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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FRIENDS OF ANIMALS, a non-profit
corporation,

Plaintiff,

v.

DEB HAALAND, in her official capacity as
Secretary of the Interior; and

THE UNITED STATES BUREAU OF LAND
MANAGEMENT, an agency of the United States

Defendants.

Case No. 3:22-cv-00365-ART-CLB

**PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES**

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22
23
24
25
26
27

TABLE OF CONTENTS

Motion for Preliminary Injunction 1

Memorandum of Points and Authorities 1

Introduction 1

Statement of the Facts 2

Standard of Review 4

Argument 5

A. Friends of Animals is likely to succeed on the merits..... 5

1. BLM failed to take a hard look at the impacts of its Decision under NEPA..... 5

2. BLM failed to consider reasonable alternatives to the Winnemucca ORC..... 12

3. BLM failed to provide a reasonable explanation for its FONSI and how mitigation will reduce the impacts to the point of insignificance. 13

4. BLM’s Decision violates its duty to protect wild horses and burros and breaches the ban on treating them inhumanely..... 14

B. Friends of Animals’ and its members’ recreational, aesthetic, and professional interests in the environment, including wild horses and burros, will be irreparably harmed if BLM sends animals to the Winnemucca ORC..... 16

C. The balance of equities and public interest weigh in favor of granting Friends of Animals’ preliminary injunction motion..... 23

Conclusion 24

TABLE OF AUTHORITIES

Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

350 Mont. v. Haaland,
50 F.4th 1254 (9th Cir. 2022) 13

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011)4, 16

Am. Horse Prot. Ass’n v. Andrus,
608 F.2d 811 (9th Cir. 1979)..... 9

Am. Wild Horse Pres. Campaign v. Zinke,
No. 1:16-cv-00001-EJL, 2017 U.S. Dist. LEXIS 161599 (D. Idaho Sept. 29, 2017).....9, 10

Amoco Prod. Co. v. Vill. of Gambell,
480 U.S. 531 (1987)..... 16, 19, 24

Anderson v. Evans,
371 F.3d 475 (9th Cir. 2004)..... 5

Bob Marshall All. v. Hodel,
852 F.2d 1223 (9th Cir. 1988) 12

Brady Campaign to Prevent Gun Violence v. Salazar,
612 F. Supp. 2d 1 (D.D.C. 2009)..... 16, 21

Calvert Cliffs’ Coordinating Comm., Inc. v. USAEC,
449 F.2d 1109 (D.C. Cir. 1971) 6, 7

Citizen’s Alert Regarding the Env’t v. DOJ,
No. 95-1702 (GK), U.S. Dist. LEXIS 18619 (D.D.C. Dec. 8, 1995) 23

Citizens for Better Forestry v. USDA,
341 F.3d 961 (9th Cir. 2003)..... 17

Envtl. Def. Ctr. v. BOEM,
36 F.4th 850 (9th Cir. 2022)5, 6, 7, 12, 13

Envtl. Prot. Info. Ctr. v. Carlson,
968 F.3d 985 (9th Cir. 2020)..... 16

Flexible Lifeline Sys. Inc. v. Precision Lift, Inc.,
654 F.3d 989 (9th Cir. 2011)..... 16

Food & Water Watch v. U.S. EPA,
20 F.4th 506 (9th Cir. 2021) 21

Found. On Econ. Trends v. Heckler,
756 F.2d 143 (D.C. Cir. 1985)..... 17

Friends of Animals v. U.S. BLM,
No. 3:15-CV-0057-LRH-WGC, 2015 U.S. Dist. LEXIS 17575 (D. Nev. Feb. 11, 2015)....20, 21

1 *Fund for Animals v. Clark*,
 27 F. Supp. 2d 8 (D.D.C. 1998) 19

2 *Fund for Animals v. Espy*,
 3 814 F. Supp. 142 (D.D.C. 1993)..... 18, 20, 23

4 *Fund for Animals v. Norton*,
 281 F. Supp. 2d 209 (D.D.C. 2003) 19, 24

5 *High Sierra Hikers Ass’n v. Blackwell*,
 6 390 F.3d 630 (9th Cir. 2004)..... 17, 24

7 *HSUS v. Bryson*,
 2012 U.S. Dist. LEXIS 74688 (D. Or. May 30, 2012)..... 19

8 *Idaho Sporting Cong. Inc. v. Rittenhouse*,
 9 305 F.3d 957 (9th Cir. 2002)..... 5

10 *Idaho v. ICC*,
 35 F.3d 585 (D.C. Cir. 1994)..... 6

11 *Indigenous Env’tl. Network v. U.S. Dep’t of State*,
 317 F. Supp. 3d 1118 (D. Mont. 2018)..... 11

12 *Kathrens v. Zinke*,
 13 323 F. Supp. 3d 1142 (D. Mont. 2018)..... 20, 24

14 *Kern v. BLM*,
 284 F.3d 1062 (9th Cir. 2002) 10

15 *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*,
 16 463 U.S. 29 (1983) 5, 8

17 *N. Idaho Cmty. Action Network v. U.S. DOT*,
 545 F.3d 1147 (9th Cir. 2008) 12

18 *Nat’l Parks & Conservation Ass’n v. Babbitt*,
 241 F.3d 722 (9th Cir. 2001)..... 14

19 *Nken v. Holder*, 556 U.S. 418 (2009)..... 23

20 *Red Wolf Coal. v. N.C. Wildlife Res. Comm’n*,
 21 No. 2:13-CV-60-BO, 2014 U.S. Dist. LEXIS 65601 (E.D.N.C. May 13, 2014)..... 19

22 *S. Fork Band Council of W. Shoshone v. U.S. DOI*,
 588 F.3d 718 (9th Cir. 2009)..... 6, 9, 17

23 *Save the Yaak Comm. v. Block*,
 840 F.2d 714 (9th Cir. 1988)..... 5

24 *Sierra Club v. Bosworth*,
 25 510 F.3d 1016 (9th Cir. 2007) 17, 18

26 *Sierra Club v. Martin*,
 933 F. Supp. 1559 (N.D. Ga. 1996) 16

27

1 *Simmons v. USACE*,
120 F.3d 664 (7th Cir. 1997)..... 12

2 *Soda Mt. Wilderness Council v. BLM*,
3 534 F. App'x 680 (9th Cir. 2013) 24

4 *Thomas v. Peterson*,
753 F.2d 754 (9th Cir. 1985)..... 11

5 *Univ. of Texas v. Camenisch*,
6 451 U.S. 390 (1981)..... 4

7 *Van Abbema v. Fornell*,
807 F.2d 633 (7th Cir. 1986)..... 12

8 *Vencor Nursing Centers, L.P. v. Shalala*,
63 F. Supp. 2d 1 (D.D.C. 1999) 18

9 *W. Watersheds Proj. v. Bernhardt*,
10 543 F. Supp. 3d 958 (D. Idaho 2021) 13

11 *Winter v. NRDC, Inc.*
555 U.S. 7 (2008)..... 4, 17, 23

12 **Statutes**

13 16 U.S.C. § 1331 24

14 42 U.S.C. § 4332 5

15 42 U.S.C. § 4332(C)..... 8, 13

16 5 U.S.C. § 706 4, 5

17 **Regulations**

18 40 C.F.R. § 122.1(b)(1) 7

19 40 C.F.R. § 1501.3(b)..... 13

20 40 C.F.R. § 1501.3(b)(2)(i), (ii)..... 9

21 40 C.F.R. § 1501.6(c) 14

22 40 C.F.R. § 1501.9(e) 11

23 40 C.F.R. § 1508.1(g) 5, 11

24 40 C.F.R. §1502.5 5

25 43 C.F.R. § 4700.0-5(f)..... 15

26 43 C.F.R. § 4770.1 15

27

1 **MOTION FOR PRELIMINARY INJUNCTION**

2 Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Friends of Animals hereby
3 moves for a preliminary injunction to enjoin Defendant, the United States Bureau of Land
4 Management (BLM), from sending wild horses and burros to the Winnemucca off-range
5 corral and to preserve the status quo. Plaintiff’s counsel conferred with Defendants’
6 counsel who stated they oppose this Motion. In support of this Motion, Plaintiff submits the
7 accompanying Memorandum of Points and Authorities. Friends of Animals also
8 incorporates all arguments made in support of its Motion for Summary Judgment and the
9 accompanying declarations. *See* Pl.’s Mot. for Summ. J., ECF No. 26 (“Pl.’s Br.”) at 8-10; Pl.’s
10 Reply in Supp. of its Mot. for Summ. J., ECF No. 35 (“Pl.’s Reply Br.”).

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **INTRODUCTION**

13 In its rush to approve a contract to contain and feed up to 4,000 federally protected
14 wild horses and burros on private land in Winnemucca, Nevada (hereinafter, “Winnemucca
15 ORC” or “the ORC”), BLM overlooked significant environmental impacts. The ORC
16 constitutes a large, concentrated animal feeding operation (CAFO), commonly known as a
17 “factory farm” that could produce a massive amount of pollution, including up to 40,000
18 tons of manure annually. It is located on a site that presents unprecedented hazards to wild
19 horses and burros, including extreme weather and soil that is prone to dust and flooding.
20 Experts, advocates, and community members all expressed concerns about the
21 Winnemucca ORC and requested additional analysis and safeguards to protect wild horses
22 and burros and the environment. However, in issuing the associated Environmental
23 Assessment (EA), Finding of No Significant Impact (FONSI), and Decision Record
24 (collectively, “Decision”), BLM never took a hard look at the impacts of the ORC or required
25 mitigation to adequately protect the environment and ensure for the humane treatment of
26 animals at the facility.

1 The harms posed by sending wild horses and burros to the Winnemucca ORC are
2 precisely the type of irreparable harms that cannot be adequately remedied by money
3 damages. Wild horses and burros are likely to be injured and mistreated at the
4 Winnemucca ORC. The substantial risk of disease and infection, as well as pollution, is
5 exacerbated if more animals are sent to the ORC. Money cannot repair the harm and
6 distress that Friends of Animals members, who live and visit the area, will experience if
7 more wild horses and burros are sent to the Winnemucca ORC.

8 Although BLM has refused to disclose when wild horses and burros would be
9 transported to the Winnemucca ORC, a tentative schedule that BLM posted in April 2023
10 indicates that thousands of wild horses are likely to be sent to the Winnemucca ORC as
11 early as July 2023. To preserve the status quo until the Court has an opportunity to decide
12 this case on the merits, Friends of Animals respectfully request that the Court grant
13 preliminary injunctive relief.

14 **STATEMENT OF THE FACTS**

15 In response to a BLM solicitation, JS Livestock submitted a proposal for an ORC that
16 would hold 4,000 wild horses and burros on 100 acres of private land in Humboldt County,
17 Nevada, between Paradise Valley and Winnemucca. AR_17, 19. BLM sent JS Livestock an
18 official apparent awardee letter on August 3, 2021. AR_10665-68.

19 BLM rushed through the NEPA process to approve this project because BLM was
20 given “a really short timeline to get this EA done” since it needed “a signed Decision
21 Record” before the end of the fiscal year on September 30. AR_6974. BLM began drafting
22 the EA, including its one to three day evaluation of the environmental impacts, on August
23 18, 2021. *Id.*; Pl.’s Reply Br. at 7 n.2. Two weeks later, BLM released a Draft EA. AR_76-77.

24 During the comment period, BLM received over 6,000 individual letters and emails
25 raising concerns regarding, among other things: air quality (odors and dust), animal waste
26 management, disposal of dead animals, groundwater contamination, disease transmission,
27 public access to the facility, animal health and safety, climate change, social and economic

1 values, previous litigation, environmental justice, flooding, grazing, NEPA process, water
2 rights, and public health and safety. AR_29.

3 Even though BLM missed the fiscal year deadline, BLM rushed to complete the EA to
4 meet JS Livestock's purchase agreement deadline, which was extended to November 3,
5 2021. AR_9970-71. BLM never considered preparing an EIS. On November 3, 2021, BLM
6 released the Final EA, FONSI, and Decision Record. AR_6, 10. The EA's analysis of the
7 affected environment and environmental consequences was less than three pages and
8 included no analysis of the impacts to wild horses or burros. *See* AR_26-28.

9 The Winnemucca ORC is located in an area with soils that are "very poorly drained,
10 subject to occasional flooding," "have a fairly high erodibility index for wind erosion," and
11 "become 'powdery' when disturbed." AR_26, 6683-84, 6901-39. The ORC does not provide
12 shelter and shade for healthy animals. AR_45. At maximum capacity, the wild horses at the
13 ORC will produce up to 40,000 tons of manure annually. AR_9703. Yet, BLM only requires
14 JS Livestock to clean "excess manure" from the pens "a minimum of twice per year and up
15 to four times per year." AR_20.

16 The Winnemucca ORC qualifies as a large CAFO under the Clean Water Act (CWA).
17 40 C.F.R. § 122.23(b)(4). Thus, JS Livestock must obtain a National Pollutant Discharge
18 Elimination System (NPDES) permit from the Nevada Division of Environmental Protection
19 (NDEP), (hereinafter, "CAFO permit" or "NPDES permit"). NPDES permits are not required
20 to address groundwater contamination, but "state permitting authorities may impose
21 NPDES permit conditions for these discharges." AR_8719-21. BLM issued the Final EA and
22 Decision Record before NDEP started the NPDES/CAFO permit process.

23 Friends of Animals asked Defendants' counsel to notify them before BLM transports
24 additional animals to the Winnemucca ORC to determine whether a preliminary injunction
25 was necessary to prevent the transfer of wild horses and burros to the ORC. Decl. of
26 Andreia Marcuccio, ECF No. 38-1 ("Marcuccio Decl."), Ex. 2 at 2, 4, 6. On March 24, 2023,
27 Defendants' counsel stated there is "no current schedule or plan" for sending additional

1 wild horses or burros to the Winnemucca ORC, but indicated that it could not predict when
2 animals may be sent there. *Id.*, Ex. 2 at 3.

3 In April 2023, BLM issued a tentative roundup schedule which includes several
4 roundups in Nevada starting in July. *Id.*, Ex. 5. Two of the largest roundups are scheduled to
5 start on Sunday, July 9 and would remove over 3,000 wild horses. *Id.* Friends of Animals
6 reached out to Defendants counsel again, who did not provide information about when
7 animals would be sent to the Winnemucca ORC. Given this schedule, it is very likely that
8 BLM will transport a significant number of animals to the Winnemucca ORC and
9 irreparably harm these animals as well as Plaintiff and its' members' interests.

10 **STANDARD OF REVIEW**

11 "The purpose of a preliminary injunction is merely to preserve the relative positions
12 of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S.
13 390, 395 (1981). "A plaintiff seeking a preliminary injunction must establish that he is
14 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
15 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
16 the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

17 The Ninth Circuit has adopted a "sliding scale" approach where "the elements of the
18 preliminary injunction test are balanced, so that a stronger showing of one element may
19 offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
20 1131 (9th Cir. 2011). One version of the sliding scale approach is called the "serious
21 questions" test where "'serious questions going to the merits' and a balance of hardships
22 that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so
23 long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
24 injunction is in the public interest." *Id.* at 1135.

25 All claims in this case are governed by the APA, 5 U.S.C. §§ 701-706. The APA
26 requires courts to set aside agency actions that are "arbitrary, capricious, an abuse of
27 discretion, or otherwise not in accordance with law"; or "without observance of procedure

1 required by law.” *Id.* § 706(2). An agency action is arbitrary and capricious if the agency
2 “relied on factors which Congress has not intended it to consider, entirely failed to consider
3 an important aspect of the problem,” offered an explanation that conflicts with the
4 evidence before it, “or is so implausible that it could not be ascribed to a difference in view
5 or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins.*
6 *Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted).

7 ARGUMENT

8 A. Friends of Animals is likely to succeed on the merits.

9 1. BLM failed to take a hard look at the impacts of its Decision under NEPA.

10 When preparing an EA, agencies must evaluate the environmental impacts “to the
11 fullest extent possible,” 42 U.S.C. § 4332, and “take a ‘hard look’ at the environmental
12 effects of a proposed action before implementing it.” *Envtl. Def. Ctr. v. BOEM*, 36 F.4th 850,
13 872 (9th Cir. 2022). This includes “all foreseeable direct and indirect impacts.” *Idaho*
14 *Sporting Cong. Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002); 40 C.F.R. § 1508.1(g).
15 An EA must provide enough “evidence and analysis” to determine whether to prepare an
16 EIS or FONSI. *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (quotation omitted).

17 BLM failed to take a hard look at the impacts because it rushed through critical
18 environmental analysis and predetermined the outcome of the EA. *See generally*, Pl.’s Br. at
19 8-10; Pl.’s Reply Br. at 6-7. NEPA evaluations must be prepared “early enough” so that they
20 “will not be used to rationalize or justify decisions already made.” *Save the Yaak Comm. v.*
21 *Block*, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. §1502.5).

22 Here, BLM rushed to complete the EA and concluded at the beginning that they
23 would “need a signed Decision Record,” rather than proceed with the EA to determine if
24 impacts were significant. AR_6974. Understandably, BLM’s Environmental Coordinators
25 felt “blindsided” by the EA and felt they were not given “enough time or resources” to
26 “properly” prepare the EA and make sure it does not “hurt local relationships or the
27

1 environment.” AR_10602-05, 5972. Even on the day BLM released the Final EA, an
2 Environmental Coordinator stated she was “so scared we’re overlooking something trying
3 to get [the EA] done fast.” AR_10616.

4 Headquarters unlawfully pressured BLM to quickly complete the EA and prepare a
5 FONSI instead of an EIS. AR_5953 (County Manager stating that approval appears to be
6 “come hell or high water (literally)” because it is being “driven from DC.”). Unsurprisingly,
7 the Final EA fails to contain scientific analysis to justify BLM’s FONSI. Under this condensed
8 timeframe, BLM failed to use careful reasoning and take the requisite hard look at the
9 environmental impacts. BLM’s rushed EA underlies BLM’s flawed and deficient EA analysis.

10 **a. BLM’s EA improperly relied on a yet to be drafted state CAFO**
11 **permit and ignored significant questions about the impacts.**

12 BLM also failed to take a hard look at the environmental impacts because the EA
13 improperly relied on the state CAFO permit requirements, which are not specific to the
14 Winnemucca ORC. *See generally*, Pl.’s Br. at 10-18; Pl.’s Reply Br. at 7-13. The Ninth Circuit
15 has repeatedly held that when preparing an EA, agencies must independently evaluate the
16 environmental impacts and cannot “rely on state permits to satisfy review under NEPA.”
17 *Envtl. Def. Ctr.*, 36 F.4th at 872-74 (rejecting agency’s reliance on NPDES permit). “A non-
18 NEPA document—let alone one prepared and adopted by a state government—cannot
19 satisfy a federal agency’s obligations under NEPA.” *S. Fork Band Council of W. Shoshone v.*
20 *U.S. DOI*, 588 F.3d 718, 726 (9th Cir. 2009) (rejecting BLM’s reliance on state Clean Air Act
21 permit). An agency’s attempt to “rely entirely on the environmental judgements of other
22 agencies” is in “fundamental conflict with the basic purpose of [NEPA].” *Idaho v. ICC*, 35
23 F.3d 585, 595 (D.C. Cir. 1994) (quoting *Calvert Cliffs’ Coordinating Comm., Inc. v. USAEC*, 449
24 F.2d 1109, 1123 (D.C. Cir. 1971)).

25 Here, without knowing the specific terms of the Winnemucca CAFO/NPDES permit,
26 BLM improperly relied on the state agency’s judgment to ensure the impacts would be
27 insignificant. This is precisely the approach that the Ninth Circuit recently rejected. *Envtl.*

1 *Def. Ctr.*, 36 F.4th at 875. Here, like in *Environmental Defense Center*, BLM cannot “rely[] on
2 the NPDES permit to conclude” the impacts from the ORC “would be insignificant” because
3 the permit “is issued by a different” agency and “does not specifically address” the impacts
4 of the Winnemucca ORC. *Id.* Thus, BLM failed to take the requisite hard look because it
5 relied on the flawed assumption that the CAFO permit would make the impacts “minimal.”
6 *Id.* The record is replete with evidence that BLM improperly relied on the state CAFO
7 permit to determine that the ORC’s impacts were insignificant and thereby eschewed its
8 responsibility to independently evaluate the impacts. BLM claimed that various impacts
9 “would be negligible when the requirements of the CAFO permit are implemented,” and
10 that specific permit requirements are “handled through the State of Nevada and outside the
11 scope of this EA.” *See, e.g.*, AR_19, 33, 40; Pl.’s Br. at 12 (listing the impacts).

12 Importantly, a NDPEs permit is not a zero-discharge permit, 40 C.F.R. § 122.1(b)(1),
13 meaning BLM cannot rely on broad CAFO permit requirements to conclude that impacts
14 will be insignificant. *Calvert Cliffs’*, 449 F.2d at 1123 (“[T]here may be significant
15 environmental damage (*e.g.*, water pollution), but not quite enough to violate applicable
16 (*e.g.*, water quality) standards.”). Throughout the entire NEPA process, BLM did not know
17 what provisions would be included in the CAFO permit, including critical information about
18 what or how the CAFO permit would regulate the ORC because the NDEP had not yet
19 started the CAFO permit process. Thus, BLM could not properly evaluate the impacts or
20 their significance.

21 Similarly, the EA fails to take a hard look at soil impacts and wrongly claims that soil
22 resources were “analyzed in detail” in section 3.1 of the EA. AR_31. Section 3.1 summarily
23 states the ORC is located on fine-textured silty clay soils, “which are very poorly drained,
24 subject to occasional flooding, and may have a high-water table,” “a fairly high erodibility
25 index for wind erosion,” and “become ‘powdery’ when disturbed.” AR_26. BLM ignored
26 evidence that these soils will significantly impact the environment, and the design features
27 will not mitigate those impacts. *See* AR_6722-24 (BLM’s soil expert explaining that this is

1 “[n]ot the best soil” for an ORC and soil erosion will be “a long-term issue” with no long-
2 term solutions). Moreover, BLM had no reasonable basis to conclude a large CAFO holding
3 up to 4,000 animals that can generate 40,000 tons of manure annually would have the
4 same air quality impact as alfalfa fields. AR_31. Thus, BLM’s conclusion that impacts of its
5 Decision are insignificant ignores significant questions and fails to articulate “a rational
6 connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43.

7 **b. BLM violated NEPA by ignoring the impact of the Winnemucca ORC**
8 **on wild horses and burros.**

9 BLM claimed that this action was taken “[a]s part of its responsibility to manage and
10 protect [wild horses and burros] . . .” AR_1. It also concluded that the Decision will not
11 have a significant impact because “the long-term benefits of providing a safe, sanitary
12 holding facility for wild horses and burros outweigh any short-term affects.” AR_9.
13 However, BLM’s analysis suffers from a major error—it failed to consider the impact of its
14 action on the very animals that it has an obligation to manage and protect. In fact, the EA
15 contains no analysis of the detrimental, or alleged beneficial, impacts of the Winnemucca
16 ORC on wild horses or burros. BLM dismissed comments about the dangerous, inhumane,
17 and unsanitary conditions of the Winnemucca ORC by repeatedly claiming that the impacts
18 are “outside the scope of the EA,” and referencing general guidance and policy that has
19 never been subject to NEPA review. *See* AR_38, 41-42, 46. The EA’s rationale for not
20 analyzing the impacts to wild horses or burros was that “[h]olding for removed excess
21 horses is analyzed in site specific wild horse and burro gather EAs.” AR_32.

22 There are several flaws with BLM’s conclusion and its failure to consider the
23 impacts to wild horses and burros. As an initial matter, BLM has an obligation to consider
24 the specific impacts of the Winnemucca ORC, not just holding in general. *See* 42 U.S.C. §
25 4332(C) (requiring agencies to examine the environmental impacts “to the fullest extent
26 possible”). The obligation to take a hard look at the impacts of its action includes both
27

1 short-term and long-term effects, as well as beneficial and adverse effects. 40 C.F.R. §
2 1501.3(b)(2)(i), (ii).

3 There is no exception in the law or regulations that would excuse BLM from
4 considering the specific impacts of its Decision because the general impacts of holding are
5 considered in a separate EA. *S. Fork*, 588 F.3d at 726 (“The mere existence of an entirely
6 separate draft EIS, discussing a similar issue with regard to a different project, but without
7 any indication that it discussed the specific environmental impacts at issue, cannot satisfy
8 NEPA.”); *Am. Wild Horse Pres. Campaign v. Zinke*, No. 1:16-cv-00001-EJL, 2017 U.S. Dist.
9 LEXIS 161599, at *22 (D. Idaho Sept. 29, 2017) (“BLM violated NEPA’s procedural
10 requirement by failing to consider and analyze, **in the FEIS itself**, the significant impacts of
11 the chosen action alternative” on wild horses.) (emphasis added).

12 Further, it is well established that potential impacts to wild horses and burros fall
13 under NEPA. In evaluating whether BLM’s action required an EIS, the Ninth Circuit found
14 that “environmental impact is not solely on the rangelands, but on the horses as well.” *Am.*
15 *Horse Prot. Ass’n v. Andrus*, 608 F.2d 811, 814 (9th Cir. 1979). Similarly, another court found
16 that BLM violated NEPA by failing to consider the “significant impacts on the behavior and
17 social structure of the wild horses.” *Am. Wild Horse*, 2017 U.S. Dist. LEXIS 161599, *24.

18 Here, BLM’s Decision, approving and funding the Winnemucca ORC, poses unique
19 and serious risks to the well-being of the wild horses and burros that will be held there.
20 The area is subject to extreme hot and cold temperatures, snow, rain, and flooding, and the
21 Winnemucca ORC will not provide overhead shelter or windbreaks to all animals. AR_44.
22 Moreover, the pens are only required to be cleaned twice a year. AR_20. Thus, wild horse
23 and burro experts, veterinarians, advocacy groups all raised concerns about the
24 Winnemucca ORC’s negative impact on animals, including mental and physical suffering,
25 and the high risk of disease outbreaks. *See, e.g.*, AR_9697-713, 1759-71, 2280-86. These are
26 all reasonably foreseeable impacts. BLM’s own project manager stated in an email “[n]ow I
27 understand that disease transmission is a real and present danger in these corrals.”

1 AR_10549. In addition, BLM's soil analyst stated that the soil will become "a muck-hole
2 when wet and a dust bowl when dry. Not the best soil for this operation." AR_6722; *see also*,
3 *e.g.*, AR_9703 (comment explaining how locating the ORC on these soils will result in waste
4 buildup and runoff and "cause unsanitary and unhealthy conditions for the wild horses,
5 workers at the facility, and the surrounding community.").

6 Instead of responding to comments and considering the detrimental impacts of its
7 proposed action, BLM repeatedly states that impacts to wild horses and burros are outside
8 the scope of the EA and that JS Livestock and BLM staff will act in accordance with the wild
9 horse and burro Comprehensive Animal Welfare Program ("CAWP"). *See* AR_38-46. BLM's
10 reference to a general guidance document falls far short of the hard look required by NEPA.
11 In *Kern v. BLM*, the Ninth Circuit explained that BLM's short statement in its NEPA analysis,
12 similar to the one at issue here, stating that all activities will conform with BLM's guidelines
13 was "obviously inadequate." 284 F.3d 1062, 1074 (9th Cir. 2002). BLM's failure is serious
14 because the guidance they reference, CAWP, never went through notice and comment
15 rulemaking or a NEPA review process. *Id.* at 1068-69 (finding an EA inadequate because it
16 attempted to rely on guidelines that did not go through the NEPA process).

17 Additionally, the guidance fails to address specific impacts of the Winnemucca ORC.
18 For example, the CAWP, does not identify or analyze what shade is appropriate for a facility
19 in this location and merely states that BLM should evaluate what shelter is appropriate for
20 the region, the function of their facility, and the condition of the animals in their care.
21 AR_7106. BLM never considered what was appropriate shade or shelter in an area "where
22 summer temperatures can reach a high of 91 degrees and winters a low of 17 degrees with
23 snow." AR_44 . Nor did it consider the impact of holding up to 4,000 animals in the
24 Winnemucca ORC without adequate shade and shelter. BLM's failure to consider how the
25 ORC will impact wild horses and burros violates its obligations under NEPA. *See Am. Wild*
26 *Horse*, 2017 U.S. Dist. LEXIS 161599, at *27 (finding that NEPA mandates that BLM take a
27

1 “hard look” at how its decision “affects the behavior and characteristics of the wild horses
2 with sufficient detail to support its conclusions.”).

3 BLM also failed to consider the impacts of transferring animals from public lands to
4 the Winnemucca ORC. Here, the roundup and removal of an additional 4,000 wild horses
5 and burros is a reasonably foreseeable future effect of BLM’s Decision and a connected
6 action that cannot proceed unless BLM funds the Winnemucca ORC. Thus, BLM violated
7 NEPA by failing to consider these impacts. *See* 40 C.F.R. §§ 1508.1(g), 1501.9(e)
8 (“connected actions include actions that “[c]annot or will not proceed unless other actions
9 are taken previously or simultaneously.”).

10 The roundup and removal of an additional 4,000 wild horses and burros will not be
11 able to proceed without BLM funding the Winnemucca ORC, and the Winnemucca ORC will
12 not be needed if BLM stops rounding up wild horses and burros. As BLM explained in its
13 report to Congress “wild horse and burro herds would decrease significantly as off-range
14 holding increases.” AR_9421. Thus, BLM cannot ignore the impacts of removing wild horses
15 and burros to put them in the Winnemucca ORC where, like here, those actions are
16 “inextricably intertwined.” *Indigenous Env’tl. Network v. U.S. Dep’t of State*, 317 F. Supp. 3d
17 1118, 1121 (D. Mont. 2018) (citing *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985)).

18 The Winnemucca ORC, and corresponding removal of additional wild horses and
19 burros from public lands, will impact the health and viability of the populations on public
20 lands and make it more difficult for people to observe, photograph, and study those
21 animals. AR_9708-10; *see also* AR_9782-86 and AR_9755-73 (studies showing how wild
22 horses and burros are essential to a healthy ecosystem). By failing to consider the impact of
23 its Decision on wild horses and burros, public lands, and members of the public that care
24 deeply about the animals, BLM violated NEPA.

1 **2. BLM failed to consider reasonable alternatives to the Winnemucca ORC.**

2 The Court should not accept BLM's deficient and self-serving alternatives analysis.
3 *See generally*, Pl.'s Br. at 25-28; Pl.'s Reply Br. at 16-19. NEPA requires agencies to study,
4 develop, and describe appropriate alternatives to the proposed action in its EA. *N. Idaho*
5 *Cmty. Action Network v. U.S. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008); 42 U.S.C. § 4332(E).
6 "[C]onsideration of alternatives is critical to the goals of NEPA." *Bob Marshall All. v. Hodel*,
7 852 F.2d 1223, 1228 (9th Cir. 1988). Agencies must "give full and meaningful consideration
8 to all viable alternatives in the [EA]." *Envtl. Def. Ctr.*, 36 F.4th at 878 (quotation omitted).

9 An agency violates NEPA when it "contrive[s] a purpose so slender as to define
10 competing 'reasonable alternatives' out of consideration (and even out of existence)" and
11 "thereby excludes what truly are reasonable alternatives." *Simmons v. USACE*, 120 F.3d 664,
12 666 (7th Cir. 1997). Agencies must evaluate alternative means "to accomplish the *general*
13 goal of an action," not "alternative means by which a particular applicant can reach his
14 goals." *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

15 Here, BLM's purpose statement is "to construct, maintain, and operate an ORC
16 facility through a BLM contract with the Contractor for a maximum of 4,000 excess [wild
17 horses and burros] on 100 acres of private land near Winnemucca, Nevada." AR_17. On its
18 face, this statement is unreasonably narrow because it restricted alternatives to one
19 possible preordained outcome: funding the Winnemucca ORC. BLM's general goal to
20 provide more space for wild horses and burros could be achieved by other reasonable
21 alternatives. Thus, BLM should have considered alternatives that achieve this general goal
22 such as reducing the number of livestock that graze in herd management areas and
23 reevaluating appropriate management levels. AR_1762, 9709-12.

24 Even if the Court could find that BLM's purpose statement was proper, BLM still
25 failed to "give full and meaningful consideration to all viable alternatives in the [EA]." *Envtl.*
26 *Def. Ctr.*, 36 F.4th at 876-78 (quotation omitted). BLM failed to consider viable alternatives
27 such as contracting with a long-term holding facility, establishing a BLM managed short-

1 term ORC, and imposing conditions to make the ORC safer and more humane. *See, e.g.*,
2 AR_1762, 1766. These alternatives meet the EA’s stated need “to provide holding space” to
3 safely and humanely care for animals removed from public lands. AR_17. However, BLM
4 failed to explain why it did not consider these reasonable alternatives. *W. Watersheds Proj.*
5 *v. Bernhardt*, 543 F. Supp. 3d 958, 984 (D. Idaho 2021) (holding that BLM violated NEPA by
6 failing to explain its refusal to consider reasonable alternatives in the EA).

7 **3. BLM failed to provide a reasonable explanation for its FONSI and how**
8 **mitigation will reduce the impacts to the point of insignificance.**

9 BLM’s scarce EA and FONSI lack analytical data regarding the efficacy of the
10 mitigation measures and fail to provide a convincing statement explaining how the impact
11 of the ORC would be insignificant. Pl.’s Br. at 28-31; Pl.’s Reply Br. at 19-20. NEPA requires
12 agencies to prepare a detailed EIS for “major Federal actions significantly affecting the
13 quality of the human environment.” 42 U.S.C. § 4332(C). To determine whether the impacts
14 are significant, agencies must “analyze the potentially affected environment and degree of
15 the effects of the action,” and should consider any connected actions. 40 C.F.R. § 1501.3(b).

16 To prevail on a claim that an agency failed to prepare an EIS, “plaintiffs need not
17 prove that significant environmental effects *will* occur; they need only raise a ‘substantial
18 question’ that they might.” *Envtl. Def. Ctr.*, 36 F.4th at 878-79 (quotation omitted)
19 (emphasis in original). The Ninth Circuit has regularly described this as a “low standard.”
20 *Id.* at 879 (quotation omitted). The agency must provided “a convincing statement of
21 reasons to explain why a project’s impacts are insignificant.” *350 Mont. v. Haaland*, 50 F.4th
22 1254, 1265 (9th Cir. 2022) (internal quotations omitted). “Conclusory assertions about
23 insignificant impacts will not suffice.” *Envtl. Def. Ctr.*, 36 F.4th at 879.

24 Further, a FONSI cannot rely on hypothetical mitigation measures. A “mitigated
25 FONSI” is “a finding that explains that an action will not have significant effects because of
26 the adoption of mitigation measures and, therefore, an EIS would not be required.”

27 AR_9342. BLM can only rely on a mitigated FONSI if it can “reasonably conclude, based on

1 the EA analysis, that the mitigation measures would be effective in reducing the effects to
2 nonsignificance.” AR_9279. Mitigated FONSI must contain strong evidence that mitigation
3 will be effective, and agencies must develop the proposed mitigation measures “to a
4 reasonable degree.” See *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734 (9th
5 Cir. 2001) (internal quotation omitted). Thus, “[a] perfunctory description or mere listing
6 of mitigation measures, without supporting analytical data,” is insufficient to support a
7 FONSI. *Id.* (internal citations & quotations omitted).

8 Here, BLM’s FONSI is a mitigated FONSI because BLM claims the impacts of the
9 Winnemucca ORC will only “be negligible when the requirements of the CAFO permit are
10 implemented.” AR_9-10, 19, 31, 33. BLM’s EA contains zero analysis regarding the efficacy
11 of the mitigation measures. For example, BLM’s EA almost exclusively relies on the CAFO
12 permit as a mitigation measure by claiming resources will not be impacted because the
13 contractor will obtain and comply with a CAFO permit. See, e.g., AR_21, 28-29. However,
14 since the CAFO permit process had not been started when BLM issued the Final EA, it was
15 impossible for BLM to “state any enforceable mitigation requirements,” 40 C.F.R. §
16 1501.6(c), let alone evaluate their effectiveness. Instead of evaluating the specific CAFO
17 permit requirements for the Winnemucca ORC, BLM merely listed “[e]xamples of potential
18 [CAFO permit] requirements.” AR_19. This “perfunctory description” of mitigation
19 measures, “without supporting analytical data” is insufficient to support a FONSI. *Nat’l*
20 *Parks*, 241 F.3d at 734.

21 Finally, BLM provided no support for its conclusion that the “[l]ong-term benefits of
22 providing a safe, sanitary holding facility for wild horses and burros would outweigh any
23 short-term affects.” AR_9. The EA has no analysis of the impact to animals, let alone the
24 short-term effects compared to the alleged benefits. See AR_11-30.

25 **4. BLM’s Decision violates its duty to protect wild horses and burros and**
26 **breaches the ban on treating them inhumanely.**

27 BLM’s Decision defies its duty to protect wild horses and burros and violates the ban

1 on inhumane treatment because the ORC will cause “stress, injury, or undue suffering to a
2 wild horse or burro and is not compatible with animal husbandry practices accepted in the
3 veterinary community.” 43 C.F.R. § 4700.0-5(f) (definition of inhumane treatment); 43
4 C.F.R. § 4770.1 (prohibiting inhumane treatment). According to the American Veterinary
5 Medical Association (AVMA), protecting an animal’s welfare means “providing for its
6 physical and mental needs” and “[g]ood animal welfare requires disease prevention and
7 veterinary treatment, appropriate shelter, management, nutrition, [and] humane handling.”
8 AR_2282. None of these will be provided in the Winnemucca ORC.

9 Several veterinarians commented on the inhumaneness of BLM’s Decision. For
10 example, veterinarians explained that “[t]he lack of space” provided for the animals “in this
11 [CAFO] will lead to cramped and inhumane conditions” and “the close quarters outlined [in
12 the EA] will not provide the adequate space necessary for wild horses and burros to
13 maintain their well-being and health.” AR 1169. Another veterinarian explained that the
14 conditions are “absolutely not appropriate for the health of the horses” and the “severe
15 overcrowding . . . would exponentiate viral and bacterial disease transmission, excessive
16 stress put on the horses due such high population density, and would adversely affect the
17 health of the horses.” AR_2280.

18 The fact that BLM merely requires the pens to be cleaned two times a year, AR_20, is
19 also inhumane and increases the risk of infection and disease. The lack of cleaning at the
20 ORC, means the animals eat, sleep, and live in their own waste and are needlessly exposed
21 to increased bacteria in an environment where infections are likely to spread, causing
22 death and suffering. *See, e.g.,* AR_9704-06, 498.

23 In addition, the Winnemucca ORC will not provide adequate shelter and shade,
24 causing unnecessary stress and suffering, heat exhaustion, and possibly death. *See, e.g.,*
25 AR_2282 (“Standard welfare practices would dictate that shelters should be adequate to
26 stop wind and provide shade for **all** wild horses and burros.”) (emphasis in original). BLM’s
27 own minimum adoption requirements in Nevada indicate, “[s]helter shall be available to

1 mitigate the effects of inclement weather and temperature extremes.” AR_1766-67.

2 BLM’s reference to its internal guidelines, the CAWP, in response to concerns from
3 experts and veterinarians is misplaced because those guidelines do not ensure humane
4 treatment. The guidelines do not identify how often a facility of this type should be cleaned
5 or what type of shelter is appropriate in areas with extreme weather. Nothing in the WHBA,
6 regulations, or anywhere else in the record indicates that compliance with the CAWP
7 protects against inhumane treatment.

8 **B. Friends of Animals’ and its members’ recreational, aesthetic, and professional**
9 **interests in the environment, including wild horses and burros, will be**
10 **irreparably harmed if BLM sends animals to the Winnemucca ORC.**

11 “Environmental injury, by its nature, can seldom be adequately remedied by
12 money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If
13 such injury is sufficiently likely, therefore, the balance of harms will usually favor the
14 issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Vill. of Gambell*,
15 480 U.S. 531, 545 (1987); *see also All. for the Wild Rockies*, 632 F.3d at 1135. “Ongoing
16 harm to the environment constitutes irreparable harm warranting an injunction.” *Envtl.*
17 *Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 991 (9th Cir. 2020) (quotation omitted).

18 “Plaintiffs have met their burden to establish a likelihood of irreparable harm by
19 showing that the [proposed action] will have *some* environmental impacts, even if the
20 extent of those impacts are not fully known.” *Brady Campaign to Prevent Gun Violence v.*
21 *Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) (emphasis in original). Thus, a likelihood of
22 irreparable injury is “easily shown” in environmental cases. *Flexible Lifeline Sys. Inc. v.*
23 *Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011). Moreover, irreparable harm “does
24 not focus on the significance of the injury, but rather whether the injury, irrespective of
25 its gravity, is *irreparable* - that is, whether there is any adequate remedy at law.” *Sierra*
26 *Club v. Martin*, 933 F. Supp. 1559, 1570-71 (N.D. Ga. 1996).

1 “The presence of strong NEPA claims gives rise to more liberal standards for
2 granting an injunction.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007)
3 (quotation omitted). Under NEPA, “irreparable injury flows from the failure to evaluate
4 the environmental impact of a major federal action.” *High Sierra Hikers Ass’n v.*
5 *Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). The NEPA procedural injury “is tied to a
6 substantive harm to the environment — the harm consists of added risk to the
7 environment that takes place when governmental decisionmakers make up their minds
8 without having before them an analysis (with public comment) of the likely effects of
9 their decision on the environment.” *Citizens for Better Forestry v. USDA*, 341 F.3d 961,
10 970-71 (9th Cir. 2003) (internal quotations & citations omitted). The rationale is that:

11 The NEPA duty is more than a technicality; it is an extremely important
12 statutory requirement to serve the public and the agency *before* major federal
13 actions occur. If plaintiffs succeed on the merits, then the lack of an adequate
14 environmental consideration looms as a serious, immediate, and irreparable
injury. Although the *balancing* of this harm against other factors is necessarily
particularized, the injury itself is clear.

15 *Found. On Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original)
16 (citations omitted); *Winter*, 5 U.S. at 23 (“Part of the harm NEPA attempts to prevent in
17 requiring an EIS is that, without one, there may be little if any information about
18 prospective environmental harms and potential mitigating measures.”).

19 Here, Friends of Animals and its members suffered procedural injury because there
20 is strong evidence that BLM violated NEPA. Like in *South Fork*, BLM’s improper reliance on
21 the state CAFO permit indicates there is a “high” likelihood of irreparable harm because
22 BLM did not conduct an “adequate study of the adverse effects [of the action] and possible
23 mitigation.” 588 F.3d at 728 (rejecting BLM’s reliance on state Clean Air Act permit).

24 Throughout the entire NEPA process, BLM did not know critical information about what or
25 how the CAFO permit would regulate the Winnemucca ORC, such as how manure would be
26 managed and stored. BLM’s “failure to properly assess the significance” of the impacts
27 “causes irreparable injury” because under NEPA, “irreparable injury flows from the failure

1 to evaluate the environmental impact of a major federal action.” *Sierra Club*, 510 F.3d at
2 1034 (quotation omitted). BLM’s violation of NEPA is not compensable by money damages.
3 *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 n. 10 (D.D.C. 1993) (finding defendant’s
4 failure to adequately consider the environmental effects of its action is “a harm that is
5 serious—and obviously irreparable once the contemplated action becomes a *fait*
6 *accompli*”).

7 In addition to procedural harm, declarations from Friends of Animals’ members
8 demonstrate that transferring wild horses and burros to the Winnemucca ORC will cause
9 them aesthetic, professional, and recreational harms. *See* Decl. Craig Downer, ECF 26-1
10 (“Downer Decl.”); Decl. of Steve Rose, ECF 26-2 (“Rose Decl.”); Decl. of Eddie Booth, ECF 26-
11 3 (“Booth Decl.”); Suppl. Decl. of Eddie Booth, ECF 35-3 (“Booth. Suppl. Decl.”); Suppl. Decl.
12 of Craig Downer, ECF 35-2 (“Downer Suppl. Decl.”).

13 First, Friends of Animals and its members will be irreparably injured by seeing and
14 contemplating the wild horses and burros being subjected to stress, inhumane conditions,
15 and harm at the Winnemucca ORC. The Court “may consider subjective, psychological harm
16 in its irreparable-harm analysis.” *Vencor Nursing Centers, L.P. v. Shalala*, 63 F. Supp. 2d 1, 12
17 (D.D.C. 1999). *Fund for Animals v. Espy* illustrates why harm to animals constitutes
18 irreparable harm sufficient for preliminary injunctive relief. There, the court enjoined
19 government approval of research that would have resulted in the capture, transport, study,
20 and eventual slaughter of bison. 814 F. Supp. at 143-44. The plaintiffs had an affection for
21 the bison and enjoyed seeing them “so that the sight, or even the contemplation, of
22 treatment in the manner contemplated of the wild bison, which they enjoy and have seen
23 and are likely to see captured for the program, would inflict aesthetic injury” *Id.* at 151.
24 Plaintiffs’ injuries were “not compensable in money damages because . . . aesthetic
25 interests . . . are not ownership interests in property susceptible to monetary valuation.” *Id.*

26 Several courts have found that emotional distress, including that caused by the
27 knowledge of harm to animals that he or she cares about, constitutes irreparable injury,

1 particularly where, as here, it would lessen a person’s ability to observe or study animals
2 harmed by agency action. One court expressly found that harm to plaintiffs and their
3 members “through the unauthorized taking of red wolves is [] irreparable, as
4 environmental and aesthetic injuries by their nature are not adequately remedied by
5 money damages and have permanent or long-lasting effects.” *Red Wolf Coal. v. N.C. Wildlife*
6 *Res. Comm’n*, No. 2:13-CV-60-BO, 2014 U.S. Dist. LEXIS 65601, at * 5 (E.D.N.C. May 13, 2014)
7 (citing *Amoco Prod.*, 480 U.S. at 544). The court found that the “ability to enjoy red wolves
8 in the wild and the forced contemplation of an increase in red wolf mortality would cause
9 them to suffer irreparable harm.” *Id.* Similarly, another court granted a preliminary
10 injunction based on the irreparable harm to plaintiffs caused by defendants’ “failure to
11 comply with NEPA and the aesthetic injury the individual plaintiffs would suffer from
12 seeing or contemplating . . . bison being killed in an organized hunt.” *Fund for Animals v.*
13 *Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998); *see also Fund for Animals v. Norton*, 281 F. Supp. 2d
14 209, 222 (D.D.C. 2003) (finding that plaintiffs demonstrated “substantial irreparable harm
15 to their interests” absent injunctive relief by the contemplation that the government would
16 cull 525 mute swans); *HSUS v. Bryson*, 2012 U.S. Dist. LEXIS 74688, at *22 (D. Or. May 30,
17 2012) (finding that plaintiffs would suffer irreparable harm from “the idea that some of
18 [the California Sea Lions] she has come to know may be killed.”).

19 Here, both Mr. Downer and Mr. Rose live in Nevada and have a deep connection to
20 wild horses and burros throughout Nevada and the West. Downer Decl. ¶¶ 3-7; Rose Decl.
21 ¶¶ 2-5. Mr. Downer is a wildlife ecologist who has “extensively observed and studied wild
22 horses and their habitats.” Downer Decl. ¶ 3. Mr. Rose is a wild horse advocate who views
23 wild horses “all across Nevada.” Rose Decl. ¶ 4. Mr. Downer and Mr. Rose feel compelled to
24 check on animals at the Winnemucca ORC and have plans to do so when it is open to the
25 public. Downer Decl. ¶ 9; Rose Decl. ¶ 8. They describe multiple conditions particular to the
26 Winnemucca ORC that are “inhumane and dangerous,” including that: (1) the area has
27 “frigid winter weather” and “extreme heat in the summer”; (2) the soils in the area are

1 prone to flooding and dust which will harm wild horses and burros and likely cause dust
2 pneumonia; and (3) the size and capacity of the ORC, along with inadequate cleaning will
3 “pose a serious, unnecessary risk of infection and disease transmission that will likely lead
4 to suffering and death.” Downer Decl. ¶ 11; Rose Decl. ¶ 7-8; Downer Suppl. Decl. ¶ 5
5 (“specific conditions at the Winnemucca ORC are more inhumane than other ORCs”). Like
6 in the cases described above, seeing, or even contemplating, the animals being subjected to
7 stress, inhumane conditions, and harm at the ORC will cause Mr. Downer and Mr. Rose
8 “great sadness” and “distress.” Downer Decl. ¶ 9; Rose Decl. ¶ 8. This constitutes
9 irreparable harm because aesthetic interests are not “susceptible to monetary valuation.”
10 *Fund for Animals v. Espy*, 814 F. Supp. at 151.

11 Second, sending animals to the Winnemucca ORC will irreparably harm Friends of
12 Animals and its members by diminishing their opportunities to observe, enjoy, and study
13 wild horses and burros on public land. The roundup and removal of an additional 4,000
14 wild horses and burros is a reasonably foreseeable future effect of BLM’s Decision and a
15 connected action that cannot proceed unless BLM funds the Winnemucca ORC. Pl.’s Br. at
16 23-24 (citing AR_9697, 10748, 10623, 9421, 10011). Courts have found that removing wild
17 horses from public land will likely cause significant and irreparable harm to plaintiffs and
18 their members, particularly when members have a personal connection with the wild
19 horses. *See, e.g., Friends of Animals v. U.S. BLM*, No. 3:15-CV-0057-LRH-WGC, 2015 U.S. Dist.
20 LEXIS 17575, at *10-11 (D. Nev. Feb. 11, 2015); *Kathrens v. Zinke*, 323 F. Supp. 3d 1142,
21 1153 (D. Mont. 2018). For example, in previous litigation between these parties over a
22 proposed roundup, the Nevada District Court found plaintiffs established irreparable harm
23 because its members “have visited, photographed, filmed, studied, and written about the
24 Pine Nut herd in recent years and desire to do so in the future” and thus, the removal of
25 200 horses “will adversely affect plaintiffs’ connection with this herd.” *Friends of Animals*,
26 2015 U.S. Dist. LEXIS 17575 at *10-11.

1 Here, in absence of a preliminary injunction, BLM will send wild horses and burros
2 to the Winnemucca ORC. This will harm Mr. Downer and Mr. Rose by reducing their ability
3 to view, study, and photograph animals on public lands in Nevada with whom they have a
4 personal connection. *See* Downer Decl. ¶¶ 3-7, 13-15, 17-18; Rose Decl. ¶¶ 3-6, 9; Downer
5 Suppl. Decl. ¶ 8. Mr. Downer has plans to visit herds on BLM’s 2023 roundup schedule as
6 soon as this summer. Downer Suppl. Decl. ¶ 8. If wild horses and burros are sent to the
7 Winnemucca it will impact his ability to study these herds and diminish his “enjoyment of
8 observing these herds in the wild.” *Id.* Like in *Friends of Animals*, the removal of wild horses
9 and burros from public lands to be sent to the Winnemucca ORC “will adversely affect
10 plaintiffs’ connection with th[e] herd[s].” 2015 U.S. Dist. LEXIS 17575 at *10-11.

11 Finally, the environmental injury to the local area near the Winnemucca ORC will
12 irreparably harm Friends of Animals and its members. Friends of Animals met its burden to
13 establish irreparable harm by demonstrating that sending wild horses and burros to the
14 Winnemucca ORC will have at least “some environmental impacts” on the local area. *Brady*
15 *Campaign*, 612 F. Supp. 2d at 25 (emphasis in original). CAFOs, commonly known as
16 “factory farms,” produce a massive amount of manure and pollution. *Food & Water Watch v.*
17 *U.S. EPA*, 20 F.4th 506, 510 (9th Cir. 2021) (describing CAFOs’ impacts). Here, since the
18 CAFO permit will allow for discharge into waters of the U.S., 40 C.F.R. § 122.1(b)(1), some
19 amount of contamination will inevitably occur and irreparably harm the environment. The
20 conditions at the Winnemucca ORC such as the soil composition and high-water table
21 increase the likelihood of groundwater contamination, runoff, soil erosion, dust, and
22 flooding. At maximum capacity the wild horses at the Winnemucca ORC will produce up to
23 40,000 tons of manure annually, AR_9703, yet, BLM only requires removal of “excess
24 manure” from the pens two to four times a year. AR_20. This condition is wholly
25 inadequate and will likely lead to water pollution because tons of manure will be left on the
26 ground and the “nutrients [will] overwhelm the absorptive capacity of the soil, and either
27 run off or [] leach[] into the groundwater, polluting local streams, creeks, groundwater, and

1 drinking water supplies.” AR_9703, 8721 (“Surface water concerns exist when surface
2 runoff leaves the field(s) from average annual precipitation, rain on snow or frozen ground,
3 or irrigation” and “[g]roundwater concerns exist when surface water (from any source)
4 does not leave the field.”). Further, groundwater contamination is highly likely because the
5 Winnemucca ORC is located on an area with a high-water table, AR_6683-84, which
6 contributes to the “downward movement of water and nutrients.” AR_8721.

7 The soil composition at the Winnemucca ORC also increases the likelihood of air and
8 water pollution. The ORC is located on fine-textured, silty, clay soils “which are very poorly
9 drained, subject to occasional flooding,” have a high-water table and “a fairly high
10 erodibility index for wind erosion,” and “become ‘powdery’ when disturbed.” AR_26, 6683-
11 84, 6901-39 (email from BLM’s soil expert and attached custom soil report finding the soils
12 have “[v]ery high” surface runoff and “the chance of flooding is 5 to 50 percent in any
13 year”). The dusty conditions are more likely to reduce air quality because gaseous
14 emissions are released from the decomposition of animal manure and particulate
15 substances are released by movement of animals. AR_1788. Moreover, it is well known that
16 “[w]hile CAFOs are required to have permits that limit the levels of manure discharge,
17 handling the large amounts of manure inevitably causes accidental releases which have the
18 ability to potentially impact humans.” AR_1786-87 (discussing accidental releases).

19 These environmental impacts will irreparably harm Plaintiff and its members. Eddie
20 Booth is a wildlife advocate and conservationist who lives and works as a realtor in
21 Paradise Valley and Winnemucca, Nevada. Booth Decl. ¶¶ 1, 9-10, 12. One of his homes is
22 less than 15 miles from the Winnemucca ORC and his other home is less than 23 miles from
23 the ORC. Booth Suppl. Decl. ¶ 2. Mr. Booth enjoys recreating in several mountain ranges,
24 viewing wildlife, and driving near the ORC. *Id.* ¶ 3-4. He worries the ORC will harm his
25 “personal, recreational, aesthetic and professional” interests in travel, leisure, and
26 sightseeing without increased traffic, odor, noise, degraded roads, and air, water, and other
27 pollution. Booth Decl. ¶¶ 5-7, 8, 11-13. Further, Mr. Downer has visited Winnemucca,

1 Nevada “numerous times” and “frequently” visits his family and friends who live there.
2 Downer Suppl. Decl. ¶ 6. He enjoys exploring the land, viewing and photographing plants
3 and wildlife, and bird watching, and he plans to visit this summer. *Id.* He worries the
4 pollution from “unnaturally concentrating” up to 4,000 animals at the ORC will negatively
5 impact the land he recreates in and the species he enjoys observing. *Id.* Mr. Booth and Mr.
6 Downer will be irreparably harmed by the pollution and other impacts that will occur from
7 BLM sending animals to the ORC, as this harm cannot be remedied by money damages.

8 **C. The balance of equities and public interest weigh in favor of granting Friends of**
9 **Animals’ preliminary injunction motion.**

10 A plaintiff seeking a preliminary injunction must demonstrate that “the balance of
11 equities tips in [its] favor” and that “an injunction is in the public interest.” *Winter*, 555 U.S.
12 at 20. When the government is the opposing party, the balance of equities and public
13 interest factors “merge.” *Nken v. Holder*, 556 U.S. 418, 420 (2009).

14 Here, the public interest weighs in favor of granting an injunction. There is
15 undoubtedly “a strong public interest in meticulous compliance with the law by public
16 officials.” *Fund for Animals v. Espy*, 814 F. Supp. at 152 (issuing preliminary injunction in
17 NEPA case). In fact, “[w]here a plaintiff has demonstrated a likelihood of prevailing upon
18 claims that a federal agency has failed to adequately consider environmental values
19 pursuant to NEPA, the courts have found injunctive relief fully warranted to serve the
20 strong public interest NEPA expresses.” *Citizen’s Alert Regarding the Env’t v. DOJ*, No. 95-
21 1702 (GK), U.S. Dist. LEXIS 18619, at *33 (D.D.C. Dec. 8, 1995).

22 If the Court grants the injunction and maintains the status quo while BLM conducts
23 the required analysis under NEPA or considers additional alternatives, then “an injunction
24 ensures that there will be at least a possibility that the agency will change its plans in ways
25 of benefit to the environment. It is this possibility that courts should seek to preserve.” *Id.*
26 (internal quotations omitted); *Soda Mt. Wilderness Council v. BLM*, 534 F. App’x 680, 684
27

1 (9th Cir. 2013) (“[B]ecause the public has an interest in having its environmental proposals
2 adequately considered, the public interest weighs in favor of granting an injunction.”).

3 In addition, Congress recognized that the public interest lies in the protection of
4 wild horses and burros through passage of the WHBA. Congress declared that wild horses
5 and burros “contribute to the diversity of life forms within the Nation and enrich the lives
6 of the American people,” and established a policy that they “shall be protected from
7 capture, branding, harassment, or death.” 16 U.S.C. § 1331. Where, like here, Congress has
8 recognized an interest in protecting specific areas or animals, the public interest favors
9 granting a preliminary injunction. *See High Sierra Hikers Ass’n*, 390 F.3d at 643.

10 Likewise, the balance of the harm weighs in favor of an injunction because Friends
11 of Animals, its members, wild horses and burros, and the environment will suffer
12 irreparable harm if BLM sends wild horses and burros to the Winnemucca ORC. *Amoco*
13 *Prod. Co.*, 480 U.S. at 545 (“the balance of harms will usually favor the issuance of an
14 injunction to protect the environment.”). In contrast, BLM will not suffer substantial harm,
15 let alone irreparable harm if the Court delays the transfer of animals to the Winnemucca
16 ORC. In issuing a preliminary injunction to protect animals, courts have previously rejected
17 assertions by the government that precluding it from controlling animal populations will
18 cause environmental damage, or that the window for removing the animals is too narrow
19 to enjoin. *See Fund for Animals v. Norton*, 281 F. Supp. 2d at 224; *see also Kathrens*, 323 F.
20 Supp. 3d at 1154-55 (finding that the “balance of equities tips sharply toward” wild horse
21 advocate plaintiffs when comparing the inconvenience and cost of delaying a wild horse
22 roundup with the irreparable harm to a wild horse herd).

23 CONCLUSION

24 For the foregoing reasons, Friends of Animals respectfully requests that this Court
25 preserve the status quo and issue an order enjoining BLM from sending wild horses and
26 burros to the Winnemucca ORC.

27 [SIGNATURE BLOCK ON THE FOLLOWING PAGE]

1 Dated: June 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 14, 2023, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon on all Parties enrolled to receive such notice.

Dated: June 14, 2023

Respectfully submitted,

s/ Andreia Marcuccio

Andreia Marcuccio

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