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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION¹**

GINGER KATHRENS,)	Case No. _____
107 South 7th Street)	
Colorado Springs, CO 90905)	PLAINTIFFS' COMPLAINT FOR
)	DECLARATORY AND INJUNCTIVE
THE CLOUD FOUNDATION,)	RELIEF
107 South 7th Street)	
Colorado Springs, CO 90905)	
)	
AMERICAN WILD HORSE)	
CAMPAIGN)	
1025 Alameda # 633)	
Belmont, CA 94002)	

¹ This case has been filed in the Portland Division because of its close relation to *Kathrens v. Jewell*, No. 2:16-cv-01650 (Simon, J.). Although Plaintiffs originally filed that related case in the Pendleton Division, because the location of BLM's experiments is in Harney County, *Kathrens v. Jewell* was quickly reassigned to the Portland Division because Plaintiffs had filed a motion for a preliminary injunction, which Plaintiffs intend to file in the current case as soon as possible. Accordingly, because of the close relation to *Kathrens v. Jewell* and to avoid burdening the Court with an unnecessary reassignment upon Plaintiffs' filing of their imminent preliminary injunction motion, Plaintiffs have filed this case in the Portland Division.

ANIMAL WELFARE INSTITUTE)
900 Pennsylvania Avenue S.E.)
Washington, D.C. 20003)
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CAROL WALKER)
16500 Dakota Ridge Road)
Longmont, CO 80503)
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Plaintiffs,)
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v.)
))
RYAN ZINKE, Secretary,)
Department of the Interior)
1849 C Street N.W.)
Washington, DC 20240)
))
BRIAN STEED, Deputy Director)
Bureau of Land Management)
1849 C Street, N.W.)
Washington, DC 20240)
))
JEFF ROSE, District Manager)
BLM Burns District Office)
28910 Hwy. 20 West)
Hines, OR 97738)
))
JAMIE CONNELL, State Director, Oregon)
Bureau of Land Management)
1220 SW 3rd Ave.)
Portland, OR 97204)
))
Defendants.)
_____)

INTRODUCTION

1. This case challenges a decision of the Bureau of Land Management (“BLM”) seriously limiting public access to observe and document important experiments that the agency is undertaking on sterilization of wild horse mares. This case is closely related to the previous case before this Court, *Kathrens v. Jewell*, No. 2:16-cv-01650 (D. Or. filed Aug. 15, 2016) (Simon, J.), in which most of the same plaintiffs raised very similar claims regarding a nearly

identical experiment—an experiment that the BLM stressed at the time would help determine whether this form of sterilizing wild mares can be considered “socially acceptable” to the public. After Plaintiffs sought a preliminary injunction in that case, the BLM abandoned that experiment. Now, only two years later, the BLM has announced an experiment on the same sterilization procedure, but inexplicably abandoned any effort to determine whether this procedure is “socially acceptable,” despite the fact that the agency previously described this inquiry as a critical part of the “ultimate question in the reasonably foreseeable future of wild horse population management.” And while the BLM has evidently recognized that it must provide some public observation of this experiment, it has imposed limitations that render the limited observation effectively meaningless.

2. The BLM’s experiments are to be conducted at a BLM corral facility in Hines, Oregon (“the Hines Corral”) as early as November 2018. The BLM’s sharp limitation on public observation of this government activity thwarts the important newsgathering objectives that Plaintiffs aim to achieve by observing and documenting the BLM’s treatment of federally protected wild horses, and thus violates Plaintiffs’ rights under the First Amendment of the U.S. Constitution. The BLM’s decision to conduct this experiment without any effort to determine the experimental procedure’s social acceptability and to limit public access to observe and record these experiments must also be set aside because it is arbitrary and capricious.

JURISDICTION

3. This case arises under the First Amendment of the U.S. Constitution, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340, the National Environmental Policy Act, 42 U.S.C. §§ 4331–4370h, and the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.* This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

4. Pursuant to 28 U.S.C. § 1391 and District of Oregon Local Rule of Civil Procedure 3, venue is proper in this Court because the BLM's district office that made the decision at issue is located in Harney County, Oregon.

PARTIES

5. Plaintiff Ginger Kathrens is the founder and executive director of The Cloud Foundation. Ms. Kathrens is also a long-standing wild horse advocate and an Emmy-award-winning director of a series of documentaries on the life of a wild stallion named Cloud, which has greatly increased the public's knowledge of wild horses and the public's interest in preserving wild horses. Ms. Kathrens has also filmed and produced other documentaries and short subjects on Cloud's life. She has also written, edited and produced over two dozen segments of the "Wild America" series on PBS, and has filmed for National Geographic, The Discovery Channel, Animal Planet, and the BBC.

6. In March 2016, the BLM appointed Ms. Kathrens to serve on the National Wild Horse and Burro Advisory Board in the capacity of Humane Advocacy. By appointing Ms. Kathrens to serve on the Advisory Board in the role of Humane Advocacy, the BLM has acknowledged that she has special knowledge and expertise about wild horse protection.

7. In its announcement of Ms. Kathrens' appointment, the BLM described her long-standing advocacy for wild horses and her role in increasing public awareness of wild horse issues, noting that "[h]er first Cloud film was voted the most popular documentary in the 25-year history of the Nature series on PBS."

8. Ms. Kathrens plays an important role in gathering and disseminating information about wild horse issues and in promoting responsible and humane behavior by the BLM—a role

the agency has acknowledged by seeking her participation on its Advisory Board in the role of Humane Advocacy.

9. The BLM's restrictions on access to observe and document the BLM's wild horse sterilization experiments at the Hines Corrals impair Ms. Kathrens' ability to perform her important newsgathering and information dissemination functions, thus infringing upon her First Amendment rights and impairing her ability to advocate for the humane, responsible, and transparent management of wild horses. The BLM's failure to address the social acceptability of ovariectomy via colpotomy as part of this experiment, when the agency previously indicated that this inquiry was a critical part of a very similar experiment, as well as the BLM's failure to conduct meaningful observations of the welfare of mares undergoing this experiment, impairs Ms. Kathrens' ability to advocate for the humane, responsible, and transparent management of wild horses both in her capacity as the executive director of The Cloud Foundation and particularly in her capacity as the designated role of Humane Advocacy on the BLM's Wild Horse and Burro Advisory Board.

10. A court order declaring the BLM's restrictions on public access unconstitutional or otherwise arbitrary and capricious and requiring the BLM to provide reasonable access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals, or at minimum to remand to the agency to either incorporate an inquiry about social acceptability into the proposed study and provide for meaningful observations of the mares' welfare, or provide on remand non-arbitrary reasons for abandoning the social acceptability inquiry, abandoning welfare observations, and curtailing observation access, would protect Ms. Kathrens' First Amendment rights and her procedural rights afforded by the Administrative Procedure Act.

11. Plaintiff The Cloud Foundation is a 501(c)(3) nonprofit organization headquartered in Colorado Springs, Colorado. It is dedicated to the preservation of wild horses and burros on public lands in the western United States, including Oregon. The Cloud Foundation's supporters enjoy viewing, studying, photographing, and filming the natural behavior of wild horses in their natural habitats, free from human interference. On behalf of its supporters, The Cloud Foundation regularly comments on BLM's policies and practices governing the management and treatment of wild horses, including the BLM's efforts to sterilize wild horses. The Cloud Foundation has participated in lawsuits challenging the BLM's prior efforts to sterilize wild horses. The Cloud Foundation also provides valuable newsgathering and public education functions related to wild horses and the BLM's management of wild horses. For example, The Cloud Foundation uses education, media events, videos, and its website to inform the public about these matters and to garner public involvement to advocate for the interests of wild horses.

12. Plaintiff The Cloud Foundation also has a significant history of specific opposition to the BLM's efforts to sterilize wild horses. The Cloud Foundation has expended significant resources gathering and disseminating information about the BLM's wild horse sterilization plans, including the agency's current proposed sterilization experiment at the Hines Corral. For example, The Cloud Foundation has issued press releases concerning complications and deaths among wild burros from the very procedure that the BLM now proposes to undertake on wild horses at the Hines Corral, as well as previous efforts to sterilize wild horse in other areas of the West, such as Wyoming and Idaho. The Cloud Foundation has also participated in litigation against the BLM's prior wild horse sterilization efforts. The Cloud Foundation has continued this newsgathering and public information dissemination in its efforts to oppose the

BLM's current wild horse sterilization experiments. On behalf of the Cloud Foundation, Plaintiff Ginger Kathrens has testified at a hearing of the House Subcommittee on Federal Lands at the invitation of Congressman Raul Grijalva concerning the Foundation's opposition to the experimental procedure that BLM proposed in 2016, which is the same procedure the agency again plans to perform now.

13. The BLM's restrictions on access to its wild horse sterilization experiments at the Hines Corral impair The Cloud Foundation's ability to observe and document this government activity, effectively impeding The Cloud Foundation's ability to perform its important newsgathering and information dissemination functions. The Cloud Foundation has requested further access to the controversial sterilization experiments through a letter sent to the BLM district office responsible for these experiments, but the BLM has declined The Cloud Foundation's request for improved observation of these experiments. The BLM's failure to address the social acceptability of ovariectomy via colpotomy as part of this experiment, when the agency previously indicated that this inquiry was a critical part of a very similar experiment, as well as the BLM's failure to conduct meaningful observations of the welfare of mares undergoing this experiment, impairs The Cloud Foundation's ability to advocate for the humane, responsible, and transparent management of wild horses.

14. A court order declaring the BLM's restrictions on public access unconstitutional or otherwise arbitrary and capricious and requiring the BLM to provide reasonable access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals, or at minimum to remand to the agency to either incorporate an inquiry about social acceptability into the proposed study and provide for meaningful observations of the mares' welfare, or provide on remand non-arbitrary reasons for abandoning the social acceptability inquiry, abandoning

welfare observations, and curtailing observation access, would protect The Cloud Foundation's First Amendment rights and its procedural rights afforded by the Administrative Procedure Act.

15. Plaintiff American Wild Horse Campaign ("AWHC") is a national nonprofit organization whose mission to protect and preserve America's wild horses and burros. AWHC is endorsed by a broad-based coalition of public-interest groups, environmentalists, humane organizations, and historical societies representing over ten million members and supporters. Members of AWHC's coalition, as well as AWHC's own staff members, donors and supporters, enjoy viewing wild horses on public lands, and regularly advocate for their humane treatment. AWHC has a long and substantial history of documenting the BLM's management of wild horse and burro populations and disseminating this information to the public through press releases, its website, videos, photographs, and other media. AWHC and its officers regularly contribute to news coverage of the BLM's management of wild horses. In fact, AWHC's videos of prior management of wild horse populations by BLM, which AWHC circulated to the public, generated tremendous public awareness and pressure leading the BLM to review and revise certain practices to make them more humane. For example, after AWHC documented and publicly disseminated videos of BLM personnel or agents engaged in such inhumane activities as hitting, kicking, and beating wild horses that had been removed from the public lands, deliberately slamming gates and doors on wild horses, and using electric prods on horses, the BLM adopted requirements to limit or prohibit these activities. AWHC thus serves as an important public observer of the BLM's wild horse population management, safeguarding wild horses as well as the public's interest in their welfare, and promoting responsible government behavior.

16. Plaintiff AWHC also has a significant history of specific opposition to the BLM's efforts to sterilize wild horses. AWHC has expended significant resources gathering and disseminating information about the BLM's wild horse sterilization plans, including the agency's current proposed sterilization experiments at the Hines Corral. For example, AWHC has gathered and disseminated information to muster public awareness of, and opposition to, the BLM's plan to sterilize an entire wild horse herd in Idaho, and has brought successful litigation to challenge that plan. Similarly, the BLM has withdrawn plans to sterilize wild horses in response to litigation brought by AWHC, as discussed more thoroughly below. AWHC has continued this newsgathering and dissemination in its efforts to oppose the BLM's current wild horse sterilization experiments, disseminating information via press release and interviews with the media and persuading the BLM to publicly release a Panel Report by veterinarians that the agency had relied on for its 2016 draft Environmental Assessment but which it initially withheld from public scrutiny.

17. The BLM's restrictions on access to its wild horse sterilization experiments at the Hines Corral impair AWHC's ability to observe and document this government activity, effectively impeding AWHC's ability to perform its important newsgathering and information dissemination functions. AWHC has requested further access to the controversial sterilization experiments through a letter sent to the BLM district office responsible for these experiments, but the BLM has declined AWHC's request for improved observation of these experiments. The BLM's failure to address the social acceptability of ovariectomy via colpotomy as part of this experiment, when the agency previously indicated that this inquiry was a critical part of a very similar experiment, as well as the BLM's failure to conduct meaningful observations of the

welfare of mares undergoing this experiment, impairs AWHC's ability to advocate for the humane, responsible, and transparent management of wild horses.

18. A court order declaring the BLM's restrictions on public access unconstitutional or otherwise arbitrary and capricious and requiring the BLM to provide reasonable access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals, or at minimum to remand to the agency to either incorporate an inquiry about social acceptability into the proposed study and provide for meaningful observations of the mares' welfare, or provide on remand non-arbitrary reasons for abandoning the social acceptability inquiry, abandoning welfare observations, and curtailing observation access, would protect AWHC's First Amendment rights and its procedural rights afforded by the Administrative Procedure Act.

19. Plaintiff Animal Welfare Institute ("AWI") is an organization devoted to the protection of animals and is a non-profit organization pursuant to section 501(c)(3) of the Internal Revenue Code. Founded in 1951, AWI's mission is to alleviate the suffering inflicted on animals by humans. AWI engages policymakers, scientists, industry professionals, non-governmental organizations, farmers, veterinarians, teachers, and the public in its 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.

20. AWI has more than 120,000 members and constituents, many of whom are specifically interested in the well-being of free-roaming wild horses and burros. AWI's involvement with wild free-roaming horses dates back almost to the organization's inception. In 1959, AWI's legislative division was instrumental in the passage of the Wild Horse Annie Act (P.L. 86-234), which prohibited the poisoning of wild horse and burro waterholes, as well as the

use of motorized vehicles to round the horses up for sale to slaughterhouses. In 1971, AWI's founder, Christine Stevens testified in support of the Wild Free-Roaming Horses and Burros Act. AWI was then active in efforts in 2005, 2006, and 2007 to restore provisions of the Act that were eliminated by the 2004 Omnibus Appropriations bill. Hope Ryden, author of the seminal book "America's Last Wild Horses," served on the board of trustees of AWI's lobbying arm beginning in the 1980s, and later on AWI's Scientific Committee. In October 2012, AWI presented a 377-page report entitled "Overview of the Management of Wild Horses and Burros" to the National Academy of Sciences Committee to Review the Management of Wild Horses and Burros.

21. AWI regularly engages its members on the topic of protecting wild horses and burros. For example, a recent eAlert that AWI sent to its members and constituents asking them to "Tell the BLM to Protect Wild Horses from Slaughter" generated 2,845 actions. AWI was instrumental in the introduction of the Safeguard American Food Exports (SAFE) Act in the U.S. Senate and House of Representatives, providing technical assistance to lawmakers and engaging constituents across the country to support the SAFE Act, which would protect wild horses from slaughter for human consumption or export for that purpose. AWI continues to lead a coalition lobbying for the legislation's passage and regularly posts information on its website and social media pages in order to educate its members on horse slaughter. AWI also cofounded and serves on the oversight committee of the Homes for Horses Coalition – a national network of equine rescues and sanctuaries dedicated to promoting equine welfare. In recent months, AWI has posted information about the proposed experiment at issue in this litigation via social media channels; these posts received a high number of reactions, comments, and shares.

22. The BLM's restrictions on access to its wild horse sterilization experiments at the Hines Corral impair AWI's ability to observe and document this government activity, effectively

impeding AWI's ability to perform its important newsgathering and information dissemination functions. AWI has requested further access to the controversial sterilization experiments through a letter sent to the BLM district office responsible for these experiments, but the BLM has declined AWI's request for improved observation of these experiments. The BLM's failure to address the social acceptability of ovariectomy via colpotomy as part of this experiment, when the agency previously indicated that this inquiry was a critical part of a very similar experiment, as well as the BLM's failure to conduct meaningful observations of the welfare of mares undergoing this experiment, impairs AWI's ability to advocate for the humane, responsible, and transparent management of wild horses.

23. A court order declaring the BLM's restrictions on public access unconstitutional or otherwise arbitrary and capricious and requiring the BLM to provide reasonable access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals, or at minimum to remand to the agency to either incorporate an inquiry about social acceptability into the proposed study and provide for meaningful observations of the mares' welfare, or provide on remand non-arbitrary reasons for abandoning the social acceptability inquiry, abandoning welfare observations, and curtailing observation access, would protect AWI's First Amendment rights and its procedural rights afforded by the Administrative Procedure Act.

24. Plaintiff Carol Walker is a photographer with professional and personal interests in the wild horse herds in the Warm Springs HMA, as well as other HMAs throughout the west. She is also a board member of the Wild Horse Freedom Federation, a nonprofit organization dedicated to preventing wild equine extinction and promoting the humane treatment of wild horses and their welfare. Ms. Walker is also this organization's Director of Field Documentation, serving as the organization's "eyes and ears on the ground." She has spent her

career photographing wild horses, particularly horses exhibiting wild and natural behaviors on the range. Ms. Walker particularly values seeing and photographing the natural family dynamics of wild horses, because their family structure and behavior provides both an emotionally meaningful aesthetic and recreational experience for Ms. Walker as well as commercially valuable photographs of the family ties and familial behaviors of these wild horses. She sells fine art prints, calendars, and books of her photographs of wild horses engaging in their natural behaviors. A book of Ms. Walker's photographs was published in France in 2014, titled *Mustang: The Heart of an American Legend*.

25. Ms. Walker has previously visited the wild horses in the Warm Springs HMA and has concrete plans to return. She first visited this HMA shortly before the BLM announced its first sterilization experiment in 2016. In June 2016, Ms. Walker visited the Warm Springs HMA, where she was able to locate, observe, and photograph wild horses. At that time, Ms. Walker also visited the Hines Corral, where she was able to observe and photograph horses that were being held there. It was important to Ms. Walker to visit these horses, which Ms. Walker believed were the same horses on which BLM was planning to experiment in 2016, and to witness first-hand the conditions in which they were being kept. Ms. Walker plans to return to the Warm Springs HMA in the summer of 2019.

26. If the BLM proceeds with its experiment, Ms. Walker will likely not return to the Warm Springs HMA, because she is concerned that the wild mares that have endured BLM's experimental surgeries will suffer significant behavioral changes that will impair her ability to enjoy the natural family dynamics of these wild horses and impair her ability to obtain commercially valuable photographs. Similarly, Ms. Walker is concerned that returning to this HMA knowing what the wild mares located there have endured would cause her significant

emotional distress, because her observation of individual wild mares would cause her to think of nothing but the suffering that the mares have undergone in surgery as well as the adverse impacts on their welfare associated with their permanent inability to have foals and engage in natural family dynamics. Accordingly, if the BLM proceeds with its experiments, Ms. Walker will endure an injury to her aesthetic, recreational, and professional interests.

27. As the Wild Horse Freedom Federation's Director of Field Documentation, Ms. Walker regularly works to engage and educate the public about the BLM's treatment of wild horses. The BLM's failure to address the social acceptability of ovariectomy via colpotomy as part of this experiment, when the agency previously indicated that this inquiry was a critical part of a very similar experiment, as well as the BLM's failure to conduct meaningful observations of the welfare of mares undergoing this experiment, also impairs Ms. Walker's ability to advocate for the humane, responsible, and transparent management of wild horses in this capacity.

28. A court order declaring the BLM's restrictions on public access unconstitutional or otherwise arbitrary and capricious and requiring the BLM to provide reasonable access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals, or at minimum to remand to the agency to either incorporate an inquiry about social acceptability into the proposed study and provide for meaningful observations of the mares' welfare, or provide on remand non-arbitrary reasons for abandoning the social acceptability inquiry, abandoning welfare observations, and curtailing observation access, would protect Ms. Walker's First Amendment rights and her procedural rights afforded by the Administrative Procedure Act.

29. Defendant Jeff Rose is the District Manager for the Burns District Office of the BLM. Mr. Rose is responsible for the BLM's decision to implement wild horse sterilization

experiments at the Hines Corrals and to limit public access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals.

30. Defendant Jamie Connell is the State Manager for the BLM in Oregon. Ms. Connell is responsible for the BLM's decision to implement wild horse sterilization experiments at the Hines Corrals and to limit public access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals.

31. Defendant Brian Steed is the Deputy Director of the Bureau of Land Management, and is acting with the authority of the Director, and is thus responsible for the BLM's decision to implement wild horse sterilization experiments at the Hines Corrals and to limit public access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals.

32. Defendant Ryan Zinke is the Secretary of the Department of the Interior, the parent agency for the BLM, and is thus responsible for the BLM's decision to implement wild horse sterilization experiments at the Hines Corrals and to limit public access to observe and record the BLM's wild horse sterilization experiments at the Hines Corrals.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

LEGAL BACKGROUND

I. The First Amendment

33. The First Amendment to the Constitution of the United States protects the freedom of the press. Although the First Amendment does not enumerate a specific right to observe government activities, the Supreme Court has recognized that the First Amendment does protect newsgathering. To protect this right, the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.

34. Open government and a free press are hallmarks of our democracy, and therefore public observation and newsgathering of government actions, such as the BLM's mare sterilization experiments, are essential to government accountability. When a government activity has historically been open to the press and public and the public has played a significant positive role in the functioning of that government activity, the government may impose only such restrictions as are narrowly tailored to serve an overriding government interest.

II. The Wild Free-Roaming Horses and Burros Act

35. Finding that "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West," and that "they contribute to the diversity of life forms within the Nation and enrich the lives of the American people," Congress enacted the Wild Free-Roaming Horses and Burros Act ("WHA" or "the Act") in 1971 to ensure that "wild free-roaming horses and burros shall be protected from capture, branding, harassment, [and] death," and that they are "considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331.

36. The Act provides that the Secretary of the Interior "shall manage wild free-roaming horses and burros as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* In delineating areas for wild horse use, the BLM "shall consider the appropriate management level for the herd, the habitat needs of the animals, [and] the relationships with other uses of the public and adjacent private lands." 43 C.F.R. § 4710.3-1. The appropriate management level ("AML") is "expressed as a population range within which [wild horses] can be managed for the long term." *See* BLM Handbook H-4700-1, at 4.2.1; 16 U.S.C. § 1331(b)(1) (authorizing the BLM to determine AMLs).

37. The WHA establishes rigorous procedures that the BLM must follow in managing wild horse populations, and states that “[a]ll management activities shall be at the minimum feasible level.” 16 U.S.C. § 1333(a).

38. By establishing a procedure for the BLM to manage “overpopulations” of wild horses, the WHA includes a default assumption that wild horses will be fertile and will reproduce. *See* 16 U.S.C. § 1331(b). If the BLM, on the basis of the AML and other factors, determines that (a) there is an “excess” of wild horses in a given area of public lands, and (b) those horses must be removed, the agency may take measures to remove “excess” animals in order “to restore a thriving natural ecological balance to the range.” *Id.* The statute defines the term “excess” to mean those “wild free-roaming horses or burros . . . which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” *Id.* at § 1332(f). As when it adjusts AML, in making an “excess” determination, the BLM “shall analyze grazing utilization and distribution, trend in range ecological condition, actual use, climate (weather) data, current population inventory . . . and other factors such as the results of land health assessments which demonstrate removal is needed to restore or maintain the range in a” thriving natural ecological balance. BLM Handbook H-4700-1, at 4.3.

39. The WHA further requires the BLM to consider expert input and oversight in its management of wild horses. For example, the WHA required the creation of a “joint advisory board . . . to advise [the BLM and Forest Service] on *any matter relating to wild free-roaming horses and burros and their management and protection.*” 16 U.S.C. § 1337 (emphasis added). The members of this advisory board must not be federal or state government employees and must be those who the agencies “deem to have special knowledge about protection of horses and

burros, management of wildlife, animal husbandry, or natural resource management.” *Id.*

Similarly, the BLM must “consider the recommendations of qualified scientists in the field of biology and ecology . . . [which] may include members of the Advisory Board” in its efforts to “achieve and maintain a thriving natural ecological balance on the public lands.” *Id.* § 1333(a).

When “determin[ing] 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 . . . the [BLM] shall consult with” state and federal wildlife management agencies and “such individuals independent of Federal and State government as have been recommended by the National Academy of Sciences, and such other individuals whom [it] determines have scientific expertise and special knowledge of wild horse and burro protection” *Id.* § 1333(b)(1).

40. The WHA embodies Congress’ intent that wild horses be treated humanely. For example, in any roundup of wild horses, the BLM must ensure that horses are “humanely captured and removed” from the range. *Id.* § 1333(b)(2)(iv)(B). In order to allow adoption of wild horses, the BLM must “assure humane treatment and care” and may allow an individual to adopt more than four wild horses only if it “determines in writing that such individual is capable of humanely caring for” them. *Id.* And, although the WHA originally allowed the BLM to “destroy” wild horses “in the most humane manner possible,” *id.* §§ 1333(b)(2)(iv)(A), (C), Congress has since outlawed this practice by forbidding appropriated funds to be spent on the destruction of healthy, unadopted wild horses. Further highlighting Congressional concern for the humane treatment of wild horses, one of the WHA’s original sponsors described the law as an act of “a humane and concerned Government, concerned with protecting our Nation’s wildlife and our national heritage.” Fifty years later, sixty-five members of Congress reiterated this view

in specific opposition to efforts to sterilize wild horses, sending a letter to the Secretary of the Interior on July 28, 2011 in opposition to “the drastic, inhumane practice of spaying and gelding wild horses.”

III. The Administrative Procedure Act

41. Under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 501 *et seq.*, a court reviewing final agency action “shall . . . hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” *Id.* § 706(2)(A). The Supreme Court has clarified that agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1981). An “unexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary and capricious change from agency practice.” *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). “When an agency changes its existing position, . . . a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.* at 2125–26.

42. Courts reviewing agency action must “ensure that agency decisions are founded on a reasoned evaluation of the relevant factors” and “must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quotations and citations omitted).

IV. The National Environmental Policy Act

43. Congress enacted the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4331–4370h, to ensure that federal agencies fully consider the environmental impacts of their actions before taking them, consider alternatives to proposed actions that may have less adverse environmental impacts, and make information publicly available with sufficient detail to promote fully informed public participation in agency decision-making.

44. To meet these objectives, all agencies must prepare an Environmental Impact Statement (“EIS”) for any major federal action that may “significantly affect[]” the environment. 42 U.S.C. § 4332(C).

45. The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA that are “binding on all Federal agencies.” 40 C.F.R. § 1500.3. These regulations provide that in determining whether an EIS is required with respect to a particular proposed action, an agency must prepare an Environmental Assessment (“EA”) that analyzes the environmental impacts of the proposed action as well as alternatives. *Id.* §§ 1501.4(c), 1509.9.

46. In determining whether an EIS is required, the agency must consider whether the proposed action may have a “significant” effect on the human environment. 40 C.F.R. § 1508.27. The “significance” determination is based on factors such as the degree to which the effects on the environment “are likely to be highly controversial” or “are highly uncertain”; the degree to which the action “may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration,” or “may cause loss or destruction of significant scientific, cultural, or historical resources”; and whether the action “threatens a

violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.*

47. A significant effect, requiring an EIS, may exist “even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1).

48. The existence of any one of the CEQ significance criteria usually requires the preparation of an EIS.

49. If an agency decides that an EIS is not required, it issues a Finding of No Significant Impact (“FONSI”), which must present the reasons why the agency has determined its proposed action “will not have a significant impact” on the environment.” 40 C.F.R. § 1508.13.

50. NEPA requires agencies to consider a range of reasonable alternatives for its proposed action. *See* 40 C.F.R. § 1502.14. An agency may not artificially constrain its analysis of reasonable alternatives by framing its purpose and need statement for a proposed action in an excessively narrow manner.

FACTUAL BACKGROUND

I. The Robust Public Interest in the BLM’s Management of Wild Horses

51. The BLM’s management of wild horse populations is a matter of intense public interest. The BLM generally manages wild horse populations by rounding up and removing “excess” wild horses from the public range when it determines that an “excess” of such horses exists in a particular HMA.

52. Wild horse roundups are open to public and media observation and often receive coverage in local and national news.

53. As described more thoroughly above, Plaintiffs have a long history of gathering and disseminating information about federally protected wild horses and the BLM's management of wild horse populations, and a proven record of promoting the interests of wild horse populations and successfully advocating for their humane treatment.

54. In recent years, the BLM has undertaken a drastic change to its Wild Horse and Burro Program to attempt to begin managing wild horse populations through the permanent sterilization of wild horses. Public oversight of this extremely controversial management approach has proven essential to shaping the BLM's national program of wild horse sterilization. For example, in response to widespread public opposition to sterilization, including litigation by Plaintiff AWHC, the BLM has twice withdrawn proposals to sterilize wild horses in the Wyoming and Nevada. *See AWHC v. Salazar*, 800 F. Supp. 2d 270 (D.D.C. 2011); *AWHC v. Salazar*, 859 F. Supp. 2d 33 (D.D.C. 2012). Similarly, litigation by several Plaintiffs led to the invalidation of a decision by BLM to sterilize an entire herd of wild horses in Idaho. *AWHC v. Zinke*, No. 1:16-cv-1-EJL, 2017 WL 4349012 (D. Idaho, Sept. 29, 2017). To date, aside from a single study regarding gelding stallions in Utah (the results of which will not be available for several years), the proposed permanent sterilization of wild horses has not occurred due to tremendous public opposition and litigation initiated by AWHC and The Cloud Foundation.

55. The BLM is currently planning actions to further its wild horse sterilization program through the actions at issue at the Hines Corral in Oregon, and in other locations in the West. For example, despite robust public outcry, the agency has decided to permanently geld wild stallions in the Triple B Complex in Nevada, a matter currently in litigation. *AWHC v. Zinke*, No. 3:18-cv-00059 (D. Nev., Filed Feb. 6, 2018). Indeed, the agency's recent decision confirms that it intends to use the results of the experiments at the Hines Corral to decide

whether to continue to spay additional mares in this HMA, as well as to assess the feasibility of using this surgical technique on other wild mares throughout the West. In addition, the Wild Horse and Burro Division Chief—Dean Bolstad—stated at the most recent meeting of the BLM Wild Horse and Burro Advisory Board that it may be “reasonable to consider spay and neuter of” the 40,000 wild horses that the agency considers to be excess on the range. The BLM has also recommended widespread sterilization of wild horses in a recent report to Congress, although this is an option that the public does not support.

56. The BLM’s decision to conduct experiments on wild horse sterilization at the Hines Corral has drawn significant public attention. The BLM received 2,044 public comments during its scoping phase for this project, 8,326 public comments on its first draft Environmental Assessment (“EA”), and 10,104 public comments on its revised draft EA—despite the fact that this last comment period included only 7 business days. Numerous comments raised concerns about the potential for these experiments to cause inhumane results, including the injury or death of mares and the abortion or deformation of foals.

57. The BLM’s plans to conduct sterilization experiments at the Hines Corral have already been the subject of numerous news articles in Oregon and throughout the West.

58. With regard to wild horse roundups, which are the means by which the BLM has principally managed wild horse populations, the BLM has a nation-wide policy promoting “safe and transparent visitation by the public/media at [wild horse] gather operations. Under this policy, the BLM states that agency staff “should work to ensure that the public media have opportunities to safely observe gather activities at the trap site and temporary holding facilities when practicable.”

59. Additionally, the Hines Corral—where the new sterilization experiments are to take place—is currently accessible to the public. In fact, the BLM offers public tours of the Corral facility, and Plaintiff Ginger Kathrens has visited the Hines Corrals on more than one occasion, including as recently as April 2016, to assess and document the health of the wild horses maintained there.

II. The BLM’s Previous Sterilization Experiments at the Hines Corral

60. Despite widespread public opposition to any such management approach, the BLM in 2016 decided to fund a series of three sterilization experiments on wild mares at the agency’s corral facilities in Hines, Oregon. In furtherance of that plan, the BLM solicited proposals for wild horse population suppression research projects and, in addition to four other research projects to be conducted in other states, elected to fund the experiments now at issue at the Hines Corrals. These three experiments were to be conducted by staff of Oregon State University on 225 wild mares, and would have focused on three sterilization techniques: a) ovariectomy via colpotomy, b) tubal ligation, and c) hysteroscopically guided laser ablation of the oviduct papilla.

61. One of the chief goals that the BLM stated in its EA for its 2016 sterilization research was to “determine the social acceptability” of three types of sterilization in order to inform the BLM’s future decisions regarding the management of wild horses on the public range—i.e. whether the public will accept such operations. As the BLM’s 2016 EA stated, “[t]he ultimate question in the reasonably foreseeable future of wild horse population management” includes “determin[ing] which methods are safe, effective, and socially acceptable.” BLM further acknowledges in the 2016 EA that this research was in fact intended to inform the agency’s management actions on the public range: thus, it states that “[u]nderstanding each

procedure's immediate effects and evaluating their pros and cons is the first step to ultimately making decisions on what techniques to use on the range in the future." The 2016 EA also made clear that this study was directly aimed at assessing the social acceptability of these procedures: "The results of this study are expected to aid BLM in determining the social acceptability of each procedure."

62. Ovariectomy via colpotomy is a highly invasive surgical technique disfavored by veterinary experts because of the high risk of death and injury to both the mare and its foal if the mare is pregnant, which is usually the case with respect to wild horses removed from the range. The procedure involves literally reaching into a mare's abdominal cavity through an incision in the vaginal wall, blindly and without any tool to visualize the mare's organs, to identify the ovaries by touch and to remove them by severing them with a loop of chain. The blind nature of this procedure distinguishes it from a similar, but significantly less invasive, "keyhole" procedure that veterinarians perform on domestic mares using a laparoscope that allows them to see what they are doing.

63. The American College of Veterinary Surgeons describes laparoscopic surgery as the best method for ovariectomy and that notes "with the advent of laparoscopic (keyhole) surgery, all other techniques have become relatively dated" because laparoscopic surgery provides far greater "visualization and access" and is "minimally invasive," especially in comparison to ovariectomy, which involves removing the ovaries "with a crushing-type instrument." As documented in comments by Plaintiffs on the BLM's 2016 draft EA for these experiments, ovariectomy via colpotomy significantly increases the risk of fatal hemorrhage due to the inadvertent cutting of the horse's arteries or bowels. Despite comments from Plaintiffs—and even from the United States Cattlemen's Association, an organization representing the

livestock industry that is generally very critical of wild horses—describing the dangers of ovariectomy via colpotomy, and the superior benefits of laparoscopic surgery, the BLM at that time candidly acknowledged that it decided to proceed with this far more invasive procedure due in part to “the increased costs associated with additional equipment” needed for laparoscopic procedures.

64. The BLM decided to dedicate research funds to ovariectomy via colpotomy—despite receiving a contrary recommendation from the National Research Council, a part of the National Academy of Sciences (hereinafter “NAS”)—because, according to the BLM’s EA, “the surgical complications of performing this technique on wild horse mares at various gestational stages has not been well documented.” Thus, this experiment would have focused on “potential complications as a function of gestational stage,” with the procedure performed on 100 mares, in groups of 25 at four different stages of pregnancy, ranging from open (not pregnant) to more than 8 months pregnant. The complications that BLM expected to quantify include the injuries or death of the mares and the abortion or deformation of their fetal foals. This 2016 experiment thus would have focused on how often ovariectomy via colpotomy leads to the injury or death of mares, or the deformation or abortion of their foals. In short, the BLM acknowledged that its 2016 experiment will inevitably lead to inhumane results—the BLM’s chief question is precisely how often these inhumane results will occur.

65. The NAS recommended that the BLM not dedicate research funds to this experiment because it “contains no science or experimentation related to technique.” In other words, the BLM’s 2016 experiments were not designed to make ovariectomy via colpotomy safer or more humane. The NAS specifically noted that other, far less invasive procedures “would be safer—with less risk of hemorrhage and evisceration—and probably less painful.”

The NAS thus concluded that these less invasive procedures “should replace . . . ovariectomy via colpotomy as surgical approaches for permanent sterilization.”

66. The procedures that the NAS recommendeds as less invasive and more humane than ovariectomy via colpotomy include the other two procedures that the BLM decided to study in its 2016 experiments, namely tubal ligation and hysteroscopically-guided laser ablation of the oviduct papilla. However, because these latter two procedures have not been proven safe or effective on any horses, much less wild horses, the NAS also recommended that the BLM should conduct a “proof of concept” study on *domestic* horses before considering any experiments on *wild* horses. The BLM chose not to heed either of the NAS’s recommendations.

67. Tubal ligation is a surgical procedure that, according to the BLM, although “commonly performed in humans . . . has not been commonly performed on mares.” Indeed, the BLM noted in 2016 that “[t]here are no known studies using this technique to permanently sterilize domestic mares.” The procedure involves the insertion of a flexible endoscope through an incision in the vaginal wall to allow visualization and severing of a mare’s oviducts. The BLM expects to perform tubal ligations on 50 mares, with at least 10–15 mares being pregnant and at least 10–15 being “open” (not pregnant). According to BLM’s 2016 EA, this experiment’s primary purpose was to assess how effectively this procedure sterilizes mares, rather than to provide an “accurate quantification of severe complication rates.” After the procedure, non-pregnant sterilized mares would have been repeatedly bred with fertile stallions to assess the rate at which they become pregnant. The BLM proposed in 2016 to also study how often tubal ligation of pregnant mares leads to the abortion of foals.

68. As to the third procedure, according to the BLM, “[h]ysteroscopically-guided laser ablation for mare sterilization is not documented as a surgery used in domestic horses.”

This procedure, which the BLM proposed to perform on up to 50 open (non-pregnant) mares, involves using a hysteroscope to see inside a mare's uterus and guide a laser that will burn the opening to each oviduct, causing scarring that should "prevent normal sperm/egg union with resultant contraception approaching 100 percent success." According to the BLM, "[w]hether the scar damage is sufficient to sterilize the mare permanently is the question that will be resolved by the study."

III. The BLM's 2016 Decision to Deny Public Access to Observe and Record the Experiments at the Hines Corrals

69. Plaintiffs AWHC, The Cloud Foundation, and Ginger Kathrens all opposed these sterilization procedures in comments submitted on the BLM's 2016 draft EA. They explained that such procedures (a) were not necessary to manage wild horses; (b) are inhumane; and (c) could not possibly be used on the public range as a method of managing wild horses—both because such an approach violates the WHA and because the procedures will irreparably alter wild horse behavior and would require veterinary resources that are not available on the range. Plaintiffs The Cloud Foundation and Ginger Kathrens also raised concerns about the BLM's lack of transparency in its planning process for this research.

70. Nevertheless, on June 24, 2016, the BLM issued its final decision to go forward with these experiments.

71. By letter sent July 20, 2016, Plaintiffs requested that BLM provide them with access to observe and record these procedures. Plaintiffs explained that they have a strong interest in observing these experiments which entail a significant risk of both mares and foals being treated inhumanely, and even dying. Plaintiffs also explained that they serve, and have historically served, as important public observers of the BLM's management of wild horses, that they have a long history of advocacy for the interests and welfare of wild horses on behalf of

their members, supporters, and general public, and that they have played a significant role in promoting humane and responsible management of wild horses by the BLM. Thus, Plaintiffs explained that they have a First Amendment right to observe this government activity. Plaintiffs further explained that their right to observe and document these experiments is critical to ensuring the humane treatment of wild horses, especially given the fact that one of the BLM's chief goals of this project is to "determine the social acceptability" of these procedures. Given the highly controversial nature of the proposed experiments and of the precedent-setting nature that the results of the experiments will have on agency policy, Plaintiffs' explained that transparency of these experiments is of the utmost importance. Accordingly, Plaintiffs requested that the BLM allow for observation and recording of the experiments.

72. On July 28, 2016, the BLM denied Plaintiffs' request to observe and record these experiments. As ostensible justification for its denial of Plaintiffs' First Amendment rights, the BLM cited "limited space" at the Hines Corral and the need for "a minimally disruptive working environment," stating that "[t]o minimize stress to the horses, and to ensure the safety of the horses and the research personnel, BLM will not allow for public observation during surgeries." The BLM noted that it "plans to provide public observation of these horses in their holding corrals following treatment, as well as to post 'daily reports' recapping the research progress."

73. The BLM did not address the fact that one of its chief goals for these experiments is to assess their "social acceptability," did not dispute that Plaintiffs have played a significant role in documenting prior inhumane treatment of wild horses during the BLM's management of wild horse populations, and in changing the agency's policies and practices, and did not give any consideration to the role that Plaintiffs' documentation of these experiments would play in

furthering the BLM's own goal of assessing the "social acceptability" of these experimental sterilization procedures.

74. On August 1, 2016, Plaintiffs sent the BLM a second letter requesting access to observe and record the agency's sterilization experiments remotely via video cameras. The Plaintiffs offered to purchase, situate, and install small, unobtrusive cameras that would enable observation of the BLM's experimental procedures and that would provide constant, 24-hour observation of wild horses in post-surgery recovery. As Plaintiffs' modified request explained, remote observation would eliminate each of the concerns the BLM raised when denying the Plaintiffs' initial observation request. These small, unobtrusive cameras would not occupy a significant amount of the "limited space" at the BLM's Hines Corral, would not increase stress to the horses, and would not disrupt the working environment or place horses or researchers in any danger. Moreover, this remote observation would promote the BLM's own stated goals by both providing an opportunity for the public to witness these procedures and assess their "social acceptability," and supplementing the BLM's existing plans for post-surgical observation of horses with 24-hour monitoring.

75. Despite the numerous advantages of the Plaintiffs' modest request for remote observation, by letter dated on August 4, 2016, the BLM again denied the Plaintiffs' request for any form of access to observe the agency's wild horse sterilization experiments. Once again, the agency did not address the fact that one of its chief goals for these experiments is to assess their "social acceptability," did not dispute that Plaintiffs have played a significant role in documenting prior inhumane treatment of wild horses during the BLM's management of wild horse populations and in changing the agency's policies and practices, and did not give any consideration to the role that Plaintiffs' documentation of these experiments could play in

furthering the BLM's own goal of assessing the "social acceptability" of these experimental sterilization procedures. Instead, the BLM asserted that the mere presence of any form of observation, whether live or through small, unobtrusive cameras, "can be distracting to the veterinarians who are, or are about to, perform these procedures." The BLM also claimed that the rejection of any form of observation "ensures that the horses will have the best possible care during the surgeries and monitoring periods," completely ignoring the fact that Plaintiffs had proposed to supplement the BLM's more limited post-surgical monitoring by purchasing and installing technology that would allow for around-the-clock post-surgical monitoring. Finally, the BLM claimed that if the public can witness recordings of these experiments, this would constitute "the immediate release of unpublished research data," which "could jeopardize the review process for any peer-reviewed publications anticipated from this research." The BLM did not offer any evidence to support any of its purported justifications for denying the Plaintiffs' modified request for access.

IV. Previous Litigation Regarding the BLM's 2016 Experiments

76. Plaintiffs Ginger Kathrens, The Cloud Foundation, AWHC, and Deniz Bolbol² filed suit to challenge the BLM's restriction of public observation of its 2016 experiments on August 15, 2016, along with a motion for a preliminary injunction. *See Kathrens v. Jewell*, No. 2:16-cv-01650, ECF Nos. 1 and 2 (Aug. 15, 2016).

77. Plaintiffs' motion for a preliminary injunction explained that the BLM's restrictions on public observation were both a violation of the First Amendment, as well as arbitrary and capricious because the BLM's reasons for denying public observation lacked any logical or factual basis.

² Deniz Bolbol was at that time an employee of AWHC.

78. Rather than responding to Plaintiffs' motion for a preliminary injunction, the BLM cancelled its 2016 experiments altogether.

79. After the BLM cancelled its 2016 experiments, the parties in *Kathrens v. Jewell* stipulated to the dismissal of the claims in that case, No. 2:16-cv-01650, ECF. No 16 (Sept. 9, 2016).

V. The BLM's Renewed Spay Experiment

80. Despite the fact that serious public outcry led the agency to abandon its 2016 spay experiments, the BLM has once again decided to undertake a set of experiments on the riskiest and least humane of the experimental procedures it planned to study in 2016, namely ovariectomy via colpotomy.

81. On May 21, 2018, the BLM mailed a scoping notice to various interested parties providing 14 days for members of the public to submit comments. In light of the fact that this comment period included the Memorial Day holiday, Plaintiff AWHC requested that the agency extend the comment period, but the agency refused to do so. Despite a short comment period that included a holiday weekend, the BLM received 2,044 public comments, illustrating the intense public interest in this experiment.

82. Plaintiff AWHC submitted comments on the BLM's scoping notice stressing that the agency "must evaluate the social impacts of the proposed research in light of the clear prevailing social preference against use of this method as a subject for research and/or a management tool." These comments noted that BLM had previously stated that one of its key goals was to determine the social acceptability of ovariectomy via colpotomy, but that the BLM had apparently dropped that goal from its new proposal without any explanation. Accordingly,

these comments specifically emphasized that “[d]etermining the social acceptability of the procedure must be added as an aim of the research.”

83. Plaintiff AWHC’s scoping comments also explained that ovariectomy via colpotomy is a procedure that entails extreme risks for mares and their foals, and does not meet modern equine veterinary standards. These comments also explained that because the proposed research implicates numerous of the CEQ’s “significance” factors, including impacts on cultural resources, scientific controversy, highly uncertain effects, the creation of precedent, and the threatened violation of the WHA, *see* 40 C.F.R. § 1508.27(b), the BLM would need to prepare an EIS.

84. On June 29, 2018, the BLM issued a draft EA and FONSI for a 30-day comment period. The draft EA did not include the consideration of “social acceptability” of ovariectomy via colpotomy as a research objective, as Plaintiff AWHC had stated was necessary. Nor did the draft EA offer any explanation of why the BLM refused Plaintiff AWHC’s request that the agency consider this issue, nor any explanation of why the BLM chose to ignore this issue in this experiment despite having stressed the importance of this issue in its very similar experiment in 2016.

85. The BLM’s draft EA indicated that the BLM would undertake research into ovariectomy via colpotomy in partnership with Colorado State University (“CSU”) and the United States Geological Survey (“USGS”). Under the draft EA, CSU was to study the feasibility of ovariectomy via colpotomy, specifically including an effort to track the impact of the surgery on the welfare of individual mares using a pain scoring system specifically designed for horses. USGS is to partner with BLM for a long-term study of the behavioral impacts of ovariectomy via colpotomy, which is to take place on the Warm Springs Herd Management Area

(“HMA”) through 2021. Under the draft EA, CSU staff involved in the study of ovariectomy via colpotomy included “a professor of equine surgery specializing in minimally invasive surgery and wound healing,” “an animal welfare specialist experienced in pain management,” and “a research scientist specializing in mammalian behavior and ecology.” These CSU specialists were intended to oversee “[a]ll aspects of this study.”

86. The draft EA provided for limited access to observe the ovariectomy via colpotomy procedures. Although the BLM stated that it would allow some public observation, it relied on CSU’s policies (which only apply to activities *at CSU*) to assert that the agency would not allow any recording of the procedures, and would require any observers to leave any recording devices, including cell phones, outside the facility.

87. During the 30-day public comment period on the draft EA, the BLM received 8,326 comments, again indicating the robust public interest in this government activity.

88. Plaintiffs AWHC, AWI, Ginger Kathrens, and The Cloud Foundation submitted comments on the draft EA that reiterated serious concerns about the extreme risks that ovariectomy via colpotomy entails for mares and emphasizing that this risky and inhumane procedure will not be acceptable to the public. These comments also challenged the BLM’s serious limitation on public observation. Comments from Ginger Kathrens and The Cloud Foundation stressed that “just as was the case in 2016, determining whether the public finds these inhumane experiments acceptable must continue to be a critical aspect of BLM’s analysis of this procedure, and the best way to determine whether the public will accept this procedure is to provide the public with an open, transparent opportunity to observe and record what is actually happening to the horses.” Accordingly, Ms. Kathrens stated that the BLM should abandon its restriction on recording these experiments, especially because the BLM could not lawfully or

logically rely on CSU's policies as a basis for that restriction. Similarly, Plaintiff AWHC and AWI's comments emphasized that "determining whether this experiment is socially acceptable is a critical issue that BLM must address in any consideration of this procedure," and that "the best way to determine whether a procedure is socially acceptable to the public is to show the public the unvarnished truth of what that procedure actually entails for wild horses." Plaintiff AWHC and AWI's comments also explained that BLM could not legitimately rely on CSU's policies to obstruct public observation and recording of this government activity in violation of the U.S. Constitution, and that truly independent observation and recording is necessary because the public should not have to rely on biased accounts from BLM officials or their research partners.

89. As was the case during the scoping comment period, Plaintiffs AWHC and AWI also stressed that the BLM must prepare an EIS for this decision, because it satisfies numerous significance factors specified by the CEQ. *See* 40 C.F.R. § 1508.27. Additionally, Plaintiffs' comments explained that the BLM's purpose and need statement was irrationally narrow because it limited the agency to considering in detail only ovariectomy via colpotomy as opposed to other forms of fertility control, including the forms of spaying that the agency previously proposed to study in 2016 or forms of spaying that veterinarians regard as far more humane, as well as other forms of fertility control with a proven track record of success, such as the immunocontraceptive Porcine Zona Pellucida ("PZP"). Accordingly, Plaintiffs explained that the BLM had violated NEPA both through an irrationally narrow statement of purpose and need and by failing to consider reasonable alternatives to the agency's proposed action.

90. During the comment period, Plaintiffs and others also submitted input to CSU, advising the university that the proposed experiments are inhumane and that the university should not participate in them.

91. On August 8, 2018, CSU announced that it would no longer participate in the BLM's proposed experiments.

92. On August 22, 2018, the BLM announced that it would proceed with its proposed experiments on ovariectomy via colpotomy despite CSU's withdrawal. The BLM acknowledged that the experiments would no longer "be overseen" by CSU's specialists, including "a professor of equine surgery, an animal welfare specialist, and a research scientist." The BLM asserted that "the departure of CSU's team does not affect the procedure's anticipated outcomes," but recognized that because of CSU's departure, the project no longer included CSU's observations of the welfare of the horses, which "was to have been conducted by a CSU animal welfare specialist experienced in observing, recording, and scoring based on a composite measure pain scale."

93. The BLM insisted on proceeding with this research without CSU because "conditions (population level, water availability, population growth) remain the same on the Warm Springs HMA and similarly across many HMAs in the western states." However, the BLM did not explain why it ostensibly needed to proceed with this experiment *now*, rather than even attempting to identify a research partner to fill CSU's role in quantifying the welfare impacts of this surgery. And while the BLM stated that it would monitor for "morbidity and mortality" among mares who have endured surgery, the BLM's focus is on "immediate health outcomes" and does not include the observations of *welfare* that CSU had proposed, which are distinct, based in peer-reviewed scientific literature on horse welfare, and far more rigorous.

94. In light of CSU's withdrawal from the experiments, the revised draft EA abandoned its restriction on recording experiments, which the BLM had based on CSU's (inapplicable) policies. Accordingly, the revised draft EA stated that the public could observe

and photograph or film the surgeries, provided they do so from behind a doorway to an office that the BLM set aside for that purpose. The revised EA provided a picture of the view from the designated observation area.

95. The BLM accepted public comments on its revised Draft EA between August 22, 2018 and September 2, 2018—a period of only 11 days (and only 7 business days). During that period, the BLM received 10,104 public comments, again revealing profound public interest in this government activity.

96. Plaintiffs AWHC, AWI, and The Cloud Foundation again submitted comments on the BLM's revised Draft EA. Plaintiffs again stressed that the BLM should, consistent with its prior practice, include in this research an effort to determine whether the public would find ovariectomy via colpotomy “socially acceptable.” Plaintiffs specifically noted that BLM's prior proposal to study ovariectomy via colpotomy in 2016 “repeatedly emphasized that a critical aspect of its effort was to evaluate whether this procedure could be ‘socially acceptable.’” Plaintiffs also questioned how BLM could “abandon[] 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.” Plaintiffs further explained that “[t]he abandonment of this inquiry without any explanation is profoundly irrational and lacks any basis in logic or law.”

97. Additionally, Plaintiffs' comments stressed the importance of the BLM providing for qualified, independent welfare observations. Plaintiffs explained that “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.” Plaintiffs questioned why “after CSU withdrew from the experiment, BLM inexplicably decided to abandon that effort [to quantify welfare impacts] and to proceed with the experiment without any effort to monitor the degree to which mares subjected to this experiment are suffering.” Plaintiffs explained that not only is ovariectomy via colpotomy inherently inhumane according to the consensus of the veterinary community, but also that “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.” Plaintiffs further explained that “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.” Plaintiffs also stressed that the limited opportunity to observe surgeries could not alleviate these issues because public “observers will be forced to observe the surgery through a doorway, at an odd angle to the chute where the procedure will be conducted.”

98. Consistent with concerns raised in previous comment periods, Plaintiffs’ comments also explained that the BLM’s decision is in violation of NEPA due to its overly narrow purpose and need statement, its failure to consider reasonable alternatives, and the failure to prepare an EIS.

99. Separately, on August 24, 2018, counsel for Plaintiffs also submitted to the BLM a request that the agency allow for “access for a licensed equine veterinarian to observe and record” the BLM’s surgical procedures “from a vantage point within the working area in order to guarantee that BLM’s experiment provides for independent observation of the welfare of the

wild mares subjected to this experiment.” This request explained that “[t]he presence of an independent, licensed veterinarian to observe and record this experiment is especially critical given the fact that BLM has chosen to proceed with this experiment despite the withdrawal of [CSU’s] researchers.” The request also explained that under the First Amendment, any limitation by BLM on public observation must be narrowly tailored and essential to serve a compelling government interest. Accordingly, the request asked that “BLM permit the presence of one licensed equine veterinarian in the working room to observe and record the agency’s surgical experiments on ovariectomy via colpotomy at any given time.” The request specified that “while the veterinarian observer must be provided with a clear vantage point for observation and recording, the observer will remain quiet and non-disruptive.”

100. Additionally, Plaintiffs’ request for improved observation asked BLM to “allow the installation of several small, unobtrusive video cameras to provide a continuous and comprehensive record of this experiment and monitor the mares post-surgery.” The request explained that “[a] continuous record of the experiments would help the public evaluate whether this experimental procedure is an appropriate way to manage wild horse populations,” and that “cameras could also provide for 24-hour observation of horses in recovery, improving the odds of a humane outcome for any horses that suffer from post-surgical complications by making it possible to catch such complications at an early stage.”

101. Plaintiffs requested a response from the BLM by August 30, 2018, “so that [Plaintiffs] may address the agency’s response in comments on the proposed EA for this experiment by the agency’s deadline of September 2.” Instead, the BLM treated this request as a public comment and only provided a response in the agency’s final Record of Decision.

102. On September 12, 2018, the BLM issued its final Record of Decision, EA, and Finding of No Significant Impact (“FONSI”).

103. The BLM’s final decision documents did not include any consideration of the “social acceptability” of ovariectomy via colpotomy, as Plaintiffs repeatedly stressed the BLM must do in comments, and as BLM itself repeatedly emphasized was a crucial aspect of its study of this same procedure in 2016. Nor did BLM’s decision documents include any response to Plaintiffs’ repeated calls for BLM to consider this issue, or at least to explain why the BLM is abandoning this inquiry that it previously stressed was critical. Indeed, the BLM’s only mention of this issue occurred when BLM denied Plaintiffs’ request for the installation of small, unobtrusive cameras. In response to Plaintiffs’ explanation that cameras would allow for a clear and comprehensive view of the surgeries that would assist the public in determining whether this procedure is socially acceptable, the BLM rejected this request in part because “[t]he purpose and need of the study does not include determining whether the procedure is socially acceptable or aiding the public in determining whether the procedure is an ‘appropriate’ way to manage wild horse populations.” However, the BLM offered absolutely no explanation for why it designed its experiment to ignore a factor that the agency itself stressed was critical when the agency proposed to study *the very same procedure only two years ago*.

104. The BLM did not explain why it never sought any other academic institution or other similar institution to fill the role that CSU originally was to perform. Although the BLM maintained that CSU’s welfare observations were not necessary for providing post-operative care for mares, the BLM did not explain why the CSU welfare observations were ostensibly not a significant component of evaluating the “feasibility” of this procedure. Thus, BLM did not offer any rational explanation in response to comments that expressly called for BLM to provide the

same level of welfare observation that CSU was supposed to provide, nor explain how the agency intends to decide whether to implement ovariectomy via colpotomy in the future in the absence of information about how much suffering this procedure causes for wild mares.

105. The BLM rejected Plaintiffs' request for observation by an independent, licensed veterinarian. The BLM rejected the call for observation by an independent veterinarian by asserting that this role would already be filled by a veterinarian with whom BLM enters into a contract to perform the ovariectomies. BLM found "no information suggesting that [Plaintiffs'] chosen veterinarian would be any more 'independent' or qualified than the veterinarians contracted by BLM to perform the spay feasibility study." However, BLM failed to recognize that its contractor is not truly independent because that contractor will be paid by BLM. Additionally, BLM failed to consider that BLM's contractor will necessarily have an obvious bias, both due to the fact that BLM requires that this contractor have performed the same procedure at least 100 times (indicating that the contractor believes the procedure is humane, in contrast to the consensus view of the veterinary community), and due to the contractor's motivation to make this procedure seem feasible and acceptable in order to obtain future contracts. Moreover, the BLM did not take into consideration the fact that BLM's contractor cannot possibly serve the same role as the requested independent veterinarian observer, because the contractor will be performing surgeries, while the observer would be monitoring the surgeries for indications of its humaneness and its impacts on the welfare of the mares. Additionally, contrary to the BLM's claim that "there simply is not enough space for additional public observers" "around the chute where all animal handling occurs," in the BLM's original proposal, the surgeries would have been overseen by *three* CSU specialists.

106. The BLM also rejected Plaintiffs' request to install small, unobtrusive cameras in the area where mares will endure surgery. As discussed above, the BLM rejected the request for cameras to observe the surgeries because the BLM did not include "social acceptability" as part of the purpose and need for this project, but failed to explain why it was jettisoning this inquiry it previously stated was critical for an evaluation of this same procedure. Accordingly, the BLM's rationale for forbidding small, unobtrusive cameras to be installed in the chute where surgeries will take place lacked any logical basis.

107. Likewise, the BLM rejected the request to install small, unobtrusive cameras in the pens where mares will recover for illogical or incorrect reasons. The BLM asserted that these cameras are "not a viable option because the cameras would not be able to pick up individual mare numbers nor would they be able to document anything in poor lighting" and insisted that "[n]o viable, scientific data would be collected if the individual animals could not be identified." However, the BLM failed to offer any support for the proposition that cameras would not be able to pick up individual mare numbers when those numbers are visible to the naked eye. Similarly, the BLM failed to consider that numerous commercially available cameras are able to film in detail in low light. Finally, the BLM gave no apparent consideration to Plaintiffs' explanation that the cameras would improve upon the BLM's limited in-person observation by providing for 24-hour observation of the welfare of mares in recovery.

PLAINTIFFS' CLAIMS FOR RELIEF

I. Violations of the First Amendment

108. Plaintiffs incorporate paragraphs 1 through 107 by reference.

109. The BLM's limitation of public observation of these experiments, as described above, is not narrowly tailored to serve an overriding government interest. The BLM's

limitation of public observation of these experiments impairs the Plaintiffs' ability to observe this important government activity and thus violates the Plaintiffs' rights under the First Amendment. BLM's actions therefore injure Plaintiffs in the manner described in Paragraphs 9, 13, 17, 22, 26, and 27.

II. Violations of the Wild Free-Roaming Horses and Burros Act and the Administrative Procedure Act

110. Plaintiffs incorporate paragraphs 1 through 107 by reference.

111. The BLM's failure to consider whether ovariectomy via colpotomy is "socially acceptable" is a profound departure from the agency's previous decision to study this same procedure, for which the agency has offered no rational explanation. Because this failure represents both an unexplained departure from prior agency practice and a failure to consider a factor that is indisputably relevant to the agency's implementation of the Wild Horse Act, the failure to consider "social acceptability" is arbitrary and capricious within the meaning of the APA.

112. The BLM's decision to proceed with its study of ovariectomy via colpotomy without considering partnering with another academic or research institution to fulfill the role that CSU was supposed to perform under BLM's draft EA, or explaining how the agency can rationally determine the feasibility of implementing ovariectomy via colpotomy in the absence of the welfare data that CSU was going to gather, especially in light of the WHA's consistent emphasis on treating wild horses humanely, is arbitrary and capricious within the meaning of the APA.

113. The BLM's limitation of public observation of its wild horse sterilization experiments at the Hines Corral is profoundly inconsistent with the agency's own previously stated goal of assessing the "social acceptability" of the experimental procedures. By failing to

consider the fact that Plaintiffs' observation of wild horse population management has helped promote socially acceptable humane treatment of wild horses in the past, and by failing to consider the fact that public observation and documentation of these experiments would allow the agency to better consider the "social acceptability" of these procedures—particularly through observation by Plaintiff Ginger Kathrens, who the BLM has recognized as an expert in wild horse protection by appointing her to serve on its Advisory Board in the capacity of Humane Advocacy—the agency has failed to consider an important aspect of the problem before it and failed to consider a factor relevant to its decision. The BLM's decision, including its refusal to allow observation by an independent, licensed veterinarian, is thus inconsistent with the WHA and arbitrary and capricious under section 706(2) of the APA.

114. The BLM's limitation of public observation, which has a proven record of promoting more humane treatment of wild horses by the BLM, is also profoundly inconsistent with the congressional intent in the WHA to promote the protection and humane treatment of these animals by, among other things, requiring consultation with experts in wild horse protection. This inconsistency is particularly egregious in light of the fact that the BLM has acknowledged that Plaintiff Ginger Kathrens is an expert in wild horse protection by appointing her to serve on its Advisory Board in the capacity of Humane Advocacy. The BLM's decision, including its refusal to allow observation by an independent, licensed veterinarian, is thus inconsistent with the WHA and arbitrary and capricious under section 706(2) of the APA. Its actions injure Plaintiffs in the manner described in paragraphs 9, 13, 17, 22, 26, and 27.

115. The BLM's limitation of public observation, including its denial of access for an independent, licensed veterinarian observer, is also arbitrary and capricious because the BLM's purported justifications for its decision lack any support in evidence, or any basis in fact or logic,

and thus fail to constitute the reasoned examination of the relevant factors required under the APA. Its actions injure Plaintiffs in the manner described in paragraphs 9, 13, 17, 22, 26, and 27.

III. Violations of the National Environmental Policy Act

116. Plaintiffs incorporate paragraphs 1 through 107 by reference.

117. By making a decision on the basis of an excessively narrow statement of purpose and need, and by failing to consider reasonable alternatives to its proposed action, the BLM has violated NEPA. Its actions injure Plaintiffs in the manner described in paragraphs 9, 13, 17, 22, 26, and 27.

118. By failing to take a hard look at the social acceptability and humaneness of the proposed action, particularly in comparison to a range of reasonable alternative forms of fertility control, the BLM has violated NEPA. Its actions injure Plaintiffs in the manner described in paragraphs 9, 13, 17, 22, 26, and 27.

119. By failing to prepare an EIS for this decision, the BLM has violated NEPA. Its actions injure Plaintiffs in the manner described in paragraphs 9, 13, 17, 22, 26, and 27.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

1. Declaring that Defendants' decision to proceed with its study without any effort to consider whether ovariectomy via colpotomy is socially acceptable, or even to explain how it can rationally discard this inquiry it previously deemed essential, is arbitrary and capricious;

2. Declaring that Defendants' limitation of public observation of the BLM's wild horse sterilization experiments at the Hines Corral is a violation of the First Amendment rights of the Plaintiffs or otherwise arbitrary and capricious;

3. Enjoining the Defendants from taking any action to implement the wild horse sterilization experiments at the Hines Corral without first providing improved access for public observation and documentation;
4. Enjoining the Defendants from taking any action to implement the wild horse sterilization experiments at the Hines Corral without including the assessment of the social acceptability of these procedures as a component of the study;
5. Requiring the BLM to provide improved access to observe and document these experiments and to incorporate a consideration of the social acceptability of ovariectomy via colpotomy in its study;
6. Awarding Plaintiffs their reasonable attorneys' fees and costs in this action; and
7. Providing any other relief that the Court deems proper.

Respectfully submitted,

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