



August 31, 2018

Wild Horse Spay Feasibility Research Project Lead
BLM Burns District Office
28910 Highway 20 West, Hines, Oregon 97738
Fax: (541) 573-4411

Via email: blm_or_spaystudy_warmsprhma@blm.gov

To Whom It May Concern:

These comments on the Bureau of Land Management's ("BLM") Revised 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"), DOI-BLM-ORWA-B050-2018-0016-EA, are submitted on behalf of the American Wild Horse Campaign, the Animal Welfare Institute, and The Cloud Foundation ("the groups") and are in addition to the comments the groups submitted on July 30, 2018, which are incorporated by reference and still apply to the present agency action. BLM has received over 16,000 public comments opposing these experiments so far this year, and it received over 20,000 public comments in 2016 in opposition to the BLM's previous plan to conduct this research on wild mares.

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.

The Cloud Foundation ("TCF") is a Colorado 501(c)3 nonprofit corporation, that grew out of Executive Director Ginger Kathrens' knowledge and fear for wild horses in the West. TCF works to educate the public about the natural free-roaming behavior and social structure of wild horses and the threats to wild horse and burro society, to encourage the public to speak out for their protection on their home ranges, and to support only humane management measures. Kathrens serves as the Humane Advisor on BLM's National Wild Horse and Burro Advisory Board.

I. OVERVIEW

The groups remain strongly opposed to the proposed action. Based on a careful review of the EA, 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 wild horses (in the case of removing mares’ ovaries), and uneconomical. Absent termination of the entire proposal, the BLM must abandon the proposed spay experiment given fundamental changes to the character of the experiment (i.e. given the decision by Colorado State University (“CSU”) to withdraw from the experiment), welfare concerns, and because it may violate federal laws.

In addition, the legal authority of BLM to conduct a surgical sterilization study such as the one proposed in this EA is questionable at best. In the BLM’s 2018 Report to Congress, “Management Options for a Sustainable Wild Horse and Burro Program,” the BLM stated that each of its four proposed management options, some implementing the use of mass sterilization, it provided in the report “would require new legal authorities, or benefit from clarified legal authorities. (Attachment 1, p. 13). The agency itself understands that the legal authority to sterilize wild free-roaming horses is not clear and requires clarification from Congress. Therefore, under current law, the proposed action may not be a viable option for wild horse and burro management given current legal authorities alone.

As described in more detail below, these comments explain the groups’ position that:

- The BLM’s plan to remove federally protected wild horses from the Warm Springs HMA lands violates federal law.
- The BLM must prepare an Environmental Impact Statement (“EIS”) rather than an Environmental Assessment (“EA”) because several distinct National Environmental Policy Act (“NEPA”) “significance” factors are triggered, any one of which requires preparation of an EIS.
- The BLM has not taken 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 BLM must implement meaningful animal welfare assessments both during and after surgery. Conducting this risky procedure without adequate welfare assessments of the horses to determine the degree of their suffering, to monitor their recovery from the procedure, and to mitigate the risks of adverse outcomes is extremely inhumane. Public observation of the experiments is also necessary to determine the social acceptability of performing the procedure in wild

mares. (Congress and the National Academy of Sciences have repeatedly affirmed the importance of public opinion in wild horse management policies.)

- If the BLM chooses to pursue this “study,” the agency must provide for more meaningful public observation and documentation of the ovariectomy experiment. Expecting observers to easily and meaningfully observe the experiments through a doorway, as currently proposed, lacks any logical basis.

For these reasons, the groups 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

As discussed in our previous comments, NEPA and the Wild and Free Roaming Horse and Burro Act (“WHA”) also apply to the BLM’s proposed action in the Warm Springs HMA.

A. APA

Under the Administrative Procedure Act (“APA”), courts “shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). Agency action is arbitrary and capricious if an agency “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 is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although this standard of review is deferential, “[j]udicial review is meaningless [] unless [courts] carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.” *Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). Courts “must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Id.*

B. AWA

In promulgating the Animal Welfare Act (“AWA”) in 1966, Congress found that the Act was essential to “insure that animals intended for use in research facilities . . . are provided humane care and treatment. . .” 7 USC §2131(1). To achieve this overriding purpose, the AWA and its associated regulations (at 9 C.F.R. §1 et seq.) provide minimal standards for the care, handling, transportation, and use of animals for research and exhibition.

For animals used in research, the legal requirements extend beyond ensuring the humane care of the animals but also require the establishment of Institutional Animal Care and Use Committees (“IACUC”). IACUCs are provided broad authority to review an institution’s program for the humane care and use of animals, to inspect the institution’s animal facilities, and to review

experimental protocols to ensure that they satisfy criteria intended to avoid the use of animals in unnecessarily duplicative experiments, minimize any discomfort, distress, or pain caused to animals used in experiments, and provide other oversight to ensure the humane treatment of said animals. See generally 9 C.F.R. §2.31.

III. DISCUSSION

A. BLM Must Prepare An EIS For This Action

As the groups explained in comments submitted on July 30th, it is clear that BLM is required to prepare an EIS for this action because the EA will be legally insufficient. The 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).

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

- **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 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 proposed using the procedure in the past and have specifically stated that BLM’s experiments lack merit because of the serious adverse consequences of this experimental protocol. Additionally, the 2015 National Academy of Science (“NAS”) research review panel 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.” (See Attachment 3, p. 7 to AWHC and AWI Comments July 30, 2018)

Accordingly, it is clear that there is a substantial dispute over the experiment’s effects in terms of risks to individual horses, the appropriateness of conducting the procedure in wild horses (many of whom will be pregnant, unlike the domestic mares who undergo the procedure), 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 proposing the use of the 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. As we discussed in our prior comments, the “spay” experiment in this EA is highly uncertain because the use of ovariectomy via colpotomy on wild mares and pregnant mares is experimental and the return of ovariectomized mares to the range will have unknown impacts.

- **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 a 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 lack of any post-surgical welfare observation protocol to ensure that the mares subjected to the procedure remain in good health.
- 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 in the number of wild free-roaming, reproductively intact horses and the management of such a reproductively altered population has never before been done in any HMA. There is no research regarding the impacts of maintaining a significant portion of the wild horse population as nonreproducing. (See Attachment 1 to AWHC and AWI Comments July 30, 2018).
- Moving forward with the study when the original university applicant, which reviewed and approved the experiments through its IACUC (IACUC approval is mandated by the EA) has withdrawn from participation.

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 would set dangerous precedent 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.”

As the groups explained in their July 30, 2018 letter, BLM’s proposed ovariectomy experiment threatens serious violations 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. 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).

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”). 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. 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. 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, as noted in our prior comments and repeated 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

Additionally, pursuant to NEPA, BLM must analyze all reasonable alternatives to the proposed removal of approximately 685 more horses from the Warm Springs HMA and the subsequent removal of the ovaries of nearly 100 mares.

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.” This purpose and need statement is unnecessarily narrow as it eliminates the consideration of reasonable alternatives. “[A]n agency cannot define its objectives in unreasonably narrow terms,” which occurs when an agency “define[s] the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the [environmental analysis] would become a foreordained formality.” *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010).

In the revised EA, the BLM remains fixated on an extremely narrow purpose and need that limits its range of alternatives to studying only ovariectomy by colpotomy and wrongfully eliminating other, more humane options for sterilizing wild horses. Even assuming that BLM has any legitimate need to study permanent surgical sterilization of mares (which it does not, given the proven success of PZP), BLM's extraordinarily narrow purpose and need statement in this EA requires it only to study one form of surgical sterilization (and the most risky and inhumane form, at that), when in reality *BLM has already found that studying other forms of surgical sterilization would be reasonable*. (See Attachment 4 to AWHC and AWI Comments July 30, 2018). Because BLM's purpose and need statement is unreasonably narrow, the EA is fundamentally flawed and must be reconsidered in its entirety.

The groups previously explained to BLM that it must consider more than two alternatives in this EA. However, the agency has again considered just the two alternatives in the revised EA, (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 still plans to ovariectomize more mares and remove more horses from the HMA, thereby reducing the number of reproductively intact wild horses to a quantity that is virtually incapable of being self-sustaining.

In addition to the alternatives that the groups previously asked the BLM to consider in its previous comments, the groups also ask that BLM consider other plainly reasonable alternatives such as an alternative that implements the Population Management Plan without the proposed spay experiment, as well as an alternative in which BLM partners with another research institution to perform the welfare observations originally proposed by CSU, where assessments are conducted both during and immediately after the surgical procedures.

Further, the BLM must analyze alternative methods for sterilizing wild horses including the ovariectomy via laparotomy procedure as well as less invasive procedures including oviductal ligation and laser ablation of the UTJ (papilla). There is also a completely non-surgical option for effective sterilization in N-Butyl cyanoacrylate, a butyl ester of 2-cyano-2 propenoic acid. This treatment is currently in its third successive mating season of study by Dr. Irwin Liu. (Attachment 2). The BLM should also consider immunocontraceptive vaccines as another alternative to the proposed action.¹ Finally, oviductal ligation and laser ablation are two methods which the 2015 NAS review panel said "would be safer – with less risk of hemorrhage and evisceration – and probably less painful." (See Attachment 3 to AWHC and AWI Comments July 30, 2018). Each of those procedures also has the added advantage of not causing the behavioral changes that will have a profound effect on wild herd integrity. Therefore, there are many other options for BLM to implement other than ovariectomy by colpotomy.

In the revised EA, the BLM casually dismisses spaying via flank laparoscopy, tubal ligation and laser ablation of the oviduct papilla. Specifically, the agency contends that because its proposed experiments in 2016, which intended to study three different procedures, did not occur, these tubal ligation and laser ablation need not be considered now. This is a weak and arbitrary reason for the BLM to fail to consider either tubal ligation or laser ablation of the oviduct papilla in

¹ Note the groups' discussion on immunocontraceptives in AWHC and AWI's comments from July 30, 2018.

greater detail for use in the present study. In particular, BLM asserts that because its 2016 studies did not take place, these techniques “are remote or speculative.”² Revised EA at 43. However, these techniques are no more remote or speculative now than they were in 2016, when BLM stated that there was a need to study them particularly in order to compare their efficacy and social acceptability to ovariectomy via colpotomy. BLM has offered no coherent explanation for why evaluating these procedures is less desirable now than in 2016, given that the state of the science regarding mare sterilization has not meaningfully changed since that time. As such, it is clear that these measures constitute a viable alternative that BLM has unreasonably excluded from detailed review.³

BLM’s reasoning regarding flank laparoscopy is similarly flawed. Although BLM now attempts to assert that flank laparoscopy is somehow unsuitable for use in wild mares—despite the fact that the veterinary community overwhelmingly recommends this procedure over the inhumane and risky practice of ovariectomy via colpotomy—this is contrary to its own previous position.

In 2015, the BLM held a panel discussion on “Assessment of spay techniques for mares in field conditions” which included veterinary experts, USGS, BLM, USDA-APHIS, and CSU. (Attachment 3). The panel discussed flank laparoscopy in detail and noted that the flank incision procedure had a low risk to operators and was a common surgery, while the colpotomy procedure had a higher risk to the operator and a need for trained surgeons. The panel specifically noted that it would be harder to find people who are good at colpotomies, and noted that the BLM will be more likely to find veterinarians who are trained in and comfortable with the flank procedure. *Id.* p. 10. Nevertheless, flying in the face of the consensus in a panel that BLM itself convened—and without even discussing that panel’s findings—here the BLM chose only the colpotomy procedure for use in this proposed study.

The panel also noted that when “untrained people perform colpotomies there is an increased risk that things will go wrong and some things can go very wrong.” *Id.* Because of these risks, the panel discussed the need for oversight in the application of the colpotomy procedure, yet BLM has failed to implement any such oversight in this EA; failing to seek another institution to take CSU’s place. In short, despite the fact that flank laparoscopy is clearly less risky, more humane, and recommended by experts convened by the BLM itself, BLM arbitrarily dismissed flank laparoscopy from further consideration “until proven on wild horses.” (EA p. 49). The dismissal

² Meanwhile, Dr. Liu has a successful study underway with a non-surgical sterilization alternative. (See Attachment 2). AWHC believes that this may be a viable population management alternative that offers clear advantages over colpotomy -- including the fact that it is a non-surgical approach with significantly lower risk of pain and complications and no impact mares' natural free-roaming behaviors. As such, there is no legitimate reason to exclude this alternative from consideration in the EA.

³ BLM’s assertion that ovariectomy via colpotomy “has been in practice for over a century, including in feral mares,” EA at 43, greatly overstates the study on which it relies, which involved the use of the procedure on just over 100 wild mares—by no means demonstrating that it is anything other than experimental and which certainly does not show the use of this procedure in wild mares for a century, as BLM misleadingly suggests. Further, that Fish and Wildlife Service study was not subject to the standards of the WHA (humane and minimal feasible level management practices) and as such the study is severely deficient for many reasons including but not limited to the fact that no animal welfare observations of ovariectomized horses were conducted, no quantification of the complication rate was made or reported and no post-release monitoring for complications was undertaken.

of this technique “until proven on wild horses” is especially egregious in light of the fact that ovariectomy via colpotomy is also unproven in wild horses, as BLM itself acknowledges by embarking on this study of the feasibility of using this procedure.

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 – 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 groups previously asked the BLM to adequately analyze the impacts of BLM’s proposed action on the wild horses themselves. However, even in the revised EA, the BLM has failed to adequately analyze the risks of pain, mortality and abortion for mares involved in the inhumane study of ovariectomy by colpotomy. Here the BLM has also cut the use of post-operative welfare observations without adequate analysis or reason. Finally, the BLM must consider the impacts of its inadequate allowances for public viewing of the study.

1. Ovariectomy by Colpotomy

The current proposed ovariectomy study remains inhumane, unsustainable, economically irresponsible, and a socially unacceptable option for the future management of wild horses. As stated in our previous comments, this was affirmed by the National Academy of Sciences in its 2013 report, “Using Science to Improve the BLM Wild Horse and Burro Program: A way Forward,” which concluded that ovariectomy was “inadvisable for field application” due to risk of “prolonged bleeding and peritoneal infection.”

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.

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 again failed to adequately consider the risks of ovariectomy by colpotomy on the horses 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 failure to provide the required post-operative care.
- The risk of post-operative pain in these mares and the BLM's failure 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.

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 and ensure they are managed "humanely." 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.

2. Social Acceptability

When BLM previously proposed to study ovariectomy via colpotomy, (DOI-BLM-OR-B000-2015-0055-EA), it repeatedly emphasized that a critical aspect of its effort was to evaluate whether this procedure could be "socially acceptable." *See, e.g., id.* at 47 ("BLM has the challenging task of choosing wild horse population control methods that are ecologically viable, financially viable, and socially acceptable"); *id.* at 51 ("Results from the studies under the proposed action would aid in determining the social acceptability of each procedure"); *id.* at 53 "[t]he ultimate question in the reasonably foreseeable future of wild horse population management"—namely, "which [sterilization] methods are safe, effective, and socially acceptable."); *id.* at 54 ("The results of this study are expected to aid BLM in determining the social acceptability of each procedure."). The BLM's initial acknowledgement of the importance of determining the social acceptability of the procedure was consistent with Congressional intent, and a 1982 Congressionally mandated National Academy of Sciences report, the conclusions of which were reaffirmed by the National Academy of Sciences in 2013.⁴

⁴ The 1982 NRC Report, "Wild and Free-Roaming Horses and Burros: Final Report," states, "It continues to be obvious that the major motivation behind the wild horse and burro protection program and a primary criterion of management

Despite the fact that BLM previously emphasized the need to evaluate the social acceptability of this management method and recognized that this acceptance is an integral part of any legal decisionmaking process regarding actions that may harm wild horses, it has abandoned this inquiry altogether. Moreover, BLM abandoned this inquiry without any effort to explain to the public (a) how the agency could rationally proceed without evaluating a factor that it previously considered to be critically important, or (b) why BLM apparently no longer cares whether the public will find this method of population management to be socially acceptable. The abandonment of this inquiry without any explanation is profoundly irrational and lacks any basis in logic or law. Social acceptability has been at the heart of wild horse and burro management for decades. The BLM cannot be allowed to ignore such a fundamental aspect and criterion for its entire program of managing wild horses and burros.

3. Qualified, Independent Welfare Observations

As BLM knows, the agency originally intended for CSU staff (including a professor of equine surgery, an animal welfare specialist, and a research scientist) to oversee this experiment. Indeed, among the purposes of CSU's involvement was observing and recording the degree to which wild mares will be subjected to pain and suffering during this experiment. CSU's withdrawal from this experiment means that no experienced, independent observer will be present 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. BLM has acknowledged that CSU's observations were intended to objectively document the pain and suffering of mares enduring ovariectomy via colpotomy, but after CSU withdrew from the experiment, BLM inexplicably decided to abandon that effort and to proceed with the experiment without any effort to monitor the degree to which mares subjected to this experiment are suffering.

The BLM claims that it plans to use "the same surgical protocol originally approved by the CSU IACUC." (EA p. 22). However, the CSU IACUC clearly approved post procedure monitoring (i.e., "For 7 days after surgery the mares will be observed 3x daily by a veterinarian" (Attachment 4, p. 20)), while the revised EA does not implement such welfare assessments. Further, the previous EA had an entire section describing "Post-surgery Welfare Observations." (See Attachment 4, p. 24-35 to AWHC and AWI Comments July 30, 2018). The purpose of these observations was to measure the pain experienced by the wild mares for seven days following surgery. Clearly, the CSU IACUC approval was premised on observations of animal welfare and BLM's ongoing reliance on this IACUC approval notwithstanding the agency's abandoning that premise is unreasonable and unlawful.

In our previous comments, the groups detailed how inhumane the ovariectomy procedure is, but now the BLM has exacerbated the issue by removing the only piece that served as a safety net for the health and well-being of the horses. CSU planned to observe the mares after the surgery

success is public opinion." (p. 54). The 2013 NRC Report, "Using Science to Improve the BLM Wild Horse and Burro Program: A Way Forward," states, "As was pointed out in Chapter 7, the Wild Free-Roaming Horses and Burros Act leaves considerable room for interpretation of its mandates. In 1982, the National Research Council noted that public opinion was the 'major motivation behind the wild horse and burro protection program and a primary criterion of management success,' suggesting that control strategies must be responsive to public attitudes and preferences and could not be based only on biological or cost considerations (NRC, 1982, p. 54)." (p. 239).

for signs of distress and pain. The BLM states, without any in-depth reasoning, that these observations will no longer occur under the revised EA. BLM's decision to nevertheless go forward with surgically sterilizing mares in the Warm Springs HMA without any provision to observe, monitor, and assess animal welfare is arbitrary and capricious and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2).

Dr. Pamela Corey, who has decades of related experience as explained in our comments on July 30th, explains why welfare observations are important and what they should entail:

Wild mares must have a post-operative observation protocol and a plan to re-examine any mare that aborts, has pain or colic signs, is anorexic (fever causes anorexia) or is observed lying down more than normal. To not do these things would be in direct opposition to the veterinary oath.

The plan should consider examining after surgery by placing the mare in stocks again for a full physical and the ability to check for internal bleeding. This would require field blood testing to evaluate levels of red and white blood cells at a minimum.

If there is no post-operative plan to evaluate the mares individually then this is not research but actually experimental procedure with no regard for measurement of morbidity or mortality risks. Data collection and ability to draw conclusions about the success or failure of individuals undergoing the surgery must be required. How else will they determine the ideal gestational age to perform the procedure with the least amount of complications, for example.

Finally, since the BLM plans to contract out this procedure, the agency must seriously consider implementing a post-surgery welfare observation protocol. A developed protocol will be even more important should the BLM move forward with this procedure as a management tool in the Population Management Plan for this HMA and others across the West. Accordingly, because the withdrawal of CSU's experienced oversight staff—coupled with BLM's baffling lack of any effort to obtain a similar degree of experienced independent academic oversight—means that this experiment is left totally devoid of any independent, qualified observation of wild horse pain and suffering, the need for observation and recording by an independent, licensed equine veterinarian is clear. Without a defined welfare observation protocol, these experiments leave the BLM without any information as to whether the colpotomy procedure constitutes humane care and treatment option as required under the WHA. *See* 16 U.S.C. § 1333(b)(2)(B). In other words, it was one thing for the procedure to be contracted out while it was under CSU's supervision, but it is completely different for the BLM to contract out the procedure now that CSU has withdrawn and without implementing any new, expert supervision.⁵

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 minimize impacts to

⁵ AWHC has previously raised specific concerns about one individual contract veterinarian. AWHC remains concerned that the BLM will select Dr. Pielstick as the contractor to perform these surgeries. AWHC and AWI strongly oppose the selection of Dr. Pielstick for the reasons explained in Attachment 5.

the natural behaviors that distinguish wild-free roaming horses, who are protected under federal law, from domestic horses.

4. Inadequate Public Observation

In the revised EA, the BLM has dropped all previous observation restrictions implemented through CSU's policies. However, the groups are still concerned that the new observation allowances are inadequate.

In the revised EA, the BLM is still arbitrarily limiting the number of observers allowed in the facility where the spay procedures are to be conducted to five at a time, with shifts of 2-4 hours if there are more than five people that are interested in observing. (EA p. 34). However, as proposed by BLM, these five observers will be forced to observe the surgery through a doorway, at an odd angle to the chute where the procedure will be conducted. These observation conditions are restricted without any basis in logic. Ms. 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. (See Attachment 2, p. 14 to AWHC and AWI Comments July 30, 2018). 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. Notably, 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." (*Id.*, p. 87). BLM should provide similar opportunities for the public to observe the ovariectomy via colpotomy experiment.

It remains clear, that BLM would prefer that the public not be able to document or easily observe this experiment because ovariectomy via colpotomy is a brutal procedure that the agency knows the public will not accept. The BLM has proposed inadequate public observation conditions by arbitrarily limiting the exposure of this inhumane "management" technique. As BLM repeatedly stressed in its prior attempt to experiment with this inhumane and unethical method of sterilization (which BLM abandoned after AWHC and TCF 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. Moreover, 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 clearly show the public the unvarnished truth of what that procedure actually entails for wild horses. As such, the public's ability to adequately observe and record these procedures is also in BLM's own interest.

5. The Revised Proposed Action To Surgically Sterilize Wild Horses May Still Violate The Animal Welfare Act

A. Potential AWA Deficiencies In BLM's Proposed Action

As the BLM notes throughout the EA and starting with the opening paragraph, the proposed actions constitute part of a "research project", "research proposal", and "research study", placing

the project under the AWA's provision covering horses used specifically for "research purposes" (7 U.S.C. § 2132(g)). As such, the BLM is obligated to ensure that the experiment satisfies the requirements contained within the AWA, an obligation that the BLM has not met.

For example, as noted in our comments on the original EA, the lack of any credible post-operative care plan or procedure is appalling and may violate the AWA. Similar concerns have been raised repeatedly in other comments submitted to the BLM regarding the agency's proposal for ovariectomizing these mares. Yet, the BLM continues to ignore this issue in the revised EA by failing to establish acceptable post-operative care procedures and standards for the treated horses.

AWA standards for pre- and post-operative care are based on established veterinary practices. The BLM, however, does not provide sufficient evidence that the experimental ovariectomies satisfy that requirement as it fails to identify established veterinary practices for such procedures, to disclose the specifics of such practices, or to discuss how the protocol for this experiment will satisfy such standards. Serious risks to the welfare and even the survival of treated horses exist given the proposed and controversial method of "blunt dissection" to puncture the peritoneum, which would be enlarged specifically for the purpose of facilitating entry by hand.

Dr. Robin Kelly stated in her declaration, "the post-operative care/management proposed for these mares is minimal compared to the 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 post-operative hemorrhage or herniation of bowel thru the vaginal incisions that must be left open for second intention healing." (See Attachment 8, p. 3 to AWHC and AWI Comments July 30, 2018). In addition to inadequate post-operative monitoring, other serious concerns include the "improper use of drugs on pregnant mares" given that veterinary professionals avoid using sedatives and opioids on pregnant mares "unless an emergency situation arises" (Attachment 6, p.4). "Wild horses do NOT sedate well...due to their intense "fight or flight" response to confinement...wild horses will explode as their consciousness responds to drug levels waning. (Attachment 7, p. 2).

Elective procedures such as ovariectomies that should be performed under general anesthesia do not rise to the level of an emergency surgery where typical veterinary protocols can be foregone.

Fundamentally, a number of serious animal welfare concerns stem directly from the failure to abide by the standards set forth by law – perhaps most notably that the proposed surgeries would occur in non-sterile conditions (thereby increasing the risk of infections, complications, and death). AWA regulations state plainly 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" (9 C.F.R. §2.31(d)(ix)). The BLM admits this standard cannot be met, observing in both the original and revised EAs that the surgical field "may not be entirely sterile" but that they agency will nevertheless somehow attempt to disinfect the corral. Under the current proposal, and given the reality of the field conditions, the BLM would not be able to maintain an adequately aseptic space—a clear violation of the AWA requirements.

B. BLM Cannot Continue To Rely On CSU's IACUC Approval

Related to the failure to comply with the AWA, is the BLM's continued reliance on CSU's IACUC approval in order to move forward with these experiments, despite CSU removing itself entirely from the research project. The fact that CSU will no longer be involved in any capacity makes the BLM's decision to proceed with ovariectomizing mares, as well as the agency's insistence on using CSU's IACUC especially perplexing and inappropriate. Furthermore, CSU's departure fundamentally alters the proposed action, including the proposed experiment to assess ovariectomy via colpotomy as a management option.

In view of CSU's decision to not participate in the experiment, which dramatically altered the scope and nature of the study (i.e. animal welfare observations now omitted, qualified personnel now no longer involved), the BLM should reevaluate the adequacy of CSU's proposed experimental protocol, as well as the assumption that CSU's IACUC approval can be relied on given the changed circumstances.

The issue of the proper care and use of animals in experiments is of course an area of intense public interest and scrutiny. Since such use is dependent on IACUC approval of the experimental protocol, the BLM cannot simply ignore CSU's decision to abandon the ovariectomy study (and its partnership with the BLM for this particular project) or the fact that the IACUC approval was premised on CSU's participation and ability to provide oversight (something that CSU's withdrawal automatically nullifies). For these reasons, it is clear that BLM cannot be allowed to proceed with these experiments.

IV. CONCLUSION

For the reasons explained above, the groups 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 on the human environment and violates other NEPA requirements.

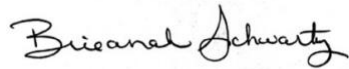
Specifically, the revised EA fails to properly analyze the potential environmental impacts of the ovariectomy by colpotomy procedure on the Warm Spring HMA and their subsequent handling, transportation, and disposition. Furthermore, the BLM clearly violated NEPA by failing to consider a reasonable range of alternatives and in deciding 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.

Considering these deficiencies in the EA as articulated in this letter, to permit the public to fully understand the full environmental impacts of the proposed action and to provide substantive and informed comments in response, the BLM must prepare an EIS for this project. In this case, the BLM should use the current EA to conclude 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, AWI, and TCF will evaluate all options, including litigation, to prevent this project from proceeding.

Thank you for your consideration of this information.

Sincerely,



Briannah Schwartz, Government Relations and Policy Counsel
American Wild Horse Campaign
9326 Willow Creek Dr., Apt. F
Montgomery Village, MD 20886
(240) 912-6397



Joanna Grossman, PhD, Equine Program Manager
Animal Welfare Institute
900 Pennsylvania Ave, SE
Washington, D.C. 20003
(202) 446-2143

Attachments

Attachment 1: BLM's Report to Congress: Management Options for a Sustainable Wild Horse and Burro Program

Attachment 2: Dr. Liu Sterilization Project

Attachment 3: BLM Spay Research Vet Panel

Attachment 4: CSU Spay Protocol

Attachment 5: AWHC's Concerns Regarding Dr. Pielstick

Attachment 6: Meredith Hou Statement

Attachment 7: Dr. Robin Kelly Statement