William Nicholson Lawton, OSB 143685
nlawton@meyerglitz.com
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue, N.W. Suite 210
Washington, DC 20016
Tel: (202) 588-5206 x 107
Fax: (202) 588-5049

William S. Eubanks II, pro hac vice application pending
beubanks@meyerglitz.com
Meyer Glitzenstein & Eubanks LLP
2601 S. Lemay Ave., Unit 7-240
Fort Collins, CO 80525
Tel: (970 703-6060
Fax: (202) 588-5049

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GINGER KATHRENS, et al., Plaintiffs, v. RYAN ZINKE, et al., Defendants.	Case No. 18-01691 **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Ginger Kathrens, The Cloud Foundation, American Wild Horse Campaign, Animal Welfare Institute, and Carol Walker hereby move for a preliminary injunction to halt the Defendant Bureau of Land Management ("BLM") from undertaking imminent wild horse sterilization experiments in Hines,

Oregon, which are now **scheduled to begin on November 5, 2018**. Pursuant to Local Rule 7-1(a), the parties made a good faith effort to resolve this dispute, but have been unable to do so.

On August 24, 2018, Plaintiffs submitted a request for a licensed equine veterinarian to observe and record these controversial experiments, explaining that they have a First Amendment right to do so and a strong interest in assessing whether BLM's experimental wild horse sterilization method is feasible and socially acceptable, through public dissemination of footage and/or first-hand accounts of BLM's experiments. BLM rejected Plaintiffs' requests on September 12, 2018.

As explained in the accompanying memorandum, BLM's restrictions on public observation of its highly invasive surgical experiments on wild horses violate the First Amendment. Additionally, BLM has not offered a legally adequate explanation for its restrictions, and has jettisoned its previous objective of determining whether such experiments are "socially acceptable" without any explanation, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

Plaintiffs' counsel have attempted to provide the Court with as much time as possible to consider these issues before BLM's November 5, 2018 start date for these experiments by meeting and conferring with Defendants' counsel. However, Defendants have refused to delay the challenged research, insisting that it must go forward as planned. Accordingly, Plaintiffs have no choice but to seek a preliminary injunction to preserve the status quo until this Court has an opportunity to review the merits of their claims.

In support of this motion, Plaintiffs submit the accompanying memorandum of law, and Exhibits A - S, including the Declarations of four equine veterinarians who address the feasibility of allowing public observation of the challenged experiments.

Respectfully submitted,

*/s/ William N. Lawton*___
William N. Lawton
nlawton@meyerglitz.com
Oregon Bar No. 143685
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Ave. NW, Suite 210
Washington, DC 20016
(202) 588-5206 (phone) / (202) 588-5409 (fax)

*/s/ William S. Eubanks II*__
William S. Eubanks II (pro hac vice pending)
beubanks@meyerglitz.com
D.C. Bar No. 987036
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 (phone) / (202) 588-5409 (fax)

Counsel for Plaintiffs

Date: September 28, 2018

William Nicholson Lawton, OSB 143685
nlawton@meyerglitz.com
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue, N.W. Suite 210
Washington, DC 20016
Tel: (202) 588-5206 x 107
Fax: (202) 588-5049

William S. Eubanks II, pro hac vice application pending
beubanks@meyerglitz.com
Meyer Glitzenstein & Eubanks LLP
2601 S. Lemay Ave., Unit 7-240
Fort Collins, CO 80525
Tel: (970 703-6060
Fax: (202) 588-5049

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GINGER KATHRENS, et al.,	)	Case No. 18-01691
	)	
Plaintiffs,	)	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**
	)	
v.	)	
	)	
	)	
RYAN ZINKE, et al.,	)	
	)	
Defendants.	)	

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 3

I. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 3

A. The First Amendment 3

B. The Administrative Procedure Act 4

C. The Wild Free-Roaming Horses and Burros Act.................................. 5

II. BLM'S STERILIZATION EXPERIMENTS 6

A. Sterilizing Wild Horses Remains Extremely Controversial. 6

B. BLM's Previous Efforts to Conduct Sterilization Experiments. 6

C. BLM's Decision to Conduct These Controversial Experiments................. 7

II. BLM'S DENIAL OF ACCESS TO OBSERVE ITS EXPERIMENTS. 9

ARGUMENT...11

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS, OR AT MINIMUM HAVE RAISED SERIOUS QUESTIONS. 11

A. Plaintiffs Have A First Amendment Right Of Access To Observe and Document BLM's Management of Wild Horses. 12

II. PLAINTIFFS HAVE ALSO RAISED SERIOUS QUESTIONS THAT BLM ACTED ARBITRARILY AND CAPRICIOUSLY. 22

A. BLM's Unexplained Abandonment of the "Social Acceptability" Inquiry................ 22

B. BLM's Decision to Press Forward after CSU's Departure without Any Substitute Researchers to Examine Whether this Procedure Comports with Standardized Animal Welfare Metrics was also Arbitrary and Capricious.. 25

C. BLM's Overbroad, Severe, and Ill-Explained Limitations on Public Observation of the Surgeries Are Arbitrary and Capricious...................................... 29

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM. 33

IV. THE BALANCE OF THE EQUITIES TIPS STRONGLY IN PLAINTIFFS' FAVOR AND THE PUBLIC INTEREST FAVORS AN INJUNCTION. 34

CONCLUSION...36

TABLE OF AUTHORITIES

Page(s)

Cases

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 3, 11, 30

Cal. First Amend. Coal. v. Woodford,
299 F.3d 868 (9th Cir. 2002) 14, 15

Def. of Animals v. U.S. Dept. of Interior,
751 F.3d 1054 (9th Cir. 2014) 5, 15

Doe v. Harris,
772 F.3d 563 (9th Cir. 2014) 33

Elrod v. Burns,
427 U.S. 347 (1976) 33

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 24

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 24, 25

Fund for Animals v. Clark,
27 F. Supp. 2d 8 (D.D.C. 1998) 35

Klein v. City of San Clemente,
584 F.3d 1196 (9th Cir. 2009) 33, 35

Leigh v. Salazar,
677 F.3d 892 (9th Cir. 2012) .... *passim*

Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 4, 23, 24, 27

Organized Vill. of Kake v. U.S. Dep't of Agric.,
795 F.3d 956 (9th Cir. 2015) (en banc) 24

OTR Wheel Engineering, Inc. v. W. Worldwide Servs., Inc.,
602 Fed. Appx. 669 (9th Cir. 2015) 11

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) 12, 15, 17, 20

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 12

Seattle Times Co. v. U.S. Dist. Ct. for W. Dist. of Wash.,
845 F.2d 1513 (9th Cir. 1988) 12

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005) 33

Winter v. Nat. Res. Def. Council,
555 U.S. 7 (2008) 11

Statutes

5 U.S.C. § 706(2)(A), (D) 4

16 U.S.C. § 1331 5

16 U.S.C. § 1333 .... *passim*

16 U.S.C. § 1337 .... 5, 30

INTRODUCTION

This case challenges a decision by the Bureau of Land Management ("BLM") to severely limit the ability of the public to observe, record, and otherwise document extremely controversial sterilization experiments the agency plans to perform on female wild horses to decide whether to use these procedures on mares on the public lands in the future as a means of population control. The experiments, unless enjoined by this Court, will occur in a BLM corral facility in Hines, Oregon ("the Hines Corral") **as early as November 5, 2018**, and will involve sterilizing mares through ovariectomy via colpotomy. This highly invasive procedure involves a surgeon reaching into the mare's abdominal cavity through an incision in the vaginal wall to locate her ovaries by touch—without any instrument to visualize her internal organs—and then severing the ovaries with a loop of chain to remove them. This procedure is inhumane and considered to be extremely outdated by equine veterinarians. Despite the clear public interest in ensuring that wild horses are treated humanely, BLM has refused to allow meaningful public observation of these experiments.

As explained below, because BLM's wild horse population management has historically been open to the press and public, and because public access plays an important role in shaping wild horse management policies, the First Amendment protects Plaintiffs' right to observe this government activity, and any access restrictions must be narrowly tailored to serve an overriding government interest. *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). Accordingly, BLM's decision to severely restrict public observation of this research violates Plaintiffs' First Amendment rights. Its decision to go forward with this research is also arbitrary, capricious, and an abuse of discretion for several additional reasons.

Plaintiffs have extensive experience observing, documenting, and publicly disseminating information about BLM's management of wild horses in order to effectively advocate for humane, responsible, and transparent management of these federally protected wild animals. Plaintiff Ginger Kathrens is an Emmy Award-winning wild horse documentarian who in 2016 was appointed to BLM's statutorily created Advisory Board for the purpose of advising the agency about whether its management practices are *humane*. Kathrens Decl. ¶ ¶ 6-7 (Ex. A).

As demonstrated below, BLM has already twice abandoned its original proposals to conduct these experiments—once in 2016 when Plaintiffs filed a lawsuit challenging the agency's deprivation of their First Amendment rights, *Kathrens v. Jewell*, No. 2:16-cv-01650 (D. Or.), and again, just last month, when, amid continued public opposition, the research institution that was supposed to oversee these experiments, Colorado State University ("CSU"), withdrew its participation. Ex. B at 1. However, BLM's attempt to redesign these experiments by severely limiting the public's ability to observe them, removing "social acceptability" as a critical objective of the research, and also jettisoning any protocol for otherwise monitoring whether the research is humane, violates Plaintiffs' First Amendment Rights. Indeed, it could not be clearer that BLM's efforts to proceed with this extremely painful and invasive research on wild horses that are otherwise to be protected as valuable "components of the public land," 16 U.S.C. § 1333(a), are now designed to eliminate any meaningful public observation because the agency knows full well that the public would be *horrified* if it could meaningfully observe the procedure that BLM intends to perform on these animals.

In any event, because BLM's plan to conduct this research without any meaningful public observation or data about the "social acceptability" of the experiments, and without guaranteeing that *someone* will be responsible for monitoring and evaluating the actual *welfare* of these

animals, is unconstitutional and arbitrary and capricious, Plaintiffs can easily meet their burden to demonstrate that they have raised the requisite "serious questions going to the merits" that entitles them to the requested preliminary relief. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011). Moreover, because Plaintiffs' personal and professional interests depend on their ability to obtain accurate information about the management practices BLM uses for wild horses, and to disseminate that information to the public, and because BLM has already announced its intention to use the results of this upcoming experiment as a basis for conducting these same procedures on wild horses *on the range*, Plaintiffs will clearly suffer irreparable harm if BLM is allowed to go forward with this experiment on November 5, 2018.

Accordingly, this Court should issue the requested injunction which would allow the parties to brief these issues on the merits *before* BLM takes any further actions that will forever eradicate Plaintiffs' ability to observe and report on this extremely controversial research. Ex. A ¶ 32; Roy Decl. ¶ 18 (Ex. C); Walker Decl. ¶ 7 (Ex. D); Liss Decl. ¶¶ 18-19 (Ex. E).

BACKGROUND

I. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Amendment

"[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. *Leigh*, 677 F.3d at 898. 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.

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.* Accordingly, "a court cannot rubberstamp an access restriction simply because the government says it is necessary." *Id.*

B. <u>The Administrative Procedure Act</u>

Under the APA, a court "shall" "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or when they are adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency's decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Although an agency may deviate from its prior practice, it "is obligated to supply a reasoned analysis for the change." *Id.* at 41-43. If the agency fails to acknowledge that it is shifting approaches or fails to provide a non-arbitrary explanation for the change, the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

C. <u>The Wild Free-Roaming Horses and Burros Act</u>

In response to overwhelming public outcry over the inhumane treatment and slaughter of wild horses on the public range, Congress passed the Wild Free-Roaming Horses and Burros Act ("WHA") in 1971 to ensure that "wild free-roaming horses and burros shall be protected from capture, branding, harassment, [and] death." 16 U.S.C. § 1331. Congress found that wild horses and burros "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." *Id.*

The WHA embodies a congressional intent to require BLM to manage wild horse populations humanely. Congress repeatedly stressed its intent to require humane management. *See id.* § 1333(b)(2)(iv)(B) (requiring that BLM ensure that wild horses removed from the range are "humanely captured" and that BLM "assure [the] humane treatment and care" of wild horses made available for adoption").[1]

To ensure that BLM honors the WHA's commitment to humane wild horse management, Congress instructed BLM to regularly consult with experts in wild horse protection. To that end, Congress required BLM to create the National Wild Horse and Burro Advisory Board to include individuals with "special knowledge about protection of horses and burros" who can "advise [the agency] on any matter relating to wild free-roaming horses and burros and their management and protection." 16 U.S.C. § 1337. Thus, Congress specifically stated that BLM "shall consult with . . . individuals whom [it] determines have . . . special knowledge of wild horse and burro protection" when determining whether to manage wild horse populations "by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on

[1] *See also In Def. of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1060 n.6 (9th Cir. 2014) (noting that although the WHA initially contemplated the "destruction" of wild horses, Congress has never authorized the use of funds for wild horse slaughter).

population levels).” *Id.* § 1333(b)(1). Thus, Congress clearly intended BLM to consider the informed input of experts in “wild horse and burro protection” when considering the possibility of sterilizing wild horses.

II. BLM’S STERILIZATION EXPERIMENTS

A. Sterilizing Wild Horses Remains Extremely Controversial.

Sterilizing wild horses is highly controversial, because it permanently “robs the horses of their defining behaviors which will fundamentally change the organization and behavior of wild horse herds.” Ex. A ¶ 9. Because of sterilization’s extremely negative effects, on July 28, 2011, sixty-five members of Congress sent a letter to the Secretary of the Interior opposing BLM’s plans to sterilize wild horses and describing it as a “drastic, inhumane practice.” Ex. F at 3. Indeed, in the 2016 Environmental Assessment (“2016 EA”) for the *same procedure* that it sought to conduct just two years ago, BLM acknowledged that “the public has participated in the long-running discussion of wild mare sterilization for multiple years,” Ex. G at 54, 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,” *id.* at 48.

B. BLM’s Previous Efforts to Conduct Sterilization Experiments.

Despite widespread public opposition, BLM decided in 2016 to fund a series of three sterilization experiments on wild mares at the agency’s corral facilities in Hines, Oregon. One of the principal goals of the 2016 EA was to determine whether the experimental methods were a “socially acceptable” way to manage wild horse populations, *id.* at 53—a goal that is consistent with the purpose of the WHA to protect wild horses for the benefit of the public.

Numerous individuals and organizations, including Plaintiffs, submitted comments on the 2016 EA explaining that BLM should not conduct experiments on using three risky and invasive surgical sterilization procedures, including ovariectomy via colpotomy. American Wild Horse Campaign ("AWHC") and The Cloud Foundation ("TCF") explained that, in light of the controversial and precedent-setting nature that the results of the experiments will have on agency policy, transparency was of the utmost importance, and requested that BLM allow for observation and recording. Yet, despite the fact that the "ultimate question" of the experiments was to determine "social acceptability," *Id.* at 51, BLM denied Plaintiffs *any* access to observe the procedures, either in person or remotely. Specifically, BLM insisted that there was "limited space" at the Hines Corral, and that a "minimally disruptive working environment" was needed "[t]o minimize stress to the horses, and to ensure the safety of the horses and the research personnel." Ex. H at 1.

Plaintiffs filed suit to challenge BLM's restriction of public observation of its 2016 experiments, along with a preliminary injunction motion. *Kathrens v. Jewell*, No. 2:16-cv-01650, ECF Nos. 1 and 2 (Aug. 15, 2016). Plaintiffs' motion for a preliminary injunction explained that BLM's restrictions on public observation were both a violation of the First Amendment, as well as arbitrary and capricious because BLM's reasons for denying public observation lacked any logical or factual basis. Rather than responding to Plaintiffs' motion, BLM cancelled its 2016 experiments altogether. Afterwards, the parties in *Kathrens v. Jewell* stipulated to the dismissal of the claims in that case.

C. <u>BLM's Decision to Conduct These Controversial Experiments.</u>

BLM now proposes to again undertake risky and inhumane experiments. The chosen procedure involves reaching inside a mare's abdominal cavity through an incision in the vaginal

wall—without any tool to visualize the mare's organs—to identify her ovaries by touch and remove them by severing them with a loop of chain. Ex. I at 24-25. According to Dr. Robin Kelly, a veterinarian with extensive experience operating on wild horses, this procedure "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." Kelly Decl. ¶ 4 (Ex. J). It is especially risky for pregnant mares, as it "is likely to cause the abortion of the pregnant mare's fetus and result in the death of the mare." *Id.* ¶ 5. Due to these risks, ovariectomy via colpotomy "is not humane to perform on wild horses and it is usually avoided in surgical practices today . . . due to the availability of superior, more humane, safer procedures." *Id.* ¶ 6.

Considering the serious welfare concerns associated with performing the procedure, it is particularly glaring that BLM *eliminated* the key objective from the 2016 experiments—determining the social acceptability of this procedure as a method of wild horse population management—from its goals for the new proposal without any explanation.

BLM originally planned to conduct the 2018 research into ovariectomy via colpotomy in partnership with CSU and the United States Geological Survey ("USGS"). Ex. M at 1. Under the initial draft EA, issued on June 29, 2018, CSU was to study the feasibility of this procedure, specifically including an effort to track the surgery's impact on the *welfare* of individual mares using a pain scoring system designed for horses, *id.* at 25, while USGS was to partner with BLM for a long-term study of the procedure's *behavioral* impacts, Ex. B at 1. CSU staff included "a professor of equine surgery specializing in minimally invasive surgery and wound healing," "an animal welfare specialist experienced in pain management," and "a research scientist

specializing in mammalian behavior and ecology." Ex. I at 18. However, on August 8, 2018, CSU announced its withdrawal from the proposed experiments. Ex. B at 1.

Nevertheless, BLM announced that it intended to proceed with the proposed experiments. *Id.* at 3. BLM did not attempt to identify another research partner to fill CSU's role in quantifying the welfare impacts of this surgery. Instead, on August 22, 2018, BLM informed the public that it was going forward with the controversial research using a single unidentified individual to perform the experiments and issued a "revised" draft EA toward that end. Ex. N. The revised draft reported that BLM would allow the public to observe and record the experiments, provided they do so only from behind a doorway to an office set aside for that purpose. *Id.* at 27. It then held 12 days of public comment on its new decision before issuing its final decision on September 12, 2018 to go forward. Ex. B at 9.

II. BLM'S DENIAL OF ACCESS TO OBSERVE ITS EXPERIMENTS.

In their comments on the Revised EA, Plaintiffs informed BLM that CSU's departure, coupled with "BLM's baffling lack of any effort to obtain a similar degree of experienced independent academic oversight," Ex. L at 12, left the public without an experienced, independent observer "to note or provide the public with an objective independent account of the degree to which BLM's experiment subjects wild mares to pain and suffering," *id.* at 11. Plaintiffs further explained that these deficiencies cannot be cured by the limited opportunity to observe surgeries because public "observers will be forced to observe the surgery through a doorway, at an odd angle to the chute where the procedure will be conducted." *Id.* at 13. Accordingly, they explained, "the need for observation and recording by an independent, licensed equine veterinarian is clear." *Id.* at 12.

On August 24, 2018, Plaintiffs' counsel also sent a letter to BLM requesting improved observation and documentation opportunities. Ex. O. Specifically, the letter requested that BLM permit "a licensed equine veterinarian to observe and record" the surgical procedures from "within the working area" to ensure that there is "independent observation of the welfare of the wild mares subjected to this experiment." *Id.* at 1. Plaintiffs' counsel explained that such independent observation "is especially critical" in light of CSU's withdrawal, *id.* at 2, and further requested that BLM allow the installation of several small, unobtrusive video cameras that would "provide a continuous and comprehensive record of this experiment," and allow for continued monitoring of the mares post-surgery. *Id.* at 5. Plaintiffs' counsel further explained that a continuous record would help the public evaluate whether the experimental procedure is an appropriate way to manage wild horse populations, and help monitor for post-surgical complications. *Id.*

Just as it did in 2016, BLM again rejected Plaintiffs' requests for observation by an independent, licensed veterinarian, and for the installation of small, unobtrusive cameras in the operating room and recovery area. Ex. B at 31-34. As purported justifications for its rejection of Plaintiffs' requests, BLM stated that the role of independent observer would already be filled by the veterinarian who would be performing the surgery, and insisted that "there simply is not enough space for additional public observers" "around the chute where all animal handling occurs." *Id.* at 31.

With respect to Plaintiffs' request for the installation of small, unobtrusive cameras at the surgery location, BLM stated that "social acceptability" was not included as part of the purpose and need for this project. *Id.* at 33. Finally, with respect to Plaintiffs' request to install cameras in the *recovery* pens, BLM insisted that the cameras were "not a viable option" as they "would not

be able to pick up individual mare numbers nor would they be able to document anything in poor lighting," and "[n]o viable, scientific data would be collected if the individual animals could not be identified." *Id.*

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, he is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a "sliding scale" to find that "[a] preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies*, 632 F.3d at 1131–32. These factors all weigh heavily in favor of granting Plaintiffs' motion for injunctive relief to preserve the status quo until the Court can decide the case on its merits. *See id.* at 1134 (noting "the longstanding discretion of a district judge to preserve the status quo with provisional relief").

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS, OR AT MINIMUM HAVE RAISED SERIOUS QUESTIONS.

Under the Ninth Circuit's "sliding scale," a preliminary injunction is appropriate when the balance of the equities tips sharply in a plaintiff's favor and the plaintiff has raised "serious questions going to the merits—a lesser showing than likelihood of success on the merits." *OTR Wheel Engineering, Inc. v. W. Worldwide Servs., Inc.*, 602 Fed. Appx. 669, 671 (9th Cir. 2015). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits." *Id.* Plaintiffs easily carry this burden.

A. Plaintiffs Have A First Amendment Right Of Access To Observe and Document BLM's Management of Wild Horses.

The press and public have a right to access and observe government activities. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). Courts apply a two-pronged test for right-of-access claims, finding that when (1) a government activity has historically been open to the press and public, and (2) the public has played a significant positive role in that government activity, the government may impose only such restrictions as are narrowly tailored to serve an overriding government interest. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) [hereinafter "*Press Enterprise II*"]. The Ninth Circuit has expressly held that the *Press-Enterprise II* test applies to BLM's wild horse management. *Leigh*, 677 F.3d at 900.

1. Wild Horse Population Management Has Historically Been Open To The Public.

Although the first prong of the *Press Enterprise II* test—i.e. whether the "place and process" have historically been accessible—is not necessarily dispositive, *see, e.g.*, *Seattle Times Co. v. U.S. Dist. Ct. for W. Dist. of Wash.*, 845 F.2d 1513, 1516–17 (9th Cir. 1988), Plaintiffs easily satisfy this prong.

Since Congress passed the WHA in 1971, BLM has managed wild horse populations principally by removing wild horses from public lands when it determines that "excess" horses exist. 16 U.S.C. § 1333(b)(2). BLM's wild horse roundups have traditionally been open to the public, and one court in this circuit has found a First Amendment right to observe them. *Leigh*, 954 F. Supp. 2d at 1101 ("[W]ild horse gathers have *historically been and remain open to the press and general public*." (emphasis added)). Plaintiffs have observed and documented numerous wild horse roundups, post-roundup holding pens, and related wild horse management activities. *See, e.g.*, Ex. A ¶ 28.

Indeed, BLM's own policies recognize the importance of transparency in wild horse population management and provide access to public and media observers. For example, in recognition of "press/media, congressional, and public attention," BLM has stated that "it is critically important that BLM operate in as open and transparent a manner as possible." BLM IM-2013-061, at 2 (Ex. P). For this reason, "BLM has a longstanding policy of allowing public/media to view [wild horse] gathers." BLM IM-2013-058, at 2 (Ex. Q). BLM's "policy and procedures" aim to provide "safe and transparent visitation by the public/media" during "every gather day." *Id.* at 1.

In fact, BLM's policy and practice promoting public access apply not only to the act of rounding up wild horses but also to trapping, holding, and shipping them. Although wild horses at the trap sites or temporary holding facilities are subject to significant stress, "BLM generally allows members of the public an opportunity to safely view gather operations from designated observation areas near the trap-site and at temporary holding facilities . . . ." *Id.* Indeed, BLM aims to "ensure that the public/media have opportunities to safely observe gather activities at the trap-site and temporary holding facilities when practicable," to "select the location that provides the best viewing of activities" as safety permits, and to provide "[o]pportunities for the public/media to visit temporary holding facilities and view the shipping activities . . . to the extent practicable." *Id.* Thus, BLM's long-standing policy and practice has been to provide *meaningful* public access to observe and document wild horse population management even at areas where horses are subject to significant stress.

Moreover, the Hines Corral, where BLM's sterilization procedures will take place, *is open to the public*. According to an official brochure published by BLM, "[o]rganized tours of the wild horse corrals and facilities are available upon request . . . for just a few people as well as

larger groups."[2] Ex. S. BLM claims to "welcome the opportunity to explain the various aspects of the wild horse program." *Id.* The Hines Corral Facility's front gate even proclaims "Visitors Welcome." Ex. A at Attach. 1. Plaintiff Ginger Kathrens has visited the Hines Corral on multiple occasions. *Id.* ¶ 17. Most recently, in April 2016, Ms. Kathrens attended a BLM-led tour, during which she was allowed to observe the holding pens and photograph wild horses held there. *Id.* In a crowd of "[a]t least 15 people," Ms. Kathrens was also able to observe and photograph a veterinary procedure on a wild horse in the same hydraulic chute where BLM plans to perform its sterilization experiments. *Id.*; *see also id.* Attach. 1.

That BLM's upcoming sterilization experiments will not yet occur *on the range* does not diminish the First Amendment rights at stake here. 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 decision to manage wild horse populations through surgical sterilization also shifts to a more medically-based procedure in a more controlled environment.

In *Woodford*, the Ninth Circuit found it persuasive that "[w]hen executions were moved out of public fora into prisons, the states implemented procedures that ensured executions would remain open to *some* public scrutiny." *Id.* at 875 (emphasis added). So too here; when BLM moves horses from the public range into traps or temporary holding facilities, its policy is to

---

[2] https://www.blm.gov/or/resources/recreation/files/brochures/OregonsCorralFacility BrochurePROOFONLY.pdf

provide "[o]pportunities for the public/media to visit temporary holding facilities and view the shipping activities." Ex. Q at 1. Similarly, even at the Hines Corral under the decision at issue, BLM intends to allow limited—albeit inadequate—public observation of the experiments. Ex. B at 27; *see also* Ex. A ¶ 26 (acknowledging that BLM will allow for "completely inadequate" public observation). Therefore, the Ninth Circuit found in *Woodford* that "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. Likewise, BLM's provision of access to view wild horse population management, even at restrictively regulated sites where horses undergo stressful activities, demonstrates that Plaintiffs have a First Amendment right to observe BLM's experiments at the Hines Corral.

2. Public Access Has Played A Significant Role In Shaping Wild Horse Population Management.

Plaintiffs also easily satisfy the *Press Enterprise II* test's more dispositive second prong. Public input has driven, and continues to drive, federal regulation and management of wild horses. Since the passage of the WHA—itself the result of public outcry regarding the treatment of wild horses—public input has resulted in the adoption of policies and practices that emphasize humane, responsible, and transparent wild horse population management. For example, due to public opposition, Congress has never authorized funds for the destruction of wild horses. *In Def. of Animals*, 751 F.3d at 1059 n.3.

Observation and documentation of wild horses and their treatment at BLM's hands has also been critical to generating public interest in wild horses' welfare. For example, Plaintiff Ginger Kathrens, whose documentaries on wild horses have been compared to Jane Goodall's work with chimpanzees, Ex. A ¶ 2, explains that "the best way to determine whether the public believes a management practice is humane is to actually show the public what is really entailed

in the practice and what is happening to the horses, so that the public will have the information it needs to engage with BLM," *id.* ¶ 22. Likewise, Plaintiff Suzanne Roy explains that "the most effective [outreach] technique is the first-hand observation and recording of what happens to wild horses as a result of BLM management actions and the dissemination of those recordings directly to the public." Ex. C ¶ 7.

As the Court of Appeals has recognized, public observation of BLM's roundups, which have historically been its principal method for managing wild horse populations, "plays a significant positive role in the function of gather activities" because "public access allows individuals to report on the government's activities as well as the health and condition of the gathered horses." *Leigh*, 954 F. Supp. 2d at 1101. Indeed, public attention has played a significant role in forestalling BLM's efforts to implement wild horse sterilization. Ex. O (noting that in response to strong public opposition, including litigation brought by Plaintiffs, BLM has repeatedly withdrawn proposals to implement widespread sterilization of wild horses).

Perhaps the clearest indication that public access continues to play a significant role in BLM's wild horse population management, is the fact that in March 2016 BLM appointed Ms. Kathrens to serve as the National Wild Horse and Burro Advisory Board's Humane Advocate. Ex. A ¶ 5. As BLM knows, Ms. Kathrens has "strongly opposed BLM's efforts to move to sterilization-based wild horse population management for many years." *Id.* ¶ 9. Her "long experience as a documentarian" has demonstrated to her that "documentary evidence is essential to public education and advocacy for wild horse welfare." *Id.* ¶ 12. Indeed, BLM itself praised Ms. Kathrens' work as a documentarian when announcing her appointment to the Advisory

Board.[3] Thus, her appointment demonstrates that her approach to advocacy—which depends substantially on direct observation of BLM's activities and public dissemination of first-hand information, *id.* ¶¶ 22, 24, 25—has proved undeniably valuable to BLM and will continue to shape its policies and practices.

In sum, there can be no legitimate dispute that public access to observe and document BLM's management of wild horse populations has played and continues to play a significant positive role in shaping the agency's policies and practices.

3. **BLM Cannot Justify Its Denial Of Public Access.**

The Ninth Circuit has explained that "a court cannot rubber-stamp an access restriction simply because the government says it is necessary." *Leigh*, 677 F.3d at 900. Instead, the government must prove that an access restriction is "narrowly tailored" and "essential" to serve an "overriding interest," *id.* at 901, through "specific, on the record" evidence, *Press-Enterprise II*, 478 U.S. at 13. As the Supreme Court stated, "[t]he First Amendment right of access *cannot be overcome by [a] conclusory assertion*" that a restriction is necessary. *Id.* (emphasis added).

Here, however, as ostensible justifications for its decision to deny meaningful opportunities for public access to observe its sterilization experiments, BLM offered nothing more than conclusory assertions with no basis in evidence or logic. For example, in insisting that the role of "independent observer" would be filled by the veterinarian with whom BLM contracts to *perform* the ovariectomies, BLM ignored the obvious bias that its own contractor will have, due to the fact that BLM requires that this contractor have performed the same procedure at least 100 times (indicating that the contractor believes the procedure is humane, in contrast to the

[3] *See* BLM, *BLM Announces Three Selections for National Wild Horse and Burro Advisory Board* (Mar. 3, 2016), https://www.blm.gov/press-release/blm-announces-three-selections-national-wild-horse-and-burro-advisory-board.

consensus view of the veterinary community), and due to the contractor's motivation to make this procedure seem feasible and acceptable in order to obtain future contracts. *See also* Kelly Decl., Ex. J ¶ 9 ("Independent observation is critical to ensure documentation of whether these objectionable and questionable procedures are performed humanely, competently, and with regard to the highest standards of veterinary care."); Roy Decl., Ex. C ¶ 13 (explaining that in her experience, "the BLM does not offer accurate portrayals of its own actions"). Moreover, it is axiomatic that an observer is designated to bear witness to the procedure. Therefore, it defies logic to insist that BLM's contractor—whom BLM will be paying to *perform* these controversial surgeries—could possibly serve in the same role as the requested independent veterinarian *observer*, who would be monitoring the surgeries for indications of its humaneness and animal welfare.

Similarly unavailing is BLM's assertion that public observation is impossible because "there simply is not enough space for additional public observers" "around the chute where all animal handling occurs." Ex. B at 31. As Ms. Kathrens explains based on first-hand observations, the operating room accommodated "[a]t least 15 people" who witnessed a procedure there, and the facility has spaces where a camera could "unobtrusively record a view of the experimental procedures." Ex. A ¶ 24. Moreover, evidence in the record *directly contradicts* BLM's claims. As originally proposed, the surgeries would have been overseen by three CSU specialists. Ex. B at 18. As a result of CSU's withdrawal from the experiments, there will be *fewer* personnel in the surgical area. Thus, BLM's claim of "limited space" in the Hines Corral cannot possibly support the agency's denial of public access to these procedures.

BLM's justifications for rejecting Plaintiffs' request to install small, unobtrusive cameras in both the operating room and recovery area also fail. BLM's primary reason for rejecting the

cameras in the operating room was that "[t]he purpose and need of the study does not include determining whether the procedure is socially acceptable or aiding the public in determining whether the procedure is an 'appropriate' way to manage wild horse populations." Ex. B at 33. However, as discussed further below, BLM offered absolutely no explanation for why it designed its experiment to ignore a factor that the agency itself stressed was critical when it proposed to study *the very same procedure only two years ago*. As for BLM's rejection of the presence of cameras in the recovery area, the agency claimed that cameras "would not be able to pick up individual mare numbers nor would they be able to document anything in poor lighting," and further, that "[n]o viable, scientific data would be collected if the individual animals could not be identified." *Id.* However, BLM failed to offer any support for the proposition that cameras would not be able to pick up individual mare numbers when those numbers are visible to the naked eye. Similarly, BLM failed to consider that numerous commercially available cameras film in detail in low light. Ex. C ¶ 14 (stating that there are "several commercially available cameras that shoot HD video in low-light conditions").

Additionally, BLM failed to present any evidence that restricting public access in this way was necessary to serve *any* legitimate overriding interest. To the contrary, as reported by Dr. Kelly, who has thirty-five years of veterinary experience and has actually performed reproductive surgery on wild horses in the presence of observers, "observation of veterinary procedures has important benefits," including to "help ensure the humane treatment" of the animals. Ex. J ¶ 8. Dr. Kelly states that "[t]here is absolutely no additional risk to the veterinarian, the bystanders, or the horse if quiet bystanders are present during the surgery, much less if a small camera is mounted in the operation area." *Id.* ¶ 9. Moreover, the presence of cameras in the recovery area are "helpful . . . to postoperatively observe any complications the

mares might experience." *Id.* ¶ 10. Accordingly, BLM's rationale for prohibiting unobtrusive cameras to be installed in the chute where surgeries will take place and in the recovery area lacks any logical basis, and cannot support a denial of public access to meaningfully observe BLM's activities.

In sum, none of BLM's stated reasons for imposing restrictions on access to observe and document the upcoming experiments constitutes a compelling justification to thwart public observation of this important governmental activity, and under binding precedent, such conclusory allegations cannot carry BLM's legal burden of proving with "specific, on the record" evidence that its restrictions are "essential." *Press-Enterprise II*, 478 U.S. at 13.

4. BLM's Denial of Public Access Is Not Narrowly Tailored.

The limitations on public observation BLM has imposed are not narrowly tailored, and in fact, render such observation meaningless.

To support this request for injunctive relief, independent veterinarians with decades of experience in such matters attest that the limited opportunities to observe the experimental procedures are insufficient to alleviate the serious First Amendment concerns raised by BLM's actions. For example, Dr. Kelly, who has actually worked with wild horses in hydraulic chutes like the one BLM proposes to use, explains that "[t]he witness access that [] BLM is providing for the public, and importantly, experienced veterinarians, to observe these procedures is *completely inadequate*." Ex. J ¶ 7; *accord* Corey Decl. ¶¶ 6-9 (Ex. R); McKalip Decl. ¶ 7 (Ex. T). Dr. Kelly notes that "[t]he observers are placed too far away and will not be able to see most of the mare's body." *Id.* Rather, from the observation vantage point, viewers will only "be able to see the mare's hind feet through the small panels on the back of the bottom of the chute," which "will make it impossible to tell if the mare slumps down in the chute or if she has sedation

issues." *Id.* Dr. Kelly explains that based on her extensive experience in similar surgical settings, veterinarians "would need to be much closer in order to meaningfully observe the procedures." *Id.* In particular, Dr. Kelly states that the ability to move around the chute is critical to allow observers to view both the mare's hind quarters to ensure the proper administration of anesthesia and proper observation of surgical protocols, and the mare's neck and head to determine the "success of sedation, which is often complex in wild horses." *Id.*

Additionally, as explained by Ms. Kathrens, BLM's proposal places observers behind a window, which impedes observers' ability to hear what is happening in the operating room. Ex. A ¶ 20. "As a videographer, [the lack of audio] significantly infringes on [her] ability to provide a complete picture of the procedures," "including how the horses react to the procedure" and whether the lead veterinarian "calls for assistance, and if he does, the reasons for why he has done so." *Id.* Indeed, the veterinarian's calls could indicate the presence of "life-threatening issues, such as a mare bleeding out or otherwise in significant distress." *Id.* Therefore, both audio *and* a clear viewing opportunity are crucial to understanding and informing the public about the procedure so the public may determine whether it is humane and socially acceptable. *See id.* Because BLM's proposal allows for neither, the "access" that BLM purports to provide is woefully inadequate.

Nor can BLM show that its restrictions on access are narrowly tailored. For example, although Plaintiffs offered to "work with the agency to identify the individuals" who would observe the experiments, BLM instead insisted that its own contractor—who is paid by the agency and has a vested interest in the success of the experiments, and therefore, by definition, is not "independent"—would suffice. Indeed, as explained by Ms. Roy, in her experience, "BLM does not offer accurate portrayals of its own actions." Ex. C ¶ 13. In contrast, "public observers

typically provide descriptions that are more candid, detailed and accurate." *Id.* BLM's purported justifications for its restrictions utterly fail to address these concerns.

Similarly, despite the fact that Plaintiffs' narrow request for observation using small, unobtrusive cameras would address BLM's stated concerns, BLM flatly denied this request for spurious reasons. Accordingly, it is impossible for BLM to carry its burden of establishing that its restrictions on public observation are narrowly tailored to an overriding government interest. Thus, Plaintiffs are likely to succeed on their First Amendment claim.

II. PLAINTIFFS HAVE ALSO RAISED SERIOUS QUESTIONS THAT BLM ACTED ARBITRARILY AND CAPRICIOUSLY.

Even if this were not a case involving unconstitutional government activities, injunctive relief would nonetheless be appropriate because Plaintiffs are likely to prevail on their claims (or have at least raised serious questions) that BLM's decision is arbitrary, capricious, and not in accordance with the WHA.

A. BLM's Unexplained Abandonment of the "Social Acceptability" Inquiry Is Arbitrary and Capricious.

As explained, ovariectomy via colpotomy is a highly invasive and high-risk surgical technique disfavored by veterinary experts. As a result, in 2016 BLM deemed as a core component of its sterilization research to "determine the social acceptability" of this procedure to inform BLM's future management decisions on the public range. Ex. G at 51. Indeed, the 2016 EA clarified that "[t]he *ultimate question* in the reasonably foreseeable future of wild horse population management" hinges on "determin[ing] which methods are safe, effective, *and socially acceptable*" to the public. *Id.* at 53 (emphases added); *see also id.* at 54 ("The results of this study are expected to aid BLM in determining the social acceptability of each procedure."). BLM's acknowledgement of the importance of securing public approval of such practices was

consistent with the conclusions of the National Academy of Sciences, which in 2013 reiterated that "*public opinion was the 'major motivation behind the wild horse . . . program*.'" 2013 National Research Council Rep., Ex. V at 239 (emphasis added).

However, in its 2018 decision authorizing the very same procedure, BLM radically departed from its insistence only two years earlier that this procedure required analyzing whether this invasive and high-risk procedure could be socially acceptable to the public and, if so, under what circumstances. In sharp contrast, BLM's new decision entirely abandoned this inquiry, despite comments urging the agency to examine this critical aspect of its decision. *See, e.g.*, Ex. L at 10-11. Rather than respond to those comments as to BLM's sudden reversal of position on this vital point, the only place the agency referred to social acceptability was in response to a *different* comment requesting the installation of video cameras to promote the "First Amendment right to access and observation of government activities." Ex. B at 33. In response to that completely separate issue, BLM candidly acknowledged that: "[t]he purpose and need of the study *does not include determining whether the procedure is socially acceptable or aiding the public in determining whether the procedure is an 'appropriate' way to manage wild horse populations*." *Id.* (emphasis added). No further explanation was provided.

BLM's unexplained reversal of position on the crucial inquiry concerning the social acceptability of this procedure is textbook arbitrary and capricious decisionmaking. First, although an agency may change its approach to discharging its statutory duties, it "is obligated to supply a reasoned analysis for the change" and thus a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 41-43. Here, BLM has not provided any explanation as to *why* it has suddenly jettisoned the social acceptability inquiry that it deemed essential only two years ago. Instead, when confronted with

detailed comments urging BLM to examine the social acceptability of this invasive procedure, the agency provided no explanation whatsoever and hence utterly failed "to supply a reasoned analysis for the change." *Id.* at 41-43. In turn, because "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position," and thus "[a]n agency may not, for example, depart from a prior policy *sub silentio*," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), BLM's silence on this important issue is arbitrary, capricious, and cannot withstand scrutiny. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[U]nexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary and capricious change from agency practice." (quotation marks and citation omitted)).

For example, in a highly analogous case, the Ninth Circuit reviewed the U.S. Department of Agriculture's abrupt change in position concerning the "social hardships" that would result from the regulation under review, finding in 2001 that such hardships were reasonably mitigated by measures adopted by the agency and then, only two years later, "ma[king] factual findings directly contrary to the 2001 ROD and expressly rel[ying] on those findings to justify the policy change." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 967-68 (9th Cir. 2015) (en banc). The court held that by changing course on this "critical underpinning" of the decision, "[t]he absence of a reasoned explanation for disregarding previous factual findings violates the APA." *Id.* at 968-68 (citing *Fox*, 566 U.S. at 515).

The same outcome is warranted here. BLM determined in 2016 that it was *crucial* to evaluate the social acceptability of this highly invasive and potentially inhumane procedure before it could be widely used on the public range. Nevertheless, in 2018, on essentially the same record, BLM has not only abandoned this core component of the research, but has refused even

to explain the basis for its total excision from the agency's 2018 decision documents. BLM's major shift in position is arbitrary and capricious, in the same way that the Ninth Circuit discerned in *Kake*. *See also Fox*, 556 U.S. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past[.]").

B. <u>BLM's Decision to Press Forward after CSU's Departure without Any Substitute Researchers to Examine Whether this Procedure Comports with Standardized Animal Welfare Metrics was also Arbitrary and Capricious.</u>

BLM's decision to proceed with these experiments after CSU's withdrawal, and without providing any means of evaluating whether the research was humane, was also arbitrary and capricious.

As explained, BLM's initial draft EA indicated that specialists from CSU would study the feasibility of ovariectomy via colpotomy, specifically including an effort to evaluate the impact of the surgery on the welfare of individual mares using a pain scoring system designed for horses. Ex. M at 20, 24-25. CSU's highly qualified team that would oversee "all aspects" of the experiments consisted of:

> [A] professor of equine surgery specializing in minimally invasive surgery and wound healing; a veterinarian experienced in performing ovariectomy via colpotomy on feral mares; an animal welfare specialist experienced in pain management; an ecologist specializing in ungulate population dynamics; and a research scientist specializing in mammalian behavior and ecology.

Id. at 18. Additionally, a detailed description of the protocols these specialists would employ to document animal welfare using the composite equine pain score was provided. *Id.* at 24-25.

However, after CSU withdrew its participation, BLM made the puzzling decision to hastily press forward with the experiments in the *absence* of any substitute academic institution or independent specialists to collect and evaluate the animal welfare data that BLM initially indicated was crucial to determining the feasibility of this procedure on the range. Indeed, BLM

acknowledged that the study would no longer "be overseen by an experienced team" of equine and animal welfare specialists. Ex. I at 20. Although continuing to stress that its "specific aims" were to "[d]etermine the feasibility of performing ovariectomies via colpotomy in free-roaming wild horses" and "[e]valuate the immediate and short-term effects of the surgical procedure on free-roaming wild mares," *id.* at 21-22, BLM clarified that it "is not proposing to conduct *any observations* on the immediate outcomes of surgery, so this portion of the originally proposed action *is no longer included* in the currently proposed action." *Id.* at 26 (emphases added).

Thus, after CSU's withdrawal, BLM completely abandoned any "attempt to quantify, using a pain scoring system developed for domestic horses, a measure of apparent discomfort in mares after surgery, as compared to untreated control mares who would not receive surgery." *Id.* Although quantifying animal welfare was an essential component of the proposed action in the initial draft EA (and is relevant to the explicit goals of the study in the revised draft and Final EA), BLM nevertheless asserted in the Final EA that "[t]he specific pain scoring measures that had been in the original USGS and CSU proposal are not necessary for quantifying the immediate outcomes of the spay surgery," and, on that basis, concluded that "there would be effectively no changes in the post-surgical care for treated mares and, hence, there would be no added impacts to the treated mares due to the removal of those pain scoring observations from the proposed action." *Id.* at 27; *see also id.* at 22 (asserting that "the departure of CSU's team does not affect the procedure's anticipated outcomes").[4]

[4] BLM received more than 10,000 comments on its revised draft EA, despite only allowing comment for seven business days (August 22-September 2, 2018). Many of those comments—including those submitted by Plaintiffs—stressed the importance of BLM providing for qualified, independent animal welfare observations and data collection, in order to assist BLM in determining the feasibility of adopting this management approach on the range. *See, e.g.*, Ex. L.

BLM's abrupt about-face with respect to the need for qualified, independent quantification of animal welfare as a core component in determining the overall feasibility of implementing ovariectomy via colpotomy is arbitrary and capricious. To begin with, again, BLM failed to articulate a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Whereas BLM's initial draft EA extensively detailed the minute-by-minute protocol that CSU's specialists would follow to account for post-surgical pain to assess animal welfare, Ex. M at 24-25, BLM has now discarded that protocol entirely (including the composite equine pain score) because, in the agency's view, measures of animal welfare are "not necessary for quantifying the immediate outcomes of the spay surgery." Ex. I at 26. In other words, BLM's stated rationale for abandoning this protocol is that it can quantify the *immediate outcome of the surgery*—i.e., whether a mare lives or dies—without any evaluation of each mare's post-surgery *welfare* at critical times after the conclusion of surgery.

However, whether a mare ultimately survives the procedure is an entirely distinct inquiry from how much pain a mare suffers during and after of this highly invasive technique—i.e., the express purpose of the protocol developed by CSU to analyze *animal pain and welfare*, as separate from survival/death outcomes. In light of BLM's refusal to grapple with the need for qualified, independent researchers to examine the post-surgical *animal welfare* scores of these horses in order to assist the agency in "[d]etermin[ing] the feasibility of performing ovariectomies via colpotomy in free-roaming wild horses," Ex. I at 22—i.e., BLM's own stated objective for this study—there is no rational connection between the facts in BLM's own documents and its choice to abandon the crucially important animal welfare protocol the agency itself previously deemed necessary to the success of this experiment.

By the same token, BLM arbitrarily failed to explain how the agency can rationally determine the feasibility of implementing ovariectomy via colpotomy on the range—again, BLM's stated aim for this study—in the absence of the welfare data that BLM originally contracted with CSU to gather. Simply put, because BLM *continues to insist* after CSU's withdrawal that the primary goal for this study is to determine the feasibility of this surgical technique for range-wide application, *see* Ex. I at 20, it must, at a minimum, provide a coherent explanation as to how it can accomplish that overriding objective when it now lacks data that BLM itself conceded to be a crucial aspect of making that ultimate determination. Because BLM has not supplied any coherent, non-arbitrary response as to how this study can fulfill its stated objectives in the absence of highly probative animal welfare data, the decision cannot withstand scrutiny.

Moreover, BLM's arbitrary abandonment of animal welfare data collection and analysis also cannot be squared with the WHA. Thus, Congress directed that "[a]ll management activities shall be *at the minimal feasible level*," 16 U.S.C. § 1333(a) (emphasis added), and mandated that BLM "assure humane treatment and care" to wild horses. *Id.* § 1333(b)(2)(B). Given these statutory instructions, it is inconceivable that Congress intended for BLM to adopt a highly invasive, high-risk surgical procedure for sterilizing horses—especially when there are far more effective and less invasive population suppression options such as PZP—without obtaining essential animal welfare data and ensuring that this extremely invasive procedure will not cause unnecessary and inhumane suffering of wild horses. Because BLM has completely failed to explain how dropping the animal welfare protocol could possibly comport with the statutory scheme to *protect* wild horses from inhumane treatment, the decision is also arbitrary and capricious and an abuse of discretion.

C. BLM's Overbroad, Severe, and Ill-Explained Limitations on Public Observation of the Surgeries Are Arbitrary and Capricious.

The primary objective of this study is to "[d]etermine the feasibility of performing ovariectomies via colpotomy in free-roaming wild horses," Ex. I at 22. Yet, as described above, BLM has jettisoned *two* relevant factors to that determination that the agency itself previously identified as essential: (1) whether the procedure is "socially acceptable," and (2) whether the procedure results in inhumane pain and suffering using standardized animal welfare metrics. In light of the agency's abandonment of those two crucial inquiries, robust public observation of these procedures and their aftermath is even more important, even apart from Plaintiffs' First Amendment right to such observation. *Accord* Ex. U ¶ 3. Nevertheless, BLM has sharply curtailed public observation, and done so without providing sufficient explanations that can survive APA review.

As explained, BLM has only provided the public with very limited observation of the procedures through a window in a doorway (limited to a maximum of five observers in the room at a time, meaning that not even all the observers can look through the door at the same time), at an odd angle that does not provide up-close viewing of the experiment or the ability to hear what is occurring, nor allow for meaningful filming or photography opportunities. Ex. B at 27-28. In response to Plaintiffs' requests to accommodate additional public observation in order to thoroughly and completely document the procedures and their humaneness—including observation closer to the chute where "all animal handling occurs"—BLM insisted that "the presence of additional people jeopardizes the safety of the staff, the safety of the public visitors, or the safety of the animals," and "there simply is not enough space for additional public observers within this confined area" due to "the number of BLM employees involved with animal handling and restraint, the veterinarians performing the surgeries, and the research team

members collaring and tagging." Ex. B at 31. BLM further stated that there was no need to accommodate Plaintiffs' requests because the veterinarian chosen by BLM to conduct these experiments would be "independent." *Id.* at 32. None of these responses have any merit.

At the outset, BLM's response does not come to grips with the dispositive fact that at least *three* CSU specialists would have "overseen" these procedures, but those coveted spots have now been freed up by CSU's withdrawal from the project—and BLM's failure to find substitute animal welfare specialists. Not only does this fact cast serious doubt on BLM's assertion that there "is not enough space" for even a *single* observer (let alone three), but CSU's withdrawal *reinforces* the fundamental need for animal welfare observers from the public to step into these roles due to the glaring absence of any specialist-based observation of this critical aspect of the experiments. Especially where highly qualified members of the public are ready and willing to serve in this capacity in the place of CSU or an analogous research institution—such as Ms. Kathrens who is the *Humane Advocate* on the National Wild Horse and Burro Advisory Board, specifically appointed *by BLM* to advise the agency on the humane treatment of wild horses, 16 U.S.C. § 1337, *see* Ex. A ¶¶ 6, 7, 21—it was arbitrary and capricious to restrict *all* observation in the area where the procedure will take place that would shed light on the welfare of horses during (and immediately after) these surgeries, and, in turn, inform "the feasibility of performing ovariectomies via colpotomy in free-roaming wild horses," Ex. I at 22.

In addition, BLM's refusal to install small, unobtrusive cameras in the area where mares will endure surgery—especially in light of the very limited in-person public observation and the lack of any observation by animal welfare specialists from CSU or elsewhere—is also arbitrary and capricious. BLM's reason for denying this request was that BLM did not include "social acceptability" in the purpose and need for this project. Ex. B at 33. But that is non-responsive.

As demonstrated above, BLM's removal of this critical factor is itself arbitrary and capricious. However, irrespective of how BLM framed its purpose and need for purposes of NEPA, the public has a right to observe these procedures and, consistent with the WHA, to assist BLM in determining whether these experiments are humane and meet basic animal welfare standards.

In short, BLM has not provided any coherent explanation as to why it cannot (or will not) install small, unobtrusive cameras—which will not in any way jeopardize the procedures (nor has BLM asserted they will do so)—to facilitate public observation and shine light on the agency's activities affecting federally protected wild horses. It could not be clearer that the agency has decided not to do so—and to eliminate "social acceptability" as a relevant concern—because it knows the public would be *horrified* if it were to see what is entailed in these gruesome and completely outdated experiments. *See, e.g.,* Ex. J ¶ 4 (explaining that veterinarians no longer use this procedure because it is inhumane); Ex. S ¶ 12 (same).

Likewise, BLM rejected Plaintiffs' request to install small, unobtrusive cameras in the pens where mares will recover—i.e., where any post-surgical pain or physical problem will be evident indicating that their welfare is poor and that they are suffering. BLM's ostensible justification for this decision was that "cameras would not be able to pick up individual mare numbers nor would they be able to document anything in poor lighting," and thus "[n]o viable, scientific data would be collected if the individual animals could not be identified." Ex. B at 33. However, contrary to BLM's unadorned assertion, there is no support in the record for the proposition that high-resolution cameras would not be able to discern individual mare numbers, when those numbers *are visible to the naked eye*. Nor did BLM consider the fact that many commercially available cameras are able to film in high resolution even in low light settings, *see* Ex. C ¶ 14, which also undermines BLM's rationale for rejecting cameras. Finally, aside from its

conclusory claim that no viable scientific evidence could be collected using cameras—based on the agency's erroneous assumption that "individual animals could not be identified"—BLM never addressed the fact that cameras most assuredly *would* enhance the limited in-person observation by providing for 24-hour observation of mares in recovery, and allow at least some conclusions to be drawn about their welfare that otherwise would escape public scrutiny.

Finally, BLM's explanation that no such public observation is required because its "independent" veterinarian conducting the research can perform the animal welfare observation that would have been conducted by CSU, Ex. I at 32, is demonstrably incorrect. BLM is using one surgeon for this experiment, *see, e.g., id.* at 24-25 (referring to only a single "surgeon"). Moreover, far from being "independent" of BLM, this individual is being *paid* by BLM to conduct this research, and, if BLM believes the research is successful, has an economic interest in being used by BLM to conduct the same experiments on more wild horses *on the range* in the future. Indeed, as Plaintiffs' experts explain, this method of sterilization is so outdated and inhumane that very few equine veterinarians will even conduct these kinds of procedures. *See, e.g.,* Ex. J ¶ 4 (explaining that "ovariectomy via colpotomy—[is] *no longer commonly performed on horses*. The veterinary community generally avoids ovariectomy via colpotomy as a method for spaying mares because of *the major risk of complications and significant pain/risk of exsanguination these mares inhumanely experience*—all of which is avoidable by using other less invasive and risky surgical methods" (emphases added)). Hence, the surgeon selected by BLM has a clear economic interest in making sure that he conducts and assesses the effectiveness of these experiments in a manner that will please BLM and ensure that he is awarded similar contracts in the future. Thus, he is far from "independent" of the agency.

For all of these reasons, BLM's sharp limitations on public observation—both in person and via camera—are arbitrary, capricious, and completely unsupported by the record.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

It is well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009). Accordingly, "[u]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005). Demonstrating a "colorable" First Amendment claim is not a high bar; plaintiffs must merely establish that "the underlying constitutional question is close." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). As demonstrated above, Plaintiffs have easily carried that burden here. *Klein*, 584 F.3d at 1207–08.

Similarly, BLM's arbitrary and capricious denial of reasonable access to observe these experiments irreparably impairs Plaintiffs' individual and organizational efforts to obtain and disseminate information about BLM's treatment of wild horses and to advocate for humane management of wild horse populations. Plaintiffs have a long, proven history of observing and publicly disseminating information about BLM's treatment, including inhumane treatment, of wild horses in order to improve the agency's management of these federally protected animals. *See, e.g.*, Ex. A ¶ 4 (noting that Ms. Kathrens and TCF "regularly comment on [BLM's] proposed management actions, and endeavor to provide information to [BLM] to help inform [its] management actions"); Ex. C ¶ 2 ("Under [Ms. Roy's] leadership, AWHC has effectively

used the gathering and public dissemination of information about the management of wild horses by [BLM].").

Therefore, by denying Plaintiffs access to observe and document these experiments, BLM has significantly impaired their ability to help determine the feasibility of the procedure for range-wide application—i.e., the agency's stated aim of the experiment. *See, e.g.*, Ex. A ¶ 25 (explaining that BLM's restrictions on access will [] unquestionably impair [Ms. Kathrens'] ability . . . to provide informed comments on whether the BLM can or should implement these experimental procedures on the range in the future").

In short, BLM's denial of access causes irreparable injury to Plaintiffs in three distinct ways: (1) it denies Plaintiffs a unique opportunity to observe, document, and assess the humaneness and social acceptability of these experiments in a controlled setting; (2) it denies Plaintiffs a unique opportunity to help assess whether (and why) this procedure is feasible to implement on the open range *before BLM actually decides whether to implement it* on a range-wide basis; and (3) it deprives Plaintiffs of information they need in order to educate the public, muster public interest, and provide informed comments in the future. *See, e.g.*, Ex. C ¶ 19 ("[B]y limiting the public's ability to observe these experiments BLM is thwarting both my and AWHC's ability to report to the public about the inhumane . . . experiments."). For these reasons, Plaintiffs' injuries cannot be remedied by money damages and are plainly irreparable.

IV. THE BALANCE OF THE EQUITIES TIPS STRONGLY IN PLAINTIFFS' FAVOR AND THE PUBLIC INTEREST FAVORS AN INJUNCTION.

The balance of the equities tips strongly in Plaintiffs' favor. An injunction would not only safeguard Plaintiffs' First Amendment rights, but would also protect the significant public interest in observing, documenting, and assessing the social acceptability of the experimental procedures BLM plans to perform on federally protected wild horses. Moreover, an injunction

preserving the status quo would neither imperil BLM's ability to ultimately perform its experiments, nor cause BLM any harm through delay.

The fact that BLM's denial of meaningful access to observe these experiments infringes on Plaintiffs' First Amendment rights is itself sufficient to show that the balance of equities and the public interest weigh in favor of an injunction. As the Ninth Circuit explained in *Klein*, because a violation of First Amendment rights are at stake, "[t]he balance of equities and the public interest thus tip sharply in favor of enjoining the [challenged action]." *Id.* at 1208. So too here.

Moreover, the balance of the equities and the public interest would tip strongly in favor of issuing an injunction even if no First Amendment right were at issue. An injunction would give the Court time to fully consider Plaintiffs' claims that BLM acted arbitrarily and capriciously in denying public access to observe and document these experiments. If the Court ultimately remands the case to the agency to more thoroughly consider whether to provide public access to these experiments, BLM may well change its position in light of the fact that public observation is the single best way to achieve the agency's own goal of assessing the "feasibility" of these experimental procedures. By ultimately leading to a fuller consideration of the issues by the Court and the agency, an injunction could thus serve both BLM's interest and the public interest. Hence, in light of the seriousness of the legal violations Plaintiffs have alleged, an injunction is warranted because "the public has a general interest in the meticulous compliance with the law by public officials." *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998).

Furthermore, a preliminary injunction would not meaningfully impair any governmental interest, as an injunction would not imperil BLM's ability to ultimately conduct its planned

experiments, but instead would merely give the Court time to consider the Plaintiffs' claims that BLM should provide access to observe the experiments.

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' request for a preliminary injunction to preserve the status quo until the Court can fully resolve this case on its merits.

Respectfully submitted,

*/s/ William N. Lawton*___
William N. Lawton
nlawton@meyerglitz.com
Oregon Bar No. 143685
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Ave. NW, Suite 210
Washington, DC 20016
(202) 588-5206 (phone) / (202) 588-5409 (fax)

*/s/ William S. Eubanks II*__
William S. Eubanks II (pro hac vice pending)
beubanks@meyerglitz.com
D.C. Bar No. 987036
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 (phone) / (202) 588-5409 (fax)

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under Local Rule 7-2(b) because it contains 10,997 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, I electronically filed the foregoing Motion and supporting Memorandum with the Clerk of the Court for the United States District Court for the District of Oregon using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*/s/ William N. Lawton*___
William N. Lawton
nlawton@meyerglitz.com
Oregon Bar No. 143685
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Ave. NW, Suite 210
Washington, DC 20016
(202) 588-5206 (phone) / (202) 588-5409 (fax)

*/s/ William S. Eubanks II*__
William S. Eubanks II (pro hac vice pending)
beubanks@meyerglitz.com
D.C. Bar No. 987036
Meyer Glitzenstein & Eubanks LLP
245 Cajetan Street
Fort Collins, CO 80524
(970) 703-6060 (phone) / (202) 588-5409 (fax)

Counsel for Plaintiffs