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November 2, 2015

Dear Mr. Forbes, Ms. Burkett, and Ms. Bogardus:

We are writing on behalf of the American Wild Horse Preservation Campaign (“AWHPC”) and its representative Deniz Bolbol, and Return to Freedom (“RTF”) and its representative Neda DeMayo in order to demand that the Bureau of Land Management (“BLM”) provide our clients with daily, unobstructed, meaningful opportunities to observe the roundup of wild horses from the Beatys Butte Herd Management Area (“HMA”) in Lake County, Oregon. The BLM’s refusal to allow representatives from AWHPC and RTF, such as Ms. Bolbol and Ms. DeMayo, access to view the Beatys Butte roundup¹ for more than one day each violates their First Amendment rights to observe these government activities.

In light of the fact that this roundup has already begun, ***this matter demands your immediate attention. Please let us know by no later than 3 p.m. Eastern on Tuesday, November 3*** whether you will agree to rectify the BLM’s violation of the First Amendment by providing Ms. Bolbol, Ms. DeMayo or other representatives of AWHPC and RTF with daily, unobstructed, meaningful observation opportunities during the Beatys Butte roundup. If we do not hear from you by that time, we will assume that you have refused to take the necessary remedial actions, and we will file suit to protect our clients’ Constitutional rights.

¹ BLM euphemistically refers to wild horse roundups as “gathers.”



The Beatys Butte wild horse roundup is a matter of significant public interest. This roundup is unusually large, aiming to permanently remove 1,400 wild horses from the public lands. This represents approximately 75 percent of the horses being targeted for removal by the BLM from public lands throughout the West for Fiscal Year 2016.² Due to the unusually large size of this roundup, the public has an especially strong interest in documenting the BLM's activities and ensuring the safe, humane treatment of the wild horses that the agency has a statutory duty to protect.

AWHPC, RTF and their representatives have a long history of observing and promoting public awareness of wild horse roundups. AWHPC and RTF have documented numerous prior roundups and work to disseminate information about roundups to the public through press releases, websites, and other media sources. AWHPC's videos of prior roundups, which it circulated to the public, led the BLM to review and revise some of its roundup practices in 2011. AWHPC and RTF thus serve as important public observers of the BLM's roundup procedures, safeguarding wild horses and the public interest in their welfare and promoting responsible agency behavior.

Members of the public and the press have the right to access and observe government activities. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). When the government impairs this right, courts apply the Supreme Court's two-part test for right-of-access claims. *Press-Enterprise Co. v. Superior Court ("Press Enterprise II")*, 478 U.S. 1, 8–9 (1986). Under that test, when a government activity has historically been open to the press and public and the public has played a significant positive role in that government activity, the government may impose only such restrictions as are narrowly tailored to serve an overriding government interest. *Id.* The Court of Appeals for the Ninth Circuit has clearly held that the test from *Press Enterprise II* applies in the context of the BLM's roundups of wild horses. *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

The BLM's roundups of wild horses clearly meet the first part of the *Press Enterprise II* test. As the District of Nevada concluded in similar litigation, "the press and general public have had access and a right to be present at wild horse roundup on public land." *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1100 (D. Nev. 2013). Moreover, "public access contributes to the purpose and functioning" of BLM's roundups of wild horses." *Id.* Public access serves "an important role in the function of the roundup" by protecting the interests of wild horses and news gathering for the public benefit and by "allow[ing] individuals to report on the government's activities as well as the health and condition of the gathered horses." *Id.* at 1101. For all these reasons, "the public has a right of access to roundups on public lands." *Id.*

Because the public has a right of access to roundups on public lands, the BLM has the duty to establish that any restrictions of that right are "narrowly tailored to serve the government's overriding interests." *Id.* A reviewing court will not "rubber-stamp an access restriction simply because the government says it is necessary." *Leigh*, 677 F.3d at 900. Instead,

² BLM Tentative FY 2016 Wild Horse and Burro Removal and Fertility Control Treatment Schedule http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management/tentative_gather_schedule.html

the court has “a duty to conduct a thorough and searching review of any attempt to restrict public access.” *Id.*

The BLM’s restrictions of the public’s right to access and observe the Beatys Butte wild horse roundup are not narrowly tailored to serve an overriding governmental interest. The BLM is currently restricting the public’s right of access to three days this week (Wednesday November 4, Thursday November 5 and Friday, November 6) despite the fact that the roundup itself is scheduled to last at least 12 days, from November 2 until November 13. The BLM has offered no plausible rationale for this seemingly arbitrary restriction, much less articulated any overriding government interest that makes this restriction necessary.

The BLM has a nation-wide policy of “full transparency in its Wild Horse and Burro Program.” BLM IM 2011-040, Protocols for Media at Wild Horse and Burro Gathers. The BLM’s National Policy Regarding Access for Public and Media Observation of Gather Operations sets forth a presumption that “[e]very gather day is considered a public observation day.” BLM IM 2013-058, at 1. The BLM’s national policy further states that the agency’s 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.” *Id.* The BLM further purports to “welcome[] media interest in its management of wild horses” and to be “committed to working with members of the media to accommodate reasonable requests for access.” BLM IM 2011-040.

The restriction of public access to the Beatys Butte roundup is a significant departure from the BLM’s national policy of transparency in its management of wild horses. Despite the presumption that every roundup day is a public observation day, the BLM has scheduled only three public observation days for this roundup, which is scheduled to last for nearly two weeks. Similarly, the BLM’s restriction of public access to only three days of observation is a significant departure from the BLM’s practice in other states. For example, during roundups in Nevada, the BLM provided AWHPC’s representatives Ms. Bolbol and other members of the public with daily observation opportunities during the entirety of roundups that lasted for weeks. In contrast, the BLM here has provided public observation for only three days out of a roundup that lasts nearly two weeks. This restriction is a departure from the BLM’s own national policies and practices and a violation of our clients’ First Amendment rights.

By restricting the public right to observe the Beatys Butte wild horse roundup, the BLM has violated the First Amendment rights of AWHPC and Ms. Bolbol and RTF and Ms. DeMayo. In order to rectify this constitutional violation, the BLM must provide daily, unobstructed, meaningful observation opportunities throughout the Beaty sButte roundup. The BLM has provided such daily, unobstructed, meaningful observation opportunities during other roundups, and it has a duty to provide them in this roundup as well.

If we do not hear from you by 3 p.m. Eastern Standard Time tomorrow, November 3, 2015, we will be taking legal action to uphold our clients’ First Amendment rights to observe this roundup. You can reach me at the email and telephone number below.

Sincerely,

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