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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GINGER KATHRENS, et al.

Plaintiffs,

v.

RYAN ZINKE, Secretary of the United States Department of the Interior, et al.,

Defendants.

Case No. 3:18-cv-1691

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In an effort to address the rampant overpopulation of wild horses on public lands, the United States Bureau of Land Management ("BLM") and United States Geological Survey ("USGS") are conducting a research study to evaluate the safety and feasibility of performing ovariectomy via colpotomy spaying procedures on wild horse mares. BLM is currently gathering wild horses for the study from the Warm Springs Herd Management Area ("Warm Springs HMA") in Harney County, Oregon. The spaying procedures are scheduled to begin on November 5, 2018.

Plaintiffs have filed a motion for preliminary injunction to halt this much-needed research, alleging that BLM has violated the First Amendment and the Administrative Procedure Act ("APA") by failing to provide a "meaningful" opportunity for the public to view the procedures. Plaintiffs also claim that BLM's study is arbitrary and capricious because BLM did not analyze the social acceptability of its procedures in the environmental assessment ("EA") or find another research partner after Colorado State University ("CSU") decided not to participate in the study. *See* Plaintiffs' Mot. for Prelim. Inj. ("Pls.' Brief"), ECF No. 7. As fully explained below, Plaintiffs' motion must be denied because Plaintiffs are not likely to succeed on the merits of their claims, they can show no irreparable harm, and the public interest and balance of hardships clearly favors allowing BLM to move forward with its study.

LEGAL BACKGROUND

I. Wild Free-Roaming Horses and Burros Act

When the Wild Free-Roaming Horses and Burros Act ("WHBA") was passed in 1971, Congress directed the Secretaries of the Interior and Agriculture[1] to provide for the protection and

[1] When used in the WHBA, "Secretary" means the Secretary of the Interior when used in connection with public lands administered by BLM. Because the horses referenced in this case are from lands administered by BLM, the term "Secretary" in this brief will refer to the Secretary of the Interior.

management of wild horses and burros because the animals were "fast disappearing from the American scene." *See* 16 U.S.C. § 1331. However, within only a few years of enactment, the WHBA was "so successful that the numbers of wild horses and burros 'now exceed[ed] the carrying capacity of the range'" and the excess numbers of horses and burros began "'pos[ing] a threat to wildlife, livestock, the improvement of range conditions, and ultimately their own survival.'" *Blake v. Babbitt*, 837 F. Supp. 458, 459 (D.D.C. 1993) (quoting H.R. Rep. No. 95-1122 at 21 (1978)); *see also Wyoming v. U.S. Dep't of Interior*, 839 F.3d 938, 940 (10th Cir. 2016). Congress determined that "'action [was] needed to prevent a successful program from exceeding its goals and causing animal habitat destruction.'" *Am. Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (quoting H.R. Rep. No. 95-1122 at 23 (1978)); *see also Wyoming*, 839 F.3d at 940. Accordingly, in 1978 Congress amended the WHBA to provide the Secretary with greater authority and discretion to manage and remove excess horses from rangeland. *See Watt*, 694 F.2d at 1316 (citing Pub. L. No. 95-514, 92 Stat. 1803 (1978)).

As amended, the WHBA directs the Secretary to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a). In order to determine whether there is a thriving natural ecological balance, the Secretary must maintain a current inventory of wild free-roaming horses and burros on public lands. 16 U.S.C. § 1333(b)(1). The purpose of the inventory is to "make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; [and] determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands." *Id.* The Secretary has broad discretion regarding how and when to manage and remove wild horses from public lands when there is an overpopulation, including the ability to use sterilization, other methods of population

control, or permanently remove the horses from public lands. *See id.* (stating that the Secretary may "determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as *sterilization*, or natural controls on population levels)" (emphasis added)); *In Def. of Animals v. U.S. Dep't of the Interior*, 751 F.3d 1054, 1065 n.16 (9th Cir. 2014).

When the Secretary determines both that an overpopulation of wild horses and burros exists and that action is necessary to remove these "excess" animals, "he shall immediately remove excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2). Removing the excess animals "restore[s] a thriving natural ecological balance to the range, and protect[s] the range from the deterioration associated with overpopulation." *Id.* Once the excess horses and burros are removed from the range, they are either placed in short-term corral facilities where they are prepared for adoption, sale, or transfer to another governmental agency, or they are placed in long-term pasture holding facilities funded by BLM where they live out the remainder of their lives.[2] The Secretary has delegated the responsibility of managing wild horses and burros to BLM.

II. The Administrative Procedure Act

The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action" subject to review under the

[2] The WHBA allows the Secretary to "destroy[ ] in the most humane and cost efficient manner possible" old, sick, lame, or unadoptable horses. 16 U.S.C. § 1333(b)(2)(A), (C). However, BLM has not destroyed excess unadoptable horses since January 1982, when a former BLM director issued a moratorium on the destruction of excess unadoptable horses. Additionally, Congress has prohibited the use of appropriated funds for the purpose of euthanizing unadoptable horses between 1987 and 2004, again in 2010, and each year since then. *See, e.g.*, 2018 Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348 (2018).

APA "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

III. First Amendment to the United States Constitution

The First Amendment of the United States Constitution prohibits any law "abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Supreme Court has recognized a qualified First Amendment right for the press to access and observe aspects of criminal judicial proceedings. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality) (holding that there is a First Amendment right to access and attend criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-611 (1982) (holding that a statute violated the First Amendment right of access because it required judges, at trials for certain sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the victim's testimony); *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1, 8-10 (1986) (holding that the press has the right to access criminal preliminary hearings).

In *Press-Enterprise II*, the Supreme Court developed a two-prong test for analyzing these First Amendment right of access claims. *See* 478 U.S. at 8-10. First, a court must determine whether a qualified First Amendment right exists by examining "whether the place and process [the press is trying to access] have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8 (citation omitted). If a court determines that there is a right of access, the government may overcome that First Amendment right by demonstrating "an overriding interest" that is "narrowly tailored to serve that interest." *Id.* at 9-10. In *Leigh v. Salazar*, the Ninth Circuit held that the *Press-Enterprise II* test is "not limited to criminal judicial proceedings" and must be

used to evaluate a claim that BLM had unlawfully restricted viewing opportunities at a wild horse gather. 677 F.3d 892, 899-900 (9th Cir. 2012).

FACTUAL BACKGROUND

I. BLM's Wild Horse and Burro Program

BLM determined that the appropriate management level ("AML") (i.e., the number of wild horses and burros that can thrive in balance with other public land resources and uses and avoids a deterioration of the range) for all public lands is 26,715. *See* Envtl. Assessment on Spay Feasibility and On-Range Behavioral Outcomes Assessment and Warm Springs HMA Population Mgmt. Plan (Sept. 12, 2018), Ex. A at 2. When the WHBA was passed in 1971, there were approximately 25,000 wild horses and burros on public lands. Mare Sterilization Research Envtl. Assessment (May 23, 2016), Ex. B at 2. As of March 1, 2015, there were an estimated 58,150 wild horses and burros on the range. *Id.* Just three years later, there were an estimated 81,814 wild horses and burros. Ex. A at 2. This number will continue to grow exponentially, as the annual population growth rate in many wild horse and burro herd management areas approaches twenty percent or even greater. *Id.*

In addition to the wild horses and burros currently on the range, there are 45,402 wild horses and burros living in BLM funded long-term holding pasture facilities across the United States. *Id.* at 3. These wild horses and burros had been gathered and removed from herd management areas and other public lands, in many cases because the population in those areas exceeded the AML. *See* 16 U.S.C. § 1333(b)(2)(B). There is limited funding and space to care for additional animals in long-term facilities. Ex. A at 3. In fiscal year 2017, BLM was forced to allocate $47.536 million to off-range holding costs—approximately 58 percent of BLM's entire wild horses and burro program budget. *Id.* at 113.

Other wild horses and burros that are removed from the range are adopted out or sold to good homes. *See* Ex. A at 111. In 2017 alone, BLM placed 3,517 horses and burros into private care through adoption, with another 582 animals sold. *Id.* However, the adoption and sale demand does not keep up with the average annual twenty percent population growth rate. *Id.*

II. The Warm Springs HMA

The Warm Springs HMA consists of approximately 474,547 acres of BLM-managed land in Harney County, Oregon. *Id.* at 2. The Warm Springs HMA is divided into two large pastures with one main fence down the middle, with comparable topographical, vegetative, and watering features on either side. *Id.* at 20. BLM has determined that the AML for this HMA is between 96 to 178 wild horses and 14 to 24 burros. *Id.* at 2. As of September 2016, BLM estimated a population of 586 horses. *Id.* Less than two years later, BLM and USGS estimated that there were 852 horses on the Warm Springs HMA—more than 650 horses over AML. *Id.*

III. Effects of Wild Horse and Burro Overpopulation

Wild horse and burro overpopulation can have detrimental impacts on public lands, users of public lands, and other species—including sensitive species, like the greater sage-grouse. *Id.* at 2-3; U.S. Dep't of the Interior's Office of Inspector General Report, Ex. C at 9. Additionally, overpopulation can negatively impact the wild horses and burros themselves because there is often not enough space, water, or food on the herd management area to sustain that many horses. Ex. A at 2-3. For example, the Warm Springs HMA naturally contains a limited amount of water and drought conditions are common. When there are drought conditions on the Warm Springs HMA, there is a high potential for mortality due to the overpopulation. *See id.* at 2; Decision Record on Spay Feasibility and On-Range Behavioral Outcomes Assessment and Warm Springs HMA Population Mgmt. Plan (Sept. 12, 2018), Ex. D at 7.

During a 2014 drought at the Warm Springs HMA, wild horses and burros were forced to congregate at the few remaining water sources. Ex. A at 3. In an effort to avoid large scale mortality or the need for emergency gathers and removals, BLM hauled water to an existing waterhole and temporary troughs where roughly 80 wild horses were congregating. *Id.* Similarly this year, there is not enough water to support a subset of the population on the western portion of the Warm Springs HMA. *Id.* Thus, BLM has begun hauling water to sustain approximately 236 animals in the area. *Id.* But with an estimated 650 horses over the AML, a severe drought in the fall of 2018 or in coming years will likely result in the dehydration and subsequent deaths of wild horses. *Id.*

IV. BLM's Past Efforts to Address the Overpopulation and Growth Rate

BLM is legally required to maintain herd management areas at AML and "achieve and maintain [the] thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a). For the past several decades, BLM has tried various methods to reduce the number of wild horses on public lands and curb their population growth rate to achieve these statutory requirements, including periodically gathering and removing excess horses from public lands and applying temporary fertility control vaccines like porcine zona pellucida ("PZP") to wild horses. Ex. A at 2-3; Ex. C at 10. However, neither of these methods have proven to be an effective long-term strategy for managing wild horse and burro populations in a majority of herd management areas.[3]

While gathering and removing wild horses from HMAs brings the population within the AML for a time, it does nothing to slow the nearly twenty percent growth rate. For example, BLM has gathered and removed horses sixteen times from the Warm Springs HMA. *Id.* at 2. Nevertheless, the Warm Springs HMA is currently estimated to be 650 horses over AML. *Id.*

[3] BLM has also tried other methods of population control, including gender ratio adjustment and gelding. Ex. C at 10 (discussing gender ratio and concerns with the method); Ex. D at 40-41 (discussing gelding and possible concerns with that method).

Alternatively, fertility control vaccines are designed to restrict the wild horse growth rate. But vaccines delivered remotely via darting are often difficult to administer because of the approachability of wild horses, the fact that mares must be treated with the vaccine during late winter/early spring for maximum efficacy, and the location, size, and accessibility of most herd management areas. *See id.* at 16-17, 43-44; Ex. C at 10. For instance, the majority of horses on the Warm Springs HMA do not allow humans to approach within 0.5 miles of them. Ex. A at 44. Before it could even administer the vaccine, BLM needs to locate, identify, and gather all of the mares requiring the vaccine on an HMA that is 474,547 acres. *Id.* at 16, 44. Even if BLM were able to locate and identify the wild horses, weather conditions make the roads on the Warm Springs HMA impassible so gathering horses in late winter/early spring is not feasible. *See* Sharp Decl., Ex. E ¶¶ 7-8. Additionally, research has shown that the first formulation of PZP is only effective for one year and the second formulation ("PZP-22") is only somewhat effective for two years and, to be more effective, mares would need booster doses every year. *See* Ex. A at 81-82. Therefore, for PZP to be an effective population management tool on the Warm Springs HMA, BLM would need to gather and vaccinate mares every year—something that BLM has determined is "logistically infeasible." *Id.* at 16. The Department of the Interior's Office of Inspector General has reported that PZP does not "currently provide[] an effective means to limiting the population of wild horses and burros at a level that can be sustained on public lands." Ex. C at 10.

Because there are "no highly effective, long lasting, easily delivered, and affordable fertility control methods available," BLM has determined that it "must explore the use of different methods and techniques for long-term population growth suppression." Ex. A at 3-4, 17.

V. The 2016 Proposed Spay Study

On September 23, 2013, BLM issued a "Request for Information" to the public on the

development of techniques and protocols for wild horse and burro sterilization or contraception. *See* Ex. B at 4. After receiving information from the public, BLM issued a "Request for Applications" for research proposals "aimed at developing new or refining existing techniques and establishing protocols for the contraception or permanent sterilization of either male or female wild horses and/or burros in the field" and received nineteen proposals in response. *Id.* A proposal from Oregon State University recommended performing ovariectomy via colpotomy procedures on wild mares. *Id.* The ovariectomy via colpotomy procedure involves placing a mare in a working chute, sedating her, making an approximately 1-3 centimeter incision in the vagina, injecting a local anesthetic near each ovary, and using a mechanical device called a chain ecraseur to remove each ovary. Ex. A at 24-25. The procedure takes about fifteen minutes. *Id.* at 25.

In November 2014, BLM arranged for the National Research Council ("NRC") of the National Academy of Sciences to have a committee of scientific experts review the nineteen proposals and advise BLM which proposals merited funding. Ex. B at 4. The NRC committee recommended that BLM move forward with nine of the proposals, pending availability of funds. *Id.* The NRC committee did not recommend the Oregon State University proposal for research funding because the committee determined that ovariectomy via colpotomy is a common procedure performed on domestic mares and the proposal contained no new science or experimentation related to technique. *Id.* at 4-5. However, the committee suggested that BLM could immediately begin using ovariectomy via colpotomy as a tool to sterilize wild horse mares, while noting that there could be an increase in surgical complications compared to those observed in domestic mares. *Id.* at 5. Because the surgical complications of performing the procedure on wild horse mares at various gestational stages has not been well documented, BLM partnered with Oregon State University for a research study to investigate potential complications as a function

of gestational stage. *Id.* The study was designed to assess whether ovariectomy via colpotomy and other surgical sterilization methods were effective in wild horses and whether they could, in the future, be applied safely and efficiently to wild horse mares on public lands. *Id.*

BLM issued a decision record authorizing the 2016 proposed spay study on June 24, 2016. On August 15, 2016, Plaintiffs Ginger Kathrens, the Cloud Foundation, and American Wild Horse Preservation Campaign filed a complaint and motion for preliminary injunction in this Court alleging that BLM had violated the First Amendment by not allowing the public to observe the surgical procedures. *Kathrens v. Jewell*, 2:16-cv-1650 (D. Or.). Before the motion for preliminary injunction could be litigated, Oregon State University decided that it would not participate in the research study and BLM withdrew the decision record.

VI. The Spay Feasibility and On-Range Behavioral Outcomes Assessment

On September 12, 2018, BLM issued a decision record for a new spay study that will evaluate the safety, complication rate, and feasibility of performing ovariectomy via colpotomy procedures on wild horse mares living on the Warm Springs HMA. *See* Ex. D; Ex. A at 1. The spay study will also allow USGS to evaluate the impacts of the spay procedures on mare behavior once the mares are returned to the range. Ex. A at 1.

First, BLM will gather up to 100 percent of the total wild horse population on the Warm Springs HMA and transport all of the horses to the Oregon Wild Horse Corral Facility in Hines, Oregon. *Id.* at 21. BLM will then select 200 horses to participate in the study. *Id.* These horses will be selected based on which half of the HMA they were gathered from, their physical characteristics, age, and sex. *Id.* Those horses not selected for the study will remain at the Corral Facility and be prepped for the adoption and sale program. *Id.* BLM will separate the 200 horses selected for the study into a control group (100 horses) and a treatment group (100 horses). *Id.* at 20. BLM will also randomly select horses from both groups for the USGS on-range behavioral

assessment that occurs after the ovariectomy by colpotomy procedures are completed. *Id.* at 21. USGS will fit the horses with GPS collars or radio tags so that the agency can record the spatial ecology of horses and locate animals to record behaviors, births, deaths, body conditions, and group composition following the procedures. *Id.* at 29.

Approximately 28-34 mares in the treatment group will receive the ovariectomy by colpotomy procedure.[4] *Id.* at 22. The veterinarians performing the procedure are required to use a surgical protocol approved by CSU's Institutional Animal Care and Use Committee. *Id.* The veterinarians are also required to have experience performing ovariectomy and standing sedation on at least 100 ungentled, wild horse mares. *Id.* After the procedures, the mares will be placed into a half-acre pen with other mares that receive the surgery, to recover from sedation. *Id.* at 25. The mares will be monitored for any signs of discomfort. *Id.* As soon as the mares become fully alert, they can be moved into a larger pen with mares that did not receive the surgery and any dependent foals. *Id.* The mares will remain in this pen until they are returned to the range or made available for adoption or sale. *Id.* The veterinarians performing the procedures will monitor the mares from a distance three times a day for a week, observing attitude, respiratory rate, fecal production, signs of abdominal distress, ambulation, and appetite. *Id.* at 26.

The horses in the control group will be returned to the range within approximately seven days of the procedures being completed, while the horses in the treatment group will be returned within approximately ten days. Ex. E ¶ 4. When the horses are returned to the Warm Springs HMA, the control group will be returned to one half of the HMA while the treatment group will be returned to the other half of the HMA. Ex. A at 20-21. A complete schedule for the study is in the

[4] Approximately 70 mares that will remain at the Corral Facility will also receive the ovariectomy via colpotomy procedure. *Id.* at 22. This will improve the quantification of the complication rate of the surgical procedure. *Id.*

attached declaration of Robert Sharp. *See* Ex. E ¶ 4.

The public is allowed to observe, record, and photograph every aspect of BLM's study. Ex. A at 27-28. Public observation during the gather at the Warm Springs HMA is provided in accordance with BLM's WO IM 2013-058, Wild Horse and Burro Gathers: Public and Media Management policy. *See id.* at 27. Once the horses arrive at the Corral Facility, the public will be allowed to view the animals within the facility during working hours via the existing self-guided auto tour. *Id.* The public may also observe USGS's collaring/tagging process and the ovariectomy via colpotomy procedures. *Id.* BLM has converted a doorway to an office space within the working barn into a full length window so that the public may safely observe these activities. *See id.* at 27-28, Figure II-2. The window is within fifteen feet of the working chute where the procedures will be performed. *See id.* A maximum of five people at a time will be allowed to observe at the window due to the limited space available. *Id.* at 28. However, if more than five observers are interested in observing during a day, viewing would occur in shifts with observers rotating through every two to four hours. *Id.* Beginning on October 15, 2018, anyone interested in observing these activities must contact BLM's Burn District Public Affairs Specialist so that their name can be added to the viewing list. *Id.* Observation will be offered to those on the viewing list in order based on the date in which the request was made. *Id.* After the procedures, the public will be able to view the horses in the recovery pens via the self-guided auto tour. *Id.* at 29.

STANDARD OF REVIEW

I. Preliminary Injunctive Relief

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted); *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). The plaintiff "bears the heavy burden of

making a 'clear showing' that it [i]s entitled to a preliminary injunction." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015). To obtain a preliminary injunction, a plaintiff must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) the preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20. If a plaintiff fails to meet its burden on any of these four requirements, its request for a preliminary injunction must be denied. *Id.* at 20-23.

While courts within the Ninth Circuit evaluate these four elements on a "sliding scale," where a "stronger showing of one element may offset a weaker showing of another," a plaintiff seeking an injunction must still make a showing on all four prongs. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1134-35 (9th Cir. 2011). For example, a court may issue an injunction if there are "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135; *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013). The balance of equities and public interest factors merge when the United States opposes the requested injunction. *Nken v. Holder*, 556 U.S. 418, 427, 435-36 (2009).

II. Merits of Plaintiffs' Claims

The WHBA does not contain an internal standard of judicial review. Therefore, the APA governs the Court's review of Plaintiffs' WHBA claims and APA claims. *See In Def. of Animals v. U.S. Dep't of the Interior*, 751 F.3d at 1061. The APA provides that a court may set aside final agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs must satisfy a "high threshold" to establish that agency action is unlawful under the APA. *River Runners for Wilderness v. Martin*, 593 F.3d 1064,

1067 (9th Cir. 2010) (per curiam). The APA's standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007); *accord Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*), *overruled in part on other grounds by Winter*, 555 U.S. 7. In more recent years, the Ninth Circuit has strongly affirmed the narrow and deferential nature of that APA standard. *See McNair*, 537 F.3d at 988 (overturning prior jurisprudence that had "shifted away from the appropriate standard of review"). The Court's role is "not to make its own judgment" on the matters considered and resolved by the agency, as the standard of review "does not allow the court to overturn an agency decision because it disagrees with the decision." *River Runners*, 593 F.3d at 1070 (citation omitted).

The APA also provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right." 5 U.S.C. § 706(2)(B). While the Court "'owes no deference to the agency's pronouncement on a constitutional question'" and may review constitutional challenges de novo, "a deferential standard applies to an agency's factual findings and ultimate decision." *Chen-Li Sung v. Doyle*, 988 F. Supp. 2d 1195, 1205 (D. Haw. 2013) (quoting *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1045 (D.C. Cir. 2009)), *aff'd sub nom. Sung v. Doyle*, 670 F. App'x 560 (Mem.) (9th Cir. 2016).

ARGUMENT

I. Plaintiffs Have No Likelihood of Succeeding on the Merits of Their Claims

A. Plaintiffs Will Not Succeed on their First Amendment Claim

Plaintiffs have no likelihood of succeeding on the merits of their First Amendment claim because there is no First Amendment right to access and observe the ovariectomy via colpotomy procedure. Under the first prong of the *Press-Enterprise II* test, the Court must determine whether Plaintiffs have a qualified First Amendment right by examining "whether the place and process

[the press is trying to access] have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8 (citation omitted). If one of those inquiries is answered in the negative, no First Amendment right of access attaches to the activity. *See id.* at 9.

In this case, the place and process at issue—the working chute at the Corral Facility and the BLM-managed ovariectomy via colpotomy procedure being performed on wild horse mares—have not historically been open to the public. Moreover, Plaintiffs have failed to establish that their requested level of access will play a significant positive role in the functioning of the procedures. For these three independent reasons, Plaintiffs do not have a First Amendment right to observe the procedures, and thus the scope of BLM's viewing restrictions are irrelevant.

Alternatively, even if the Court finds that Plaintiffs have a qualified right to observe the procedures under the first prong of the *Press-Enterprise II* test, Plaintiffs are not entitled to a preliminary injunction because they are not likely to succeed on the merits of their First Amendment claim. Although it was not legally required to do so, BLM has provided the public with an opportunity to observe the procedures. And, under the second prong of *Press-Enterprise II*, BLM has an overriding interest in effectively managing the population of wild horses on public lands and performing the procedures in an environment that is safe for the horses, veterinarians, and observers. BLM's viewing restrictions are narrowly tailored to serve those interests.

1. Plaintiffs Do Not Have a First Amendment Right to Access and Observe the Ovariectomy via Colpotomy Procedures

As a threshold matter, Plaintiffs have mischaracterized the "process" at issue in this case as BLM's "wild horse population management." Pls.' Brief at 12-15. Plaintiffs' description of the process would cover every aspect of BLM's wild horse and burro program—BLM's adoption and sale program, gathers, payment of long-term care facilities, and decisions regarding whether to

administer fertility control vaccines. However, it is not BLM's wild horse population management generally, or other aspects of the spay study (e.g., gathering and collaring the horses) that is at issue. The only process that Plaintiffs have alleged a First Amendment right to access and observe are the BLM-managed ovariectomy via colpotomy procedures to be performed on wild mares.

Plaintiffs' attempt to cast the process at issue in the broadest possible terms is contrary to both Supreme Court and Ninth Circuit law. When faced with a First Amendment right of access claim, the Supreme Court and Ninth Circuit have narrowly characterized the process at issue. For example, in *Richmond Newspapers*, the Supreme Court identified the process at issue as a criminal trial. 448 U.S. at 564-75. A few years later in *Press-Enterprise II*, the Supreme Court conducted a separate analysis to decide that criminal pretrial hearings, a process related to criminal trials, were also historically open to the public. 478 U.S. at 10-14. In neither case did the Supreme Court use broad terms, like "criminal justice legal system," to describe the process at issue. Similarly, in a Ninth Circuit case addressing whether BLM's viewing restrictions of a wild horse gather complied with the First Amendment, the Ninth Circuit did not describe the process at issue as "wild horse population management." Instead, the Ninth Circuit remanded the case to the district court with specific instructions to determine whether "*horse gathers* have traditionally been open to the public." *Leigh*, 677 F.3d at 900 (emphasis added); *see also id.* at 901 ("First, the district court must determine whether the public has a right of access to horse gathers by considering whether horse gathers have historically been open to the general public.") The process at issue in this case is not "wild horse management" generally; rather, it is BLM's ovariectomy via colpotomy procedures to be performed on wild horse mares.

Courts have looked to history and past governmental practice to determine whether a process has been historically open to the public. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 565-

69 (examining criminal trials occurring as far back as "the days before the Norman Conquest"). In *Press-Enterprise II*, the Supreme Court determined that preliminary hearings at criminal trials were historically open to the public after considering the "celebrated trial of Aaron Burr for treason." 478 U.S. at 10. The Court determined that "the probable-cause hearing was held in the hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens." *Id.* (citing *United States v. Burr*, 25 F. Cas. 1 (No. 14,692) (CC Va. 1807). The Court also determined that "[f]rom *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court." *Id.* (footnote omitted). On remand, the district court in *Leigh* found that "historically, subject to a variety of restrictions, the press and general public have had access and a right to be present at *wild horse gathers* on public land" based on evidence that BLM had allowed the public to attend previous gathers. *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1097, 1100 (D. Nev. 2013) (footnote omitted) (emphasis added).

In this case, neither history nor past practice demonstrate that BLM-managed ovariectomy via colpotomy procedures have been historically open to the press and general public. To our knowledge, unlike the cases mentioned above where the government has undoubtedly performed the process at issue, here there is no evidence that BLM has ever performed ovariectomy via colpotomy procedures on wild mares. *See* Ex. E ¶ 23. Thus, to our knowledge, the general public has never witnessed BLM performing an ovariectomy via colpotomy procedure on a wild mare. *Id.* Based on these facts alone, it is apparent that the process at issue is not one that has been historically open to the press and general public.

Moreover, Plaintiffs have not submitted any evidence demonstrating that they have ever witnessed an ovariectomy via colpotomy procedure on a wild mare, let alone one performed under

BLM's oversight. Plaintiffs' declarants, Drs. Hope McKalip and Robin Kelly, believe that the ovariectomy via colpotomy procedure is uncommon. "[T]he procedure is not a common procedure at all. This procedure is rare. I had never even heard of the ecrasure tool [used to remove a mares's ovaries] in all my years [since 1994] as an equine veterinarian. I worked for a few years in equine hospitals, and this procedure was never done." McKalip Decl., ECF No. 7-21 ¶ 12. "The surgeries that BLM proposes to perform—ovariectomy via colpotomy—are no longer commonly performed on horses." Kelly Decl., ECF No. 7-11 ¶ 4.

The Declaration of Ginger Kathrens contains the only allegation in Plaintiffs' filings suggesting that a member of the general public has witnessed an ovariectomy via colpotomy procedure being performed. *See* Decl. of Ginger Kathrens, ECF No. 7-2. Ms. Kathrens states that she received an anonymous call from a person in Phoenix, Arizona, "who had witnessed this procedure being performed on a mare and wild female burros that had been removed from the Lake Pleasant Herd Management Area north of Phoenix." *Id.* ¶ 11. However, the procedures Ms. Kathrens refers to were performed as part of a "spay workshop" which occurred at the Southwest Wildlife Conservation Center, with the purpose of training nine veterinarians on performing ovariectomy via colpotomy and ovariectomy via flank incision procedures. Ex. E ¶ 21. This workshop was hosted by a private organization and was not associated with BLM. *Id.* Nor was the procedure performed on wild horse mares under BLM's jurisdiction. *See id.* BLM-managed ovariectomy via colpotomy procedures on wild horse mares have *not* historically been open to the press and general public. Therefore, Plaintiffs' do not have a First Amendment right to access and observe the procedures.

The fact that the process at issue has not been historically open to the public, by itself, dooms Plaintiffs' First Amendment claim. But Plaintiffs' claim would also fail because they have

not established that the working chute in the working area of the barn where BLM will be performing the procedures has been historically open to the general public. The general public can tour the outside portion of the Corral Facility using the self-guided auto tour and access the informational kiosk during normal working hours (8:00 AM to 3:00 PM, Monday through Friday). Burns District Policy on Visitor Access at the Oregon Wild Horse Corral Facility, Ex. F at 1. However, visitors are not allowed in the barn "during most types of animal surgery, when euthanasia is performed, or during any situation where the safety of visitors, employees, and the animals would be jeopardized by the presence of additional people." *Id.* "There may be situations where a limited number of visitors are permitted inside the barn to view animal surgeries or more than routine preparation procedures." *Id.* Importantly, BLM does not have a policy allowing the general public to be in near the working chute in the working area of the barn. *See id.*

The only evidence that Plaintiffs have provided to suggest that the general public is allowed near the working chute is Ms. Kathrens' statement that she "attended a BLM-led guided tour of the Hines Corral *for the* [*National Wild Horse and Burro*] *Advisory Board*" and was "able to observe and photograph wild horses held at the facility and to observe the hydraulic chute where the BLM will perform its experiments on the wild horse mares." Kathrens Decl., ECF No. 7-2 ¶ 17 (emphasis added). Ms. Kathrens states that during the tour, she and eight other observers had room to watch a veterinarian perform an ultrasound on a mare. *Id.* Ms. Kathrens was able to be close to the working chute while it was in use due to her membership on the Advisory Board, which was created by Congress in the WHBA to advise BLM on "any matter relating to wild-free roaming horses and burros and their management and protection." 16 U.S.C. § 1337. As Ms. Kathrens points out, the Advisory Board consists of people with "special knowledge about protection of horses and burros, management of wildlife, animal husbandry, or natural resources

management." *Id.*; *see* Kathrens Decl., ECF No. 7-2 ¶ 5. Advisory Board members are clearly not co-extensive with the general public. Ultimately, Plaintiffs have failed to establish that the working area of the barn near the working chute has historically been open to the general public.

Finally, Plaintiffs have not established that their *requested* public access will play a "significant positive role in the functioning of the particular process in question"—the BLM-managed ovariectomy via colpotomy procedures on wild horse mares. *See Press-Enterprise II*, 478 U.S. at 9. Plaintiffs are not satisfied with level of access that BLM has provided, *see supra* Factual Background Section VI, and have requested an unknown number of cameras to be installed in BLM's government facility to record and monitor the mares 24-hours a day post-surgery. Pls.' Br. at 10. Plaintiffs have also requested that BLM allow an "independent" veterinarian of Plaintiffs' choosing to be near the working chute as the surgeries are being performed. *Id.* But to the extent that Plaintiffs will play a significant positive role in the functioning of these procedures, there is no evidence that Plaintiffs' role will be altered or impacted in any way by complying with BLM's access as opposed to their requested level of access.[5]

2. BLM's Viewing Restrictions Are Narrowly Tailored to Serve Overriding Interests

Irrespective of Plaintiffs' assertion of a qualified First Amendment right to observe the ovariectomy via colpotomy procedures under the first prong of the *Press-Enterprise II* test, Plaintiffs' First Amendment claim still fails. BLM may limit Plaintiffs' right of access and observation if the agency identifies an overriding interest and its viewing restrictions are narrowly tailored to serve that interest. *Press-Enterprise II*, 478 U.S. at 9-10.

[5] Plaintiffs' argument that an independent veterinarian of their choosing must be allowed in the working area also fails for a purely legal reason. While Plaintiffs' veterinarian declarants say they could attend the procedures, Plaintiffs have not submitted any evidence that these veterinarians are actually members of Plaintiffs' organizations or that their First Amendment rights are being violated because he or she cannot observe the procedure from the working area.

Here, BLM has identified two overriding interests: (1) performing the procedures in an environment that is safe for the horses, BLM employees and contractors, and observers; and (2) effectively and efficiently performing the ovariectomy via colpotomy procedures on wild horses. In *Leigh*, the Ninth Circuit specifically recognized that safety is an interest that can override a plaintiff's First Amendment right of access claim. *See Leigh*, 677 F.3d at 900. "*Press-Enterprise II* balances the vital public interest in preserving the media's ability to monitor government activities against the government's need to impose restrictions *if necessary for safety or other legitimate reasons*." *Id.* (emphasis added). When the case was remanded to the district court, the court agreed that safety of the viewing public, BLM employees and contractors, and the horses themselves was an overriding interest. *See Leigh v. Salazar*, 954 F. Supp. 2d at 1101-03. Similarly, providing for the effective and efficient performance of the procedures is an interest that overrides a First Amendment claim. *See id.* at 1101 (holding that "the effective and efficient gather of the horses" was an "important overriding interest").

In addition, BLM's viewing restrictions for the ovariectomy via colpotomy procedures are narrowly tailored to serve these two overriding interests. BLM will perform the ovariectomy via colpotomy procedures on approximately 100 wild horse mares in a four day period. Ex. E ¶ 4. To complete this task, BLM will need to move all 100 horses into and out of the barn and working chute. *Id.* ¶ 17. Wild horses are not accustomed to being corralled, having limited space, or entering barns and working chutes. *See* Ex. A at 44 (the majority of wild horses on the Warm Springs HMA do not allow humans to approach within 0.5 miles of them). Therefore, the process of moving wild horses into confined spaces can be dangerous for both the horses and anyone in the immediate vicinity. Ex. E ¶ 17.

As one of Plaintiffs' declarants, Dr. McKalip, explains, "[a] stressed wild horse is a

dangerous animal and can cause harm to itself and the handlers." McKalip Decl., ECF No. 7-21 ¶ 14. Dr. McKalip explains that she has been in situations where she had to get Angus cattle (which have little interaction with humans and are not frequently handled) into working chutes. Even as a veterinarian with over twenty years of experience, she states that this process was "scary" and that it could be a "stressful and dangerous ordeal for both the cow and the veterinarians involved." *Id.* It is precisely because this can be a "dangerous ordeal" for veterinarians, BLM employees, and nearby observers that BLM made the reasonable decision to restrict all non-essential personnel (including BLM employees) from the working area and place the observation area fifteen feet away from the working chute. Ex. E ¶¶ 17, 19. Additionally, having the observers in the public observation area, rather than the surgical area, "drastically reduce[s] any additional human induced stress to the mares prior to or during the procedure." *Id.* ¶ 17.

BLM's viewing restrictions also allow BLM employees and contractors to focus on the tasks at hand—moving the wild horses into the barn and working chute as quickly as possible, providing the horses with focused and conscientious care during the procedures, and helping the horses leave the working chute and enter the corrals for their recovery time—without the observers becoming a distraction. *See id.* This allows BLM employees and contractors to focus on ensuring their own personal safety and the safety of the horses in their care without the need to ensure the safety of observers as well. *See id.* For all of these reasons, BLM's viewing restrictions are narrowly tailored to ensure that the ovariectomy via colpotomy procedures are performed in an environment that is safe for the horses, BLM employees and contractors, and observers, and that BLM can effectively and efficiently perform those procedures.

BLM has provided the public with a meaningful opportunity to view the procedures. Plaintiffs and their declarants speculate that the observation window will not be adequate despite

the fact that they have not seen the observation location. *See, e.g.*, Kathrens Decl., ECF No. 7-2 ¶¶ 19-20; Corey Decl., ECF No. 7-19 ¶¶ 6-12. BLM employee Robert Sharp, who has personally observed the view from the observation area, attests that the viewing location "provides a very good vantage point of the procedure being performed." Ex. E ¶ 17. In fact, the observation that BLM is providing will be "almost identical" to the camera location seen in video footage of an ovariectomy via colpotomy procedure being performed on privately-owned horses on private land. *Id.* ¶ 18; *see* https://www.youtube.com/watch?v=rjxzcmjXGTI&feature=youtu.be.[6] In public comments submitted to BLM on August 31, 2018, Plaintiffs the American Wild Horse Campaign and Cloud Foundation submitted the affidavit of Meredith Hou, an equine veterinary technician with 21 years of experience in the horse industry and three years of ambulatory, hospital, and surgical experience. *See* Public Comments, ECF No. 7-13 at 16; Affidavit of Meredith Hou, Ex. G ¶ 2. Ms. Hou viewed the video and describes in detail her observations and analysis of the procedures. Ex. G ¶¶ 6-7. Ms. Hou's analysis includes descriptions of the mare's sedation level, her body and eye position, response to stimuli, respiratory rate, apparent comfort level, and actions performed by the veterinarian during the surgery. *Id.* Ms. Hou's affidavit clearly contradicts Plaintiffs' claims, as well as the opinions of Plaintiffs' declarants in this case, that BLM's viewing opportunities are not "meaningful" because they are allegedly too limited to actually observe what is happening during the procedures. *See* Ex. E ¶ 19. Plaintiffs have also used video footage from ovariectomy via colpotomy procedures being performed on burros at a workshop hosted by a private organization (not associated with BLM) for their public awareness campaigns in 2016 and

[6] Robert Sharp observed these procedures in person and the horses' owner provided the video to BLM. Ex. E ¶ 18. BLM posted the video on YouTube so that it was available to the public. *Id.* BLM also included the link to the video on its E-planning website, along with the environmental assessments and other supporting documents for this action. *Id.*

2018. Ex. E ¶ 22. That footage, which Plaintiffs provided to this Court in previous litigation, is "taken from nearly the same angle and distance to the chute as the observation location BLM is providing." *Id.*

The public viewing opportunities need not be ideal, or precisely what Plaintiffs have proposed. Rather, under the *Press-Enterprise II* test, the restrictions on viewing opportunities simply need to be narrowly tailored to serve an overriding governmental interest. For example, in *Leigh v. Salazar*, the district court recognized that "because of these [viewing] restrictions Leigh was not able to take the pictures she wanted, and was not provided an unobstructed view of the horses close enough to identify them by their markings. However, in light of the aforementioned concerns present at the [BLM] Silver King Gather, these limited restrictions were reasonable." 954 F. Supp. 2d at 1103.

Finally, Plaintiffs' desired viewing opportunities are not relevant to the Court's analysis of whether the restrictions at issue comport with the First Amendment. *See* Pls.' Br. at 17-20. As the Ninth Circuit explained in *Leigh*, "the issue here is whether the viewing *restrictions* were unconstitutional" under the *Press-Enterprise II* test. 677 F.3d at 900. Therefore, the issue in this case is not whether BLM adequately justified its decision not to adopt Plaintiffs' proposal for public observation. However, even if such an analysis were required, BLM has thoroughly explained why it will not allow observers in the working areas or permit Plaintiffs to install video cameras in the corral. *See* Ex. E ¶¶ 19-20; Ex. D at 32-33.

Under the First Amendment and the Supreme Court's *Press-Enterprise II* test, BLM is not legally obligated to provide *any* viewing opportunities to Plaintiffs because the BLM-managed ovariectomy via colpotomy procedures have not been historically open to the press and general public. Nonetheless, BLM has provided the public with a meaningful opportunity to observe. The

limited viewing restrictions are narrowly tailored to allow the agency to safely, effectively, and efficiently perform these procedures. For these reasons, Plaintiffs' First Amendment Claims are not likely to succeed on the merits and its preliminary injunction must be denied.

B. Plaintiffs Will Not Succeed on their APA Claims

1. BLM is Not Required to Analyze Whether its Research is Socially Acceptable; the EA is Not a Change in Agency Policy.

BLM did not reverse its position or otherwise act arbitrarily or capriciously in deciding to proceed with the spay study. *See* Pls.' Br. at 22-25. Plaintiffs' argument that BLM was required to assess the social acceptability of the study is without merit for several reasons.

At the outset, social acceptability was not "a core component" or a "key objective" of BLM's 2016 proposed spay study. There is no language relating to social acceptability in the "Purpose and Need for Proposed Action," "Decision to be Made," or "Description of Proposed Action and Alternatives" sections of the 2016 EA.[7] Social acceptability is only mentioned in the "Social and Economic Values" section of the 2016 EA, which was part of the effects analysis for the 2016 proposed study. In that section, BLM states that the *results* from the studies could help BLM determine the social acceptability of the procedures because the studies would quantify complication rates, effectiveness, and success rates of each technique. Ex. B at 51; *see also id.* at 54 (stating that the "results of this study are expected to aid BLM in determining the social

[7] As BLM explained in its "Purpose and Need for Proposed Action" section, the purpose and need of the study was "to conduct research on three methods of permanent mare sterilization on horses at BLM's Wild Horse Corral Facility in Hines, Oregon, in order to assess which method(s) are effective in wild horses and could, in the future, be applied safely and efficiently to wild horse mares." Ex. B at 5. In the "Decision to be Made" section, BLM states that it "will decide whether or not to proceed with one or more of the proposed mare sterilization procedures at Oregon's Wild Horse Corral Facility and under what terms and conditions." *Id.* And the "Description of the Proposed Action and Alternatives" section describes the ovariectomy via colpotomy procedures—without any mention of the proposed action including an analysis of social acceptability. *Id.* at 12-20.

acceptability of each procedure"). It is apparent that social acceptability was not a part of the 2016 proposed action or the purpose and need for that action, but something would be considered after the proposed action was over. *See id.* at 51, 54. Similarly, BLM's 2018 spay study does not discuss social acceptability as part of the proposed action or purpose and need statement. But the EA does not foreclose the possibility that BLM will consider the social acceptability of the procedures at some future time after the study is complete. It cannot be said that the 2018 spay study constitutes a change in agency position that is arbitrary and capricious because it chose to focus solely on the proposed action that was required to be analyzed and not any future opinions about the unknown results of the proposed action.

Additionally, and more fundamentally, BLM was never legally required to analyze social acceptability in the 2016 EA or the current EA. There is no statute, regulation, manual, or handbook that requires BLM to consider the "social acceptability" of any of its wild horse management actions. The WHBA does not contain any language suggesting that social acceptability should be a factor in BLM's decisionmaking. *See* 16 U.S.C. § 1331 *et seq.* Nor do the regulations that BLM has adopted to implement the WHBA or BLM's Wild Free-Roaming Horses and Burros Management Manuals and Handbooks. *See* 43 C.F.R. §§ 4700.0-1 – 4770.5.[8] Therefore, BLM was under no legal obligation to analyze social acceptability in this EA and the fact that it chose to

[8] Plaintiffs did not raise the National Environmental Policy Act ("NEPA") as a basis for preliminary injunction, but NEPA similarly does not require agencies to consider "social acceptability" at the EA stage. *See* 40 C.F.R. § 1508.14 ("economic or social effects are not intended by themselves to require preparation of an environmental impact statement"). NEPA is focused on actions "significantly affecting the quality of the human environment," not on issues of social acceptability. 42 U.S.C. § 4332(C). *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944 (9th Cir. 2005); *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1186 (9th Cir. 1997); *D'Agnillo v. U.S. Dep't of Hous. & Urban Dev.*, 738 F. Supp. 1443, 1452 (S.D.N.Y. 1990) ("The law is clear that sociological impact is not cognizable under NEPA.").

follow the law in this EA cannot be considered "arbitrary and capricious."[9]

2. BLM's Decision to Eliminate an Inconsequential Subpart of the Spay Study Was Not Arbitrary and Capricious

Nor was it an APA violation for BLM to remove CSU's planned pain-scoring study from the project. *See* Pls.' Br. at 25-28. The pain-scoring study was not necessary to the purpose and need of the study, and its removal will not change the level of care provided to the horses.

To be clear, the primary purpose relating to the spay study has not changed, nor have the specific aims of the study. *Compare* Original EA for the Spay Feasibility and On-Range Behavioral Outcomes Assessment and Warm Springs HMA Population Management Plan, Ex. H at 4-5, 20 *with* Ex. A at 5-6, 21-22. One result of CSU's decision not to participate was that an animal welfare specialist, who originally intended to conduct a pain-scoring study on a limited number of randomly selected horses, from both the treatment (spay) and control (non-spay) groups, would no longer be involved in the study. *See* Ex. H at 24-25. Because that pain-scoring study did not advance either the purpose or the aims of the main spay feasibility study, BLM did not replace the pain-scoring researcher. Ex. A at 27.[10]

Contrary to Plaintiffs' claims, removing the pain-scoring subpart did not change the level of care provided to the horses in the study: "Despite CSU's withdrawal, the spay procedures and after care would remain the same under BLM oversight and be conducted by a contracted veterinary team with experience in performing ovariectomy via colpotomy and standing sedation

[9] If there was a change in agency policy, it occurred in the now withdrawn 2016 EA when BLM decided to discuss social acceptability in the "Economics and Social Value" section. Defendants are unaware of any other BLM EA or environmental impact statement relating to wild horse management that analyzed social acceptability.

[10] Plaintiffs repeatedly portray this pain-scoring study as "crucial" to the overall spay study, without supporting citation. *See, e.g.*, Pls.' Br. at 25 ("crucial"), 26 ("an essential component"), 27 ("a core component"), 27 ("necessary to the success"), 28 ("a crucial aspect"). But as the EA clearly indicates, the pain-scoring study was inconsequential to the spay study's specific aims. *See* Ex. A at 27.

on wild horse mares." Ex. A at 20. Indeed, BLM is using the same surgical protocol and expects the same outcomes:

> The BLM would use the same surgical protocol originally approved by the CSU IACUC. . . . Because the procedure would still be carried out by experienced contract veterinarians, and the surgical protocol is unchanged, the departure of CSU's team does not affect the procedure's anticipated outcomes.

Id. at 22. BLM also has not changed its commitment to the horses' general welfare, or its efforts to minimize pain: "Most spay surgeries on mares have low [complication rate] and with the help of medications pain and discomfort can be mitigated. Pain management is an important aspect of any ovariectomy …." *Id.* at 70; *see also id.* at 24 (describing specific combinations of medications and anesthetics used to reduce pain). Therefore, there has been no meaningful change to the EA as a result of eliminating the pain-scoring study.[11]

BLM's revision to one subpart of its proposed spay study, before finalizing the study plan and issuing a final EA, does not reflect a "final agency action" subject to challenge. Plaintiffs' citation to *Motor Vehicle Manufacturers Ass'n v. State Farm* is inapplicable because that case involved rescission of a final agency standard that governed automobile manufacture. 463 U.S. 29 (1983); *see* Pls.' Br. at 27. By contrast, here BLM revised a single subpart of a preliminary proposal, as reflected in an EA that was later revised. Because the draft EA is not the agency's final action, the authority upon which Plaintiffs rely is distinguishable.

Fourth, even if the revised EA did reflect a change in policy position, BLM fully explained the reason for its revision. Ex. A at 26-27. After CSU chose not to participate, BLM did not retain

[11] Plaintiffs try to suggest, by quoting a snippet of the EA out of context, that BLM plans to ignore animal welfare, claiming that BLM "is not proposing to conduct *any observations* on the immediate outcomes of surgery." Pls.' Br. at 26 (emphasis in original). But the actual EA makes clear that the observations not being conducted are only those related to the CSU pain-scoring study. Indeed, the surrounding paragraphs of the EA describe at length how the spayed horses will be carefully assessed "three times a day" by veterinarians and given appropriate pain relief and other treatment. Ex. A at 26-27.

the pain-scoring study because that study was not necessary to accomplish the main spay study's aims: "The currently proposed veterinary observations would provide the information needed to address the third specific aim discussed in the proposed action, which remains unchanged from the June 29, 2018, draft EA …." *Id.* at 27. BLM also determined that the pain-scoring study was not linked to post-surgical plans to relieve pain, so its removal would not affect the treated horses:

> The originally proposed "Post-surgery Welfare Observation" section did not have any identified design elements that would have based veterinary treatment on pain measure scores of treated mares. As a result, 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. Accordingly, BLM demonstrated a "rational connection between the facts found and the choice made" with respect to elimination of the pain-scoring study. *See State Farm*, 463 U.S. at 43 (citation omitted).

Fifth, contrary to Plaintiffs' claims, the approach described in BLM's revised EA is fully consistent with the WHBA. Plaintiffs rely on passages of the statute that they take out of context. *See* Pls.' Br. at 28 (citing § 1333(b)(2)(B)). That section relates to private adoption. It does not govern the research at issue here. Indeed, the WHBA explicitly contemplates "sterilization" of wild horses. 16 U.S.C. § 1333(b)(1).

3. BLM's Viewing Restrictions Are Not Arbitrary and Capricious

For the same reasons outlined above that BLM's viewing restrictions comply with the First Amendment and the *Press-Enterprise II* test, the restrictions are not arbitrary and capricious under the APA. *See supra* Argument Section I.A.

II. The Irreparable Harm, Balance Of Equities, and Public Interest Factors Weigh Against a Preliminary Injunction.

Plaintiffs are further not entitled to a preliminary injunction because they have not

demonstrated that they are likely to suffer irreparable injury in the absence of a preliminary injunction or that the balance of equities and the public interest tip in their favor. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011).

A. Plaintiffs have not demonstrated irreparable harm

Plaintiffs have not demonstrated that they are likely to suffer irreparable harm absent injunctive relief. *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20); *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009) (plaintiff must show that an irreparable injury is likely, not merely possible). To obtain an injunction, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury[.]" *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). The harm must be immediate, individualized, and substantiated with evidence. *Caribbean Marine Servs.*, 844 F.2d at 674.

Here, Plaintiffs allege that they are injured in three ways: (1) denial of an opportunity to "observe, document, and assess the humaneness and social acceptability" of the research; (2) denial of an opportunity to "help assess whether (and why) this procedure is feasible to implement on the open range" prior to BLM making a final decision regarding whether to implement it; and (3) deprivation of information that Plaintiffs need to "educate the public, muster public interest, and provide informed comments in the future." Pls.' Br. at 34. Plaintiffs cannot demonstrate immediate threatened injury to their interests under any of these theories because there will be an opportunity for public observation, and Plaintiffs may disseminate to the public any information that they gather through such observation.

None of Plaintiffs' declarants attests that she or he will attempt to personally observe the

spay procedures in accordance with the process set up by BLM for public observation. *See* Ex. A at 28 ("Those interested in observing must contact the Burns District BLM Public Affairs Specialist at 541 -573-4400, two weeks prior to the start of the surgeries to have their name added to the viewing list."). The declarants' opinions about the adequacy of the viewing opportunity that BLM will provide do not establish harm absent evidence that they will personally observe the procedures, and thus be subjected to the viewing restrictions.

Assuming, *arguendo*, that some or all of the declarants will seek to have their names added to the viewing list, they will have an opportunity to observe the procedures from nearby. *See id.* at 27-28. BLM will create a space for public observation in an office space adjacent to the working chute, where interested parties can observe from within fifteen feet of the surgical site. *Id.* at 27. BLM will permit observers to film and photograph the procedures from the observation space. *Id.*

Plaintiffs cannot reasonably claim that they will be deprived of information in light of the public access that BLM will provide for interested observers. Plaintiffs' assertions that they will be unable to obtain sufficient information to understand and inform the public about the procedures are speculative and do not rise to the level of irreparable harm. *See, e.g.*, Kathrens Decl., ECF No. 7-2 ¶ 20 (stating that observers will be unable to hear sounds of distress from the mares or statements made by the lead veterinarian); Roy Decl., ECF No. 7-4 ¶ 11 (stating that observers will not be able to see "how the mares are reacting to the procedure"). Plaintiffs' speculation that they will be unable to gather sufficient information about the procedures through direct observation from fifteen feet away is insufficient to demonstrate the requisite harm for preliminary injunctive relief. *See Caribbean Marine Servs*, 844 F.2d at 674 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." (citation omitted)); *Giftango, LLC v. Rosenberg*, 925 F. Supp. 2d 1128, 1140 (D. Or. 2013) ("The likely harm must be

supported by a 'clear showing,'" and "[s]peculative injury is insufficient." (citations omitted)). Additionally, as Robert Sharp explains and the affidavit of Ms. Hou admits, Plaintiffs will be able to obtain sufficient information during the procedures. *See supra* Argument Section I.A.2; *Leigh v. Salazar*, 954 F. Supp. 2d at 1103 (the First Amendment does not require BLM to provide ideal observation).

B. The Balance of Hardships Favors BLM

The balance of hardships favors BLM because of the extreme overpopulation of the range and the agency's need to develop more effective means of sterilizing wild horse mares. BLM is facing a severe overpopulation of wild horses on public lands, with more than three times more wild horses than the AML dictates. Ex. A at 2-3. This overpopulation harms the wild horses themselves, because they often lack the food, water, and space they need. *Id.* at 2; *see All. for the Wild Rockies v. Krueger*, 35 F. Supp. 3d 1259, 1267-78 (holding, in the Endangered Species Act context, that a court must "tip the balance [of hardships] in favor of whatever action is in the best interest of the species, regardless of which party supports that action"). In addition, the overpopulation negatively impacts other animal species, local vegetation, other range users, and even archeological sites. *Id*. With the wild horse population increasing by approximately 20 percent or more annually, BLM spends substantial resources every year to try to protect the wild horse population from drought and early mortality. *Id*. In addition, BLM currently spends nearly $50 million per year to manage over 45,000 horses BLM has removed from the range. *Id.* at 3.

Focusing on the immediate situation at the Warm Springs HMA, the inequities resulting from a preliminary injunction would be even more apparent. BLM has expended significant resources over a long period of time to develop and initiate this current spay study. Ex. E ¶¶ 3-4. Because weather conditions around the Warms Springs HMA deteriorate rapidly after late-

November (when the horses are scheduled to be returned), maintaining the tight schedule for this spay study is critical. *Id.* ¶¶ 7-8. Returning horses across 15-20 miles of natural surface roads becomes more difficult as winter precipitation increases, and the roads eventually become impassable. *Id.* "Delaying the spay procedures by more than one week could have significant ramifications on the project." *Id.* ¶ 6. If BLM cannot return the horses in November 2018 as scheduled, BLM will incur substantial monetary cost. Just the extra cost of housing the horses will likely exceed $300,000. *Id.* ¶¶ 8, 12. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (financial harms are relevant considerations). More importantly, if BLM is unable to return the horses to the range on schedule, then many of the underlying research objectives of the study will be forfeited entirely. *Id.* ¶¶ 9-13. For example, if the spayed horses are held in corrals until they can be returned to the range in May 2019, USGS will be unable to make behavioral observations about the impact of spaying on breeding in the wild during the first season after the procedures. *Id.* ¶ 9. If the surgical procedures are delayed, it would also affect BLM's ability to study how the mare's gestational stage affects the surgical spay procedure, and how the surgical procedure affects maintenance of pregnancy. *Id.* ¶ 10. The success of the research depends on the availability of mares in three stages of pregnancy: open (not pregnant), <120 days, and 120-250 days. *Id.* If the surgical procedures are significantly delayed, it is likely that none of the mares would be in <120 days of gestation, and fewer would be in 120-250 days of gestation. *Id.*

Given the potential contribution of this research to controlling population growth within the Warm Springs HMA, the balance of hardships weighs in favor of BLM. *See, e.g.*, *Cloud Foundation v. BLM*, 802 F. Supp. 2d 1192, 1209 (D. Nev. 2011) (where plaintiffs sought preliminary injunction preventing roundup of wild horses, balance of hardships favored BLM because continued population growth would result in damage to vegetation and riparian resources,

and possible death of wild horses from starvation and dehydration).

C. An Injunction Would Not Advance the Public Interest

Plaintiffs must show both "that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Plaintiffs repeatedly invoke the First Amendment to try to satisfy their burden. *See* Pls.' Br. at 34-35. However, Plaintiffs fail to demonstrate a likelihood of success on any First Amendment argument. *See supra* Argument Section I.A. Plaintiffs therefore cannot rely on their flawed First Amendment claim to tip the balance of equities in their favor.

More fundamentally, Plaintiffs cannot identify any significant limitations on their access rights. Like other activities at the Corral Facility, the spay procedures are open to the public. Plaintiffs can watch, record, and photograph every aspect of BLM's spay study, from the initial gather to the final return to the range. Ex. A at 27-29. Public viewing is available for the entire seven-hour working day the Corral Facility is open. *Id*. BLM even has taken extra steps to increase the public's observation opportunities, by developing a full-length viewing station in the working barn area only fifteen feet from the working chute where the collaring/tagging and the surgery will occur. *See id*., Figure II-2. "Observers can also photograph/film from this location." *Id*. at 27. After the spay procedures, Plaintiffs can continue to view the horses in the recovery pens. *Id*. at 29; *see also* Ex. E ¶ 16 (describing observation opportunities).[12]

[12] While courts generally recognize a significant public interest in upholding First Amendment principles, the significant public interest in protecting First Amendment privileges may be "overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Powell's Books, Inc. v. Myers*, 599 F. Supp. 2d 1226, 1234 (D. Or. 2008) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir.2002)), *rev'd sub nom. Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *see also Doe v. Harris*, 772 F.3d 563, 582-83 (9th Cir. 2014) ("We do not simply assume that these elements 'collapse into the merits of the First Amendment claim.'" (citation omitted)). Even if Plaintiffs' inability to ring the facility with

Plaintiffs' only other attempt to satisfy their burden is to argue that a preliminary injunction "would give the Court time to fully consider" Plaintiffs' claims that they have a First Amendment right to "observe and document" the spay procedures, and if this Court remands, to allow BLM to "change its position." Pls.' Br. at 35. Plaintiffs' argument does not reflect on the equities of the situation at all. Plaintiffs cannot legitimately bootstrap this Court's evaluation of the legal arguments into a showing of equities in Plaintiffs' favor. Contrary to Plaintiffs' suggestion, the Court can determine its own schedule. For its part, the United States does not need any additional time for a "fuller consideration of the issues." *Id*. BLM has evaluated the observation issues in great depth, specifically balancing the public's right to observe the procedures with the need to maintain a safe working area for the technicians, the public, and the horses. *See* Ex. A at 27-29; Ex. E ¶¶ 15-17. BLM already took steps to increase observation opportunities by constructing a safe public viewing station. Ex. A at 28.

Moreover, for the same reasons that the balance of hardships favors BLM (the overpopulation of public lands and the Warm Springs HMA; the resulting deterioration of the range, impacts to other species, and negative consequences for the horses themselves; and the need to develop a long-term population management tool), allowing the study and ovariectomy via colpotomy procedures to go forward is firmly in the public interest. When compared to the concrete and specific negative consequences for BLM and USGS of any schedule delay, Plaintiffs have not met their burden of identifying counterbalancing equities that favor delay.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

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cameras could be couched as a limitation on their First Amendment activities, that minimal intrusion is insufficient to counterbalance the United States' interest in this project.

Dated: October 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, a true and correct copy of the above document was electronically filed with the Clerk of Court using CM/ECF. Copies of the document will be served upon interested counsel via the Notices of Electronic Filing that are generated by CM/ECF.

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