in livestock grazing pursuant to 43 C.F.R. 4710.5(a). The BLM has a statutory mandate to protect wild horses, while livestock grazing is permitted only at the discretion of the Interior Department. Livestock grazing is not required to fulfill the agency's "multiple use" mandate. Further, it is far more cost effective to curtail taxpayer-subsidized commercial livestock grazing in this area than it is to permanently remove wild horses from the range. The recent Tenth Circuit ruling in *Wyö. v. U.S.*, 839 F.3d 938 (2016) (Attachment 15) affirms the BLM's discretion to implement this alternative, and the NAS report in its recommendations, supports this option as "a more affordable option than continuing to remove horses to long-term holding facilities." (Attachment 1, p. 270).

43 CFR § 4710.5 authorizes BLM to "close appropriate areas of the public lands to grazing use by all or a particular kind of livestock... [i]f necessary to provide habitat for wild horses or burros, to implement herd management actions, or to protect wild horses or burros from disease, harassment or injury." BLM typically states that the agency utilizes this regulation only in cases of emergency, but nothing in the text of the rule indicates that its applicability is limited to emergency situations. Further, a fiscal emergency does exist due to the fact that wild horse holding facilities are at capacity and consuming the majority of the BLM's wild horse and burro program budget. Leaving horses on the range and making downward adjustments to taxpayer-subsidized livestock grazing levels is clearly the most cost-effective option.

In sum, the BLM must further analyze this alternative by providing:

- A breakdown of Animal Unit Months (AUMs) permitted for livestock and wildlife and the actual use of AUMs by livestock for the HMA for each of the past three years.
- A listing of all allotments within the HMA, including percentages of each allotment that fall within the HMA.
- Rangeland assessment results (and all such assessments should be provided in the Appendix) for the past five years for all areas within the HMA (including pastures, allotments, etc.).
- The methodology the BLM used to differentiate livestock usage impacts from wild horse impacts, as well as the methodology used to calculate livestock AUMs versus wild horse AUMs.
- Information regarding fencing within the HMAs, including information about water sources that are available to livestock but fenced off from horses.
- Voluntary grazing retirement opportunities should be explored with permittees to determine an equitable means to achieve a fairer allocation of resources for wild horses on public lands.

3. Implement Incremental Removals

Removals, if they occur, should be incremental over time (no more than 50 horses per year). This alternative should include managing this population at the high AML of 202 horses rather than reducing it to the low AML of 111. The BLM must consider all information it has available about the need to keep horse herds at certain population levels in order to prevent adverse genetic harm to the population including inbreeding.

The BLM's own wild horse and burro handbook states:

a minimum population size of 50 effective breeding animals (i.e., a total population size of about 150-200 animals) is currently recommended to maintain an acceptable level of genetic diversity within reproducing [wild horse and burro] populations. (Attachment 16).

AML is based on the number of wild horses the BLM has decided to allow to live in the HMA after allocating the lion's share of forage to private livestock. However, as the NAS concluded:

How Appropriate Management Levels (AMLs) are established, monitored, and adjusted is not transparent to stakeholders, supported by scientific information, or amenable to adaptation with new information and environmental and social change....standards for transparency, quality and equity [are needed in] establishment, adjustment, and monitoring [of AMLs]. (Attachment 1, p. 11).

The BLM should adhere to NAS recommendations for "transparency, quality and equity" in the process to adjust AML. This must include basing decisions on sound environmental and monitoring data, a complex understanding of herd dynamics and genetic viability needs, as well as equity in resource distribution in the territory. The EA should also note that the AML range was established to allow the population to grow in the years between roundups.

4. Prioritize Bait Trapping

The EA must further analyze alternative methodologies for wild horse removal including the exclusive use of bait/water trapping. Helicopter roundups are known to inflict stress, trauma, injury and death on wild horses and collateral damage to sensitive sagebrush, grasslands, and riparian habitat areas and disruption to other wildlife species. Bait/water trapping will minimize stress to the horses, eliminate collateral environmental damage (as horses will not be stampeded through sensitive habitat), and maintain herd social structures.

If a helicopter roundup is selected as part of the proposed action, as is the current case here, the BLM must consider, analyze, and implement humane standards as outlined in the attached Standard Operating Procedure (SOP). (Attachment 17). As such, the EA should have included an analysis of existing information available to determine if improvements could be made to reduce potential stress and harm to the horses during the roundup. Improvements, to minimize stress and injury to horses during roundups must include the following:

1. Limit the distance horses/burros may be chased by a helicopter to no more than five (5) miles;
2. Require that the helicopter *not* chase/move horses at a pace that exceeds the natural rate of movement of the *slowest* animal in the band. Every effort should be made to keep older, sick and young animals together with their bands as they are moved into the trap. If there are compromised, old, weak or young animals in a small band – the helicopter should not move or capture those animals; and,
3. Establish strict parameters for suspending helicopter roundup operations in temperatures below freezing (32 degrees F) or over 95 degrees F.

The BLM must not simply state that the use of bait or water trapping is not cost-effective or practicable and/or that it will only be used as needed. Rather, the BLM must analyze how bait/water trapping *could* be implemented – how water sources *could* be controlled allowing the BLM to turn off water during water/bait trapping efforts. In addition, there are numerous pastures throughout the HMA, which are practicable for trapping operations. The use of water/bait trapping can be used to greatly reduce the stress of roundup operations and maintain the social structure of bands, thereby reducing stress to the animals and is a minimal feasible management.

5. Improved Public Observation Must Be Considered, Analyzed and Implemented

The BLM is well aware of the significant public interest in the agency's management of wild horses and burros and its roundup operations. In fact, NAS specifically recommended to the BLM to improve the transparency of its management of the Wild Horse and Burro Program. (See Attachment 1). The humane treatment of the horses is paramount.

Removal of wild horses from public lands negatively impacts the human environment for those who enjoy observing, photographing and researching these wild horses. Given the tremendous public interest and based on the agency's claims to operate with full transparency, the following actions should be considered, analyzed and implemented to ensure that the proposed

action is conducted in a manner that minimizes stress and injuries to wild horses and ensures interested parties have the ability to adequately monitor the BLM and its contractors in conducting any roundup operation or associated activities:

1. Trap sites should be located on public lands to allow public observation of roundup activities. No trap site shall be located on private lands for which the owners will not give permission for public observation of roundup activities.
2. Real-time cameras with Global Positioning System technology should be installed on all helicopters used in roundup operations and video should be live streamed on the Internet. This will improve the transparency of roundup operations and enable the BLM and public to monitor the direct impact motorized vehicle usage has on wild horses and the environment.
3. Real-time cameras should be installed on the trap, the corral and temporary holding pens and live streamed on the Internet, again, so that BLM personnel, public and media can monitor the entire roundup operation and treatment of the horses/burros.

The recommendation of real-time cameras is also supported by a report commissioned by Cattoor Livestock Roundup, a long-time roundup contractor hired by the BLM which states, “Video monitoring of animal operations is a good way to ensure humane handling is taking place on a daily basis. Video cameras mounted in helicopters and in the capture and holding pens can also render the activists’ videos as simply nothing more than proof that your business ‘walks the walk’ when it comes to upholding animal welfare standards.” The report was prepared by Mark J. Deesing, Animal Behavior & Facilities Design consultant for Grandin Livestock Handling System.

Video cameras will improve the transparency of roundup operations and enable the BLM and public to monitor the direct impact motorized vehicle usage has on wild horses and the environment. In addition, real-time cameras should be installed on the trap, the corral and temporary holding pens, again, so that BLM personnel, public and media can monitor the entire roundup operation and treatment of the horses. AWHC would be happy to provide technical and financial assistance to establish these real-time cameras as described above.

Regarding the ovariectomy study, video cameras will also help improve the transparency of the procedure and the social acceptability of the process. Currently, the BLM shows unhelpful and limited angles of the procedure in their published videos. The addition of public cameras and recording devices in the areas where the procedure will be performed will allow for more angles to be captured and give the public that is not able to attend better insight into what is actually happening to the mares chosen for the study. In short, the BLM’s narrative of the procedure is insufficient, and the public has a constitutional right to see a complete visual depiction of the procedures.

E. Economic & Social Impacts of Proposed Action Must Be Analyzed

According to the White House Council on Environmental Quality (CEQ), under NEPA,

“agencies are required to determine if their proposed actions have significant environmental effects and to consider the environmental and related social and economic effects of their proposed actions.”

The agency is facing an escalating fiscal crisis off-the-range as a result of the mass removal of wild horses from the range and the stockpiling of captured mustangs in government holding facilities. The removal of 685 horses will add wild horses to taxpayer-funded holding facilities. These factors must be disclosed and analyzed in the EA.

The importance of these factors was highlighted in a 1982 NRC report on the BLM’s wild horse and burro program:

Attitudes and values that influence and direct public priorities regarding the size, distribution, and condition of horse herds, as well as their accessibility to public viewing and study, must be an important factor in the determination of what constitutes excess numbers of animals in any area. . . [A]n otherwise satisfactory population level may be controversial or unacceptable if the strategy for achieving it is not appropriately responsive to public attitudes and values. . . .

Biologically, the area may be able to support 500 cattle and 500 horses, and may be carrying them. But if the weight of public opinion calls for 1,000 horses, the area can be said in this context to have an excess of 500 cattle. For these reasons, the term excess has both biological and social components. In the above example, biological excess constitutes any number of animals, regardless of which class above 1,000. Social excess depends on management policies, legal issues, and prevailing public preference...”

F. The Proposal to Surgically Sterilize Wild Horses May Violate the Animal Welfare Act

The proposal to sterilize wild horses by conducting ovariectomies via colpotomy as an experiment to assess the viability of this technique as a management tool for wild horses requires compliance with the Animal Welfare Act, 7 USC. § 2131 *et seq.* (AWA). In this case, CSU, as the registered research facility that is conducting the procedures, has reportedly complied with the AWA by preparing, submitting, and gaining approval from its Institutional Animal Care and Use Committee (IACUC) for the proposed research project including the surgical procedure (see Annex D to the EA). A review of Annex D and the relevant AWA regulations, including those at 9 C.F.R. § 1 *et seq.*, raises concerns as to whether the IACUC review approved by CSU is fully in compliance with the law.

For example, it is unclear if the CSU IACUC has evaluated the research facility in Oregon to be used for this experiment as required under 9 C.F.R. § 2.31(c)(2) or whether the required evaluation reports have been prepared and submitted pursuant to the law. *See* 9 C.F.R. § 2.31(c)(3). Furthermore, and more importantly, it is unclear if the specific IACUC review standards found at 9 C.F.R. 2.31(d)(1) *et seq.* have been fully satisfied, including that:

- 1) The procedures involving animals “will avoid or minimize discomfort, distress, and pain to the animals.” *Id.* at § 2.31(d)(1)(i);
- 2) The principal investigator has provided a sufficient written narrative description of the methods to be used in the experiment and that alternatives to methods that “may cause more than momentary or slight pain or distress to the animals” are not available. *Id.* at § 2.31(d)(1)(ii);
- 3) The principal investigator has provided assurance, in writing, that the procedures to be used do not “unnecessarily duplicate previous experiments.” *Id.* at § 2.31(d)(1)(iii);
- 4) Any procedures that cause more than momentary or slight pain or distress will “be performed with appropriate sedatives, analgesics or anesthetics” and require an “attending veterinary or his or her designee” to be involved in planning and consultation over the procedures to be used. *Id.* at § 2.31(d)(1)(iv)(A and B);
- 5) The living conditions for the horses will be appropriate as required in part 3 of the AWA regulations in order to “contribute to their health and comfort” and that the “housing, feeding, and nonmedical care of the animals will be directed by the attending veterinarian or other scientist trained and experiences in the proper care, handling, and use of the species being maintained or studied.” *Id.* at § 2.31(d)(1)(vi);
- 6) Medical care for the animal “will be available and provided as necessary by a qualified veterinarian.” *Id.* at § 2.31(d)(1)(vii);
- 7) Personnel who are conducting procedures on the horses “will be appropriately qualified and trained in those procedures.” *Id.* at § 2.31(d)(1)(viii);
- 8) Surgeries include “appropriate provision for pre-operative and post-operative care” of the horses “in accordance with established veterinary medical practices” and that “major operative procedures on non-rodents will be conducted only in facilities intended for that purpose which shall be operated and maintained under aseptic conditions.” *Id.* at § 2.31(d)(1)(ix).

Furthermore, AWHC and AWI note with concern CSU’s repeated non-compliance with the AWA based on USDA facility inspection reports and, therefore, question whether CSU should be engaged by the BLM to conduct this experiment. Examples of troubling inspection reports,

including some of the verbatim citations included in the USDA inspector's reports that are specific to horses,² see Attachment 18, are as follows:

June 5, 2018 Facility personnel did not perform adequate daily observations of a 12 year old, buckskin mare, ID #05, used on a teaching protocol, by failing to observe and report the worsening condition of the animal's left eye to the veterinarian.

During an inspection on June 6, APHIS inspectors observed a mare with a small injury to the lower left eyelid. The tissue surrounding the eye was swollen and the eye was tearing continuously. Inspectors observed the mare for approximately 15 minutes, during which time she predominantly held the eyelid partially or fully closed. The mare was able to open the eyelid, and inspectors observed that the eye was cloudy. The clinical veterinarian verbally informed APHIS inspectors that she observed the swollen eye on Friday, June 1, when the mare arrived. Daily observations had already been performed by facility staff before the inspectors arrived. The veterinarian stated that the eye appeared to have worsened since she had initially seen it, but facility staff had not notified her of the horse's condition. After the inspection, a veterinarian examined the mare and initiated treatment for the eye.

December 12, 2017 The protocol was approved for the use of 30 horses. Five additional horses were added to the study, however the IACUC was not informed of this protocol deviation. A post-approval monitor (PAM) detected the use of the additional horses after the study had been completed.

Additionally, APHIS personnel discovered the following procedures were conducted instead of those approved in the protocol: -Sedation of 28 horses with detomidine instead of the approved sedation xylazine

-Injection with lidocaine prior to the nerve block instead of application of an approved topical anesthetic (benzocaine)

-The use of hemostats to tap the teeth instead of the approved use of Von Frey filaments or thermal testing for confirmation of local analgesia

-The euthanasia of three horses rather than the approved two horses

-The use of six control horses was not included in the protocol. These horses were sedated but did not receive a mental nerve block prior to the responsiveness testing.

June 20, 2017 In the equine barn, screw tips and/or broken screws were protruding from the walls of four stalls each occupied by a horse. Facility staff removed the screws following inspection of the barn.

A vertical metal bar attached to the wall of another stall was partially detached, bent and protruding off of the wall.

² The USDA inspector identified deficiencies in CSU's care provided to other species as well.

In an enclosure containing five research horses, several wires holding the chain-link fencing to the metal poles contained sharp points facing into the enclosure. These wires were pointed out to facility maintenance staff who were fixing portions of the fencing.

At the Veterinary Teaching Hospital, a submerged portion of several automatic water receptacles within the primary enclosures of various animals were corroded and had rough, irregular edges. The water receptacles also contained a green algae-like growth over these rusted portions of the metal. The water receptacles affected were in separate enclosures for goats, alpacas, horses, 2 different herds of sheep, and a cow.

December 13, 2016 In the primary enclosure of two research horses, there were several wires holding the chain-link to the metal poles that contained sharp points facing into the enclosure.

There were two insulated wires coming out of the ground in the primary enclosure of two research horses. The wires were stiff, with a sharp point at the end.

A segment of the chain-link fence surrounding the enclosure of four research horses was not secure, as the chain-link was not tethered to the support beam.

A portion of the metal siding on the side of the barn in a sheep enclosure at the veterinary teaching hospital had turned upward, creating a sharp edge.

September 29, 2010 Respondent failed to maintain indoor and outdoor housing facilities in sufficiently good repair to protect the animals from injury and to contain the animals. Wires with sharp points, used to secure a fence panel, protruded into a primary enclosure containing two horses, risking injury to the animals.

Respondent failed to maintain an effective program for the control of insects, ectoparasites, and avian and mammalian pests. Respondent failed to address excessive flies at a facility housing horses, where at least two horses had numerous insect bites on their sides, necks, and faces.

November 29, 2007 Respondent failed to provide a rationale for the appropriateness of the species and numbers of animals to be used in its proposal to conduct an activity involving animals. An IACUC- approved animal use activity did not provide adequate rationale for the 235 horses requested.

We also note that, in 2011, CSU agree to pay over 23,000 USD pursuant to a settlement agreement with the USDA for various violations of the AWA from 2007 through 2010.

V. CONCLUSION

For the reasons explained above, AWHC and AWI assert that the EA is woefully inadequate in that it failed to provide the “hard look” at the full suite of direct, indirect, and cumulative environmental impacts of the proposed action and alternatives on the human environment. It may also violate other federal laws including the AWA.

Specifically, the EA failed to properly analyze the environmental impacts of the ovariectomy by colpotomy procedure or of the proposed helicopter roundup of horses from the Warm Spring HMA and their subsequent handling, transportation, and disposition. Furthermore, the BLM clearly violated NEPA by failing to consider a reasonable range of alternatives and for not subject this proposal to evaluation in an EIS.

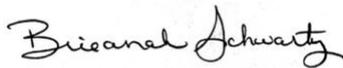
NEPA requires Federal agencies to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources. The EA failed to provide a legally sufficient analysis of these issues as has been thoroughly documented in this letter.

These issues, the deficiencies in the EA as articulated in this letter, as well as the missing data and other information required by NEPA to permit the public to fully understand the environmental impacts of the proposed action and to provide substantive and informed comments in response must be included in a supplemental EA (which must again be subject to public comment) or, preferably, in an EIS. In this case, the BLM should use the current EA to determine that an EIS is required to fully evaluate the environmental impacts of this action including those associated with the proposed ovariectomy study and wild horse roundup in Oregon.

Should the BLM ignore the compelling evidence included in this comment letter and elect to proceed with the proposed action, AWHC and AWI will evaluate all options, including litigation, to prevent this project from proceeding.

Thank you for your consideration of this information.

Sincerely,



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Attachments

Attachment 1: “Using Science to Improve the BLM Wild Horse and Burro Program: A Way Forward,” National Academy of Sciences, June 2013.

Attachment 2: Plaintiffs’ Exhibit List from Motion for Preliminary Injunction to halt the BLM’s Oregon Spay Experiments (Filed 08/15/2016)

Attachment 3: 2015 National Resource Council Report

Attachment 4: BLM’s 2015 Mare Sterilization Research EA (DOI-BLM-OR-B000-2015-0055-EA)

Attachment 5: “What the National Academy of Sciences Study will Provide”

Attachment 6: AWHC’s 2016 Comments on the BLM Oregon Spay Experiments

Attachment 7: Statement by Dr. Michael Ball

Attachment 8: Statement by Dr. Robin Kelly

Attachment 9: Statement by Dr. Allen Rutberg

Attachment 10: Statement by Dr. Pamela Corey

Attachment 11: AWHC’s 2010 Report, “BLM Calico Complex Roundup: A Case Study of a Broken System for Horses and Taxpayers”

Attachment 12: 07/26/2018-10/25/2018 Cattoor Livestock Roundup Inc. Contract Details

Attachment 13: FY 2017 BLM Budget Pie Chart

Attachment 14: “Discussion of Colpotomy – Leon Pielstick” (originally part of Plaintiff’s “Exhibit E” from Attachment 2)

Attachment 15: Tenth Circuit Court of Appeals, *Wyo. v. U.S.*, 2016

Attachment 16: BLM Wild Horses and Burros Management Handbook

Attachment 17: Standard Operating Procedures

Attachment 18: Plaintiffs’ Motion for Preliminary Injunction (Filed 08/15/2016)

Attachment 19: Stipulated Voluntary Dismissal (Filed 09/09/2016)