

1 GORDON M. COWAN, Esq.  
SBN# 1781  
2 Law Office of Gordon M. Cowan  
1495 Ridgeview Drive, #90  
3 Reno, Nevada 89519  
Telephone (775) 786-6111

4  
5 Attorney for Plaintiff LAURA LEIGH

6  
7 **IN THE UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

9 LAURA LEIGH,

10 Plaintiff,

**Case No. 3:10-cv-00417-LRH-VPC**

11 vs.

12 KEN SALAZAR, in his official capacity as  
Secretary of the U.S. DEPARTMENT OF  
THE INTERIOR, BOB ABBEY, in his official  
13 capacity as Director of the BUREAU OF  
LAND MANAGEMENT; RON WENKER in his  
14 official capacity as Nevada State Director of  
the BUREAU OF LAND MANAGEMENT, et  
15 al.,

16 Defendants.

17  
18 **PLAINTIFF’S RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER;**

19 At breakneck speed starting yesterday (July 22, 2010), the Defendants’  
20 helicopter began flying again, to gather wild horses, this time in the Rock Creek Herd  
21 Management Area.

22 Once again the Defendants chose to set their horse traps on private land to  
23 assist in their keeping out the public, the press and journalists like the Plaintiff, from  
24 effectively observing the Rock Creek gather.

25 During the Owyhee Herd Management Area gather the Defendants used this  
26 “private property” tactic to strike fear among those seeking to observe the Defendants’  
27 gather operation. Members of the public were threatened with immediate, on-the-spot  
28 arrest should they “trespass,” intentionally or not, onto the very land the Defendants

1 chose to set their horse traps to complete the Owyhee gather.

2 The Defendants succeeded in intimidating the Plaintiff and her friends from  
3 attempting to observe the Owyhee gather. In Owyhee, except for perhaps one or two  
4 observers hand-picked by the Defendants, the Defendants effectively shut out entirely,  
5 the public, the press and journalists like Ms. Leigh, from observing first-hand, from  
6 reporting, and from formulating their own thought on what truly transpired in Owyhee  
7 even though this court's order directed otherwise.

8 The Defendants' Owyhee operation resulted in the death of at least twenty-one  
9 wild horses. Because the Defendants succeeded in eliminating all independent scrutiny  
10 of their own activity there, the Defendants through their contractor are able to convey  
11 publicly with impunity, the incredible tale that this tragic loss of horses was somehow,  
12 the fault of the Plaintiff.

13

14 This motion seeks the following, limited and narrow but immediate relief:

- 15 1. Immediate cessation of all horse gather activity in the Rock Creek and  
16 Little Humboldt Horse Management Areas in northwestern Elko County, to  
17 maintain the status quo until the matter may be heard by the court. There  
18 is *no* purported emergency or pressing urgency to remove horses from  
19 purported drought conditions as was contended by Defendants, in  
20 Owyhee;
- 21 2. A Temporary Restraining Order enjoining the government Defendants  
22 from conducting helicopter wild horse gathers during summer months and  
23 so close to the foaling season. There are many foals three months in age  
24 or less, running alongside the hips of their moms. If removal of some of  
25 these horses is necessary, in that event the Defendants can reschedule  
26 and complete this process in the Fall season or at the end of Summer  
27 when temperatures are more mild and foals are more mature and better  
28 adept at withstand the gather. To gather at this date is inhumane and

1 directly contradictory to provisions of the Free Roaming Wild Horse and  
2 Burro Act of 1971;

3 3. A Temporary Restraining Order that at this point requires the Defendants  
4 in no uncertain terms to include and accommodate members of the public,  
5 the press and journalists including Ms. Leigh and others who are *not*  
6 hand-picked by the Defendants, to view every step of the process of  
7 gathering horses from public lands, such that the Defendants' gather  
8 method and process becomes open and transparent from beginning to  
9 end, rather than secretive and hidden from the public as it is currently; and  
10 such that the method of protecting the health and safety of the public  
11 during these gathers is not used as the excuse to restrict, limit or  
12 otherwise offend First Amendment speech and press concerns but  
13 instead, ensures independence in observing and reporting the  
14 Defendants' gather activities in a method encouraging liberal access and  
15 safe accommodation to the public including Ms. Leigh, to observe and  
16 record these gathers;

17 4. To require the Defendants to conduct such gathers on public lands should  
18 private land owners not be willing or able to accommodate members of  
19 the public, the press, journalists or other interested persons including Ms.  
20 Leigh, in their observation of these gathers.

21 This Motion seeks the court's help in preventing a repeat of how the Defendants  
22 gathered horses and also how they shut out the public and Plaintiff from effectively  
23 viewing the Defendants' conduct in gathering wild horses at Owyhee.

24 The Motion addresses the Defendants' conduct *only* pertaining to the areas  
25 known as the **Rock Creek Herd Management Area** ("Rock Creek") and the **Little**  
26 **Humboldt Herd Management Area** ("Little Humboldt"). The Owyhee gather was  
27 completed in an air of secrecy and preclusion and is referenced as an example.  
28

1 This Motion is made in accordance with Fed.R.Civ.P. 65(b). The Motion is  
2 specifically allowed by the court's order which granted in part and denied in part the  
3 Plaintiff's requested injunctive relief which addressed the Owyhee gather. This motion  
4 is based on the pleadings and papers on file herein, the court's prior orders, the  
5 accompanying Memorandum of Points and Authorities and supporting documents filed  
6 concurrently herewith, and on such other matters as may be presented before the  
7 court. The Plaintiff specifically incorporates her briefs and supporting papers and  
8 documents previously filed and the Declarations and documents filed concurrently with  
9 this Motion..

10 Dated this 23<sup>rd</sup> day of July 2010

11 RESPECTFULLY SUBMITTED,  
12 LAW OFFICE OF GORDON M. COWAN

13 /S/

14 

---

Gordon M. Cowan Esq. (SBN 1781)  
Attorney for Plaintiff LAURA LEIGH

15 **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF**  
16 **MOTION FOR TEMPORARY RESTRAINING ORDER, ETC.**

17 Plaintiff LAURA LEIGH submits the following Memorandum of Points &  
18 Authorities in support of her Motion for a Temporary Restraining Order:

19 **BACKGROUND AND ISSUES**

20 The Defendants are mandated to *manage* wild horses. The Defendants are *not*  
21 mandated to *remove* wild horses. "Removal" is a tool the Defendants may employ in  
22 their proper management of wild horses on public lands.

23 Plaintiff challenges the final decision of the Bureau of Land Management ("BLM")  
24 to drive wild horses by helicopter, during foaling season, from public lands in Elko  
25 County. BLM calls this helicopter push the "Tuscarora Gather" ("Gather" or "BLM  
26 helicopter Gather"). The Tuscarora Gather would remove wild horses from three  
27 separate herd management areas ("HMAs"). The court recognized these three areas  
28 when engaged previously, to determine the emergency need of proceeding in the

1 Owyhee HMA. The court gave the Plaintiff the opportunity to challenge the intended  
2 gathers scheduled in Rock Creek and Little Humboldt HMAs. See the court's Order  
3 entered a week ago today, on July 17, 2010.

4 The Owyhee helicopter gather resulted in the death of at least twenty-one wild  
5 horses. Among the dead were babies. The only ones who reported these deaths and  
6 who reported the reasons for these deaths were the Defendants themselves who  
7 shielded their activities in Owyhee from independent public verification and scrutiny.  
8 The Defendants accomplished this blackout by choosing to place their horse traps on  
9 private lands rather than on public lands. That way, when the court ordered the lifting  
10 of the closure of public lands, the Defendants remained free to continue precluding the  
11 public from viewing their Owyhee gather activities, claiming it is the decision of the  
12 landowner to allow or not allow members of the public into the viewing area.

13 The BLM helicopter Gather at this point and time of year is considered by  
14 reputable professionals as "inhumane." See, attached Declarations of Nena Winand,  
15 DVM, and Lisa Jacobson, DVM. See also Dr. Nock's report, attached.

16 Temperature forecasts for Elko for today, tomorrow (Saturday) and the next day  
17 (Sunday) are expected to reach a high temperature of 95, 96 and 98 degrees,  
18 respectively.

19 The Free Roaming Wild Horse and Burrow Act of 1971 ("Wild Horse Act"),  
20 discussed in briefs previously and below, mandates that the removal of wild horses, if  
21 necessary, shall be accomplished *humanely*. See, 16 USC 1333 (b)(2)(iv)(B). The  
22 Gather in Rock Creek and Little Humboldt HMAs violates this clear provision when the  
23 Defendants scheduled their gather at the height of the hot summer and in conjunction  
24 with the *actual* foaling season. Driving horses in heat and dry conditions harms  
25 horses. (See attached Declarations of Drs. Winand and Jacobson). Driving young foals  
26 three months or less is inhumane. (See attached Declarations of Drs. Winand and  
27 Jacobson. See also, Dr. Nock's report). The Gather therefore, is contrary to law and  
28 in, "excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5

1 USC §706(2)( C).

2 The BLM's intended course at Rock Creek and Little Humboldt is harmful and it  
3 causes irreparable harm. The gathers in these areas are also not justified by recent  
4 field observations. Some reasons why the BLM's conduct is wrong are as follows:

5 *The Gather and the Actual Foaling Season*

6 The BLM's helicopter Gather interferes and unnecessarily places in harm's way  
7 young foals three months old or less. It also places in harm's way their mothers who  
8 recently gave birth and also those mares who near the completion of their pregnancy  
9 term.

10 This past Monday (four days past), a number of young foals and their moms, and  
11 pregnant mares were observed in the Rock Creek and Little Humboldt HMAs. See  
12 attached Declaration of Laura Leigh. See attached photos taken this past Monday,  
13 supported by the Declaration of Laura Leigh.

14 *The BLM's Reason for Rock Creek and Little Humboldt Gathers*  
15 *is not Supported by Recent Field Observations*

16 The Defendants' stated purpose in gathering wild horses at this point from Rock  
17 Creek is to stop damage to water areas and forage and also to fencing on private lands.  
18 The stated purpose of the gathers in these areas is not for an overpopulation of wild  
19 horses or to remove excess wild horses. In the BLM's own video explaining the  
20 purpose of the Rock Creek and Little Humboldt HMA gathers, the BLM suggests there  
21 are reasons other than removing wild horses other than because they are populated in  
22 "excess."

23 Meanwhile, evidence of water area damage or forage damage was not seen as  
24 of Monday in the Rock Creek or Little Humboldt HMAs. In fact, there were significantly  
25 more cattle seen in these areas than there were horses. If water resource and forage  
26 resource damage were an issue, then the Defendants would likewise cause the  
27 removal of cows in the area. But cows are more prevalent here than any other foraging  
28 animal, particularly horses. See, Declaration of Katie Fite attached. See Report of

1 Katie Fite, attached. See Declaration of Laura Leigh, attached. See photos attached.  
2 The photos also demonstrate ample water and more cows near water than horses. The  
3 photos demonstrate *no* damage to those areas consistent with horse use. In fact, no  
4 signs of horses were present in numerous areas in these HMAs. See Declaration of  
5 Katie Fite. See report of Katie Fite.

6 Last year the BLM canceled a scheduled gather in these HMAs because the  
7 range there was in good condition and well balanced. Now, there is a purported need  
8 to remove a significant number of wild horses from these areas although there is no  
9 published correlation as to what changed in such a short period of time to justify a  
10 removal of wild horses at this point.

11  
12 *The BLM's Reason for Rock Creek and Little Humboldt Gathers*  
13 *is not Supported by Recent Field Observations for Another Reason*

14 The second germane issue is whether the BLM maintains authority to remove  
15 horses that are not "excess horses." It appears that Congress clearly intended to  
16 protect non-excess wild free-roaming horses from removal, and that BLM's removal  
17 authority is limited to those wild free-roaming horses it determines to be "excess  
18 animals" within the meaning of the Wild Horse Act.

19 In a film the BLM recently produced in which it justifies the reasons for removing  
20 wild horses in the Tuscarora Gather (found on the internet in the BLM's website) the  
21 narrator discusses the gather at Little Humboldt. There, the Defendants admit the  
22 purpose of the Little Humboldt gather is to remove horses not because they are  
23 "excessive" but, rather, to manage them so they don't leave the HMA borders. The film  
24 admits the herd population there is *not* excessive, currently.

25 In the same movie it is explained that horses are being removed because from  
26 Rock Creek because they are traveling outside the Rock Creek HMA and that they are  
27 destroying private fences.

28 The recent field observations of Katie Fite suggests there is not an

1 overpopulation of wild horses in either of these areas. See Katie Fite Declaration and  
2 report, attached. The absence of horses and of horse tracks in Rock Creek and Little  
3 Humboldt is noteworthy and raises the issue that there may not be an excess of wild  
4 horses there. See Katie Fite Declaration and report. See Laura Leigh Declaration.

5 In *Colorado Wild Horse and Burrow Coalition, Inc v. Salazar*, 639 F. Supp 2d 87  
6 (D.D.C. 2008) the court there determined that the removal of the Douglas wild horse  
7 herd from the range was contrary to the clearly stated purpose and intent of Congress  
8 and that Congress didn't intend for the federal Defendants (nearly one and the same as  
9 are Defendants here) to remove horses not determined to be "excess." The *Colorado*  
10 court stated the following:

11 The "specific issue" here is not whether BLM may remove an  
12 entire herd of wild free-roaming horses and burros, as  
13 Defendants assert; the "specific issue" is whether BLM may  
14 remove an entire herd of wild free-roaming horses and  
15 burros that BLM concededly has not determined to be  
16 "excess animals" within the meaning of the Wild Horse Act.  
17 (Footnote omitted). For the following reasons, the Court  
18 finds that Congress clearly intended to protect non-excess  
19 wild free-roaming horses and burros from removal, and that  
20 *BLM's removal authority is limited to those wild free-roaming*  
21 *horses and burros that it determines to be "excess animals"*  
22 *within the meaning of the Wild Horse Act.* (Footnote  
23 omitted). *Id.* p 95-96

24 The *Colorado* court concluded the, BLM's decision to remove an entire herd of  
25 non-excess wild free-roaming horses and burros is an impermissible construction of the  
26 of the Wild Horse Act under step two of Chevron." *Id.* p 96

27 The *Colorado* court reasoned further, as follows:

28 BLM's authority to "manage" wild free-roaming horses and

1 burros is expressly made subject to “the provisions of this  
2 chapter[,]” 16 U.S.C. § 1333(a), including the provision that  
3 “[i]t is the policy of Congress that wild free-roaming horses  
4 and burros shall be protected from capture....” *Id.* § 1331. It  
5 would be anomalous to infer that by authorizing the  
6 custodian of the wild free roaming horses and burros to  
7 “manage” them, Congress intended to permit the animals’  
8 custodian to subvert the primary policy of the statute by  
9 capturing and removing from the wild the very animals that  
10 Congress sought to protect from being captured and  
11 removed from the wild. *Id.*

12 In this case, where the Defendants’ own movie admits that the purpose of the  
13 Little Humboldt gather is not to remove excess horses, in that event the planned gather  
14 there and removal is contrary to the Wild Horse Act. If evidence demonstrates from  
15 viable data that the herd numbers in Rock Creek and/or Little Humboldt are not  
16 excessive, then in that event, the gather and removal of the horses from Rock Creek is  
17 likewise contrary to the Wild Horse Act. See, *Colorado, supra*.

18  
19 *The BLM’s Choice to Place Horse Traps on Private Property*

20 A picture paints a thousand words. Attached hereto is a BLM map of the Rock  
21 Creek and Little Humboldt HMAs. The much larger HMA encompassed within the red  
22 border on the map denotes Rock Creek HMA. The smaller area to the southwest of  
23 Rock Creek, also encompassed within a red border denotes Little Humboldt HMA.

24 The area to the immediate south of Rock Creek HMA, *to the south of the*  
25 *southernmost border* of Rock Creek HMA, depicts a much smaller area noted with  
26 several diagonal, parallel drawn lines. This is designated by the Defendants as a  
27 closed area. Within this closed area, a red dot is seen on the map. This red dot is the  
28 published location of the Defendants’ trap site for the Rock Creek gather.

1 Several matters are noteworthy, namely the following:

- 2 1. The Defendants once again chose an area of private land on which to
- 3 place their trap, to prevent public access;
- 4 2. The Defendants' chosen trap is far to the south, off the HMA;
- 5 3. According to this map, the Defendants closed from the public not only the
- 6 private land on which the trap sits. The Defendants also closed portions
- 7 of public lands surrounding the trap site. This closure is in direct
- 8 contravention to the court's order issued a week past which required a
- 9 lifting of the closure of public lands. Public lands are depicted on this map
- 10 with a light yellowish hew whereas private lands are depicted in white.
- 11 The closed area according to this map, encompasses both public and
- 12 private lands surrounding the Defendants' chosen trap site.

13

14 *Other Noteworthy Observations*

15 There are a number of other noteworthy observations the Plaintiff is prepared to

16 offer at a hearing on these Motions. Due however, to the shortness of time, the fact the

17 Defendants have moved along rapidly to complete these gathers, and the time it would

18 otherwise take to gather and provide the court with additional useful information, makes

19 it difficult to present additional facts in short order when prompt action appears

20 necessary. Plaintiff requests she be given opportunity to be heard at a hearing.

21

22 *The Rock Creek and Little Humboldt Gathers*  
*are Contrary to Public Policy and Law*

23

24 The BLM's Gather is contrary to the stated public policy of the United States

25 relative to the management of wild horses on federal lands. The public policy is stated

26 in The Wild Free-Roaming Horses and Burro Act of 1971 which provides, in relevant

27 part, as follows:

28 Congress finds and declares that wild free-roaming

1 horses and burros are living symbols of the historic  
2 and pioneer spirit of the West; that they contribute to  
3 the diversity of life forms within the Nation and enrich  
4 the lives of the American people; and that these  
5 horses and burros are fast disappearing from the  
6 American scene. It is the policy of Congress that wild  
7 free-roaming horses and burros shall be protected  
8 from capture, branding, harassment, or death; and to  
9 accomplish this they are to be considered in the area  
10 where presently found, as an integral part of the  
11 natural system of the public lands.

12 The Wild Free-Roaming Horses and Burro Act of 1971,  
13 P.L.92-195, 16 U.S.C. 1331.

14 The BLM remains stubbornly steadfast to proceed with its helicopter Gather, just  
15 for "plan's sake," in spite of the likely resulting tragic consequences of placing in harm's  
16 way newly born foals, unweaned foals, mares who recently gave birth and mares  
17 approaching the end of their pregnancies. The BLM's choice to conduct a helicopter  
18 Gather while disregarding true conditions of mares and babies in the BLM's intended  
19 helicopter Gathers of Rock Creek and Little Humboldt, is arbitrary, capricious, it  
20 amounts to an abuse of discretion, it is otherwise not in accordance with law, or it is  
21 implemented without observance of procedure required by law.

22  
23 Prior Restraint on First Amendment Rights

24 The First Amendment to the United States Constitution provides that "Congress  
25 shall make no law...abridging the freedom...of the press."

26 Plaintiff incorporates her contentions and also her Declarations provided in  
27 support of her prior Motion for Temporary Restraining Order and the Supplement she  
28 filed in support thereof. These need not be repeated. The court previously found the

1 Defendants closure of public lands amounted to a prior restraint of the Plaintiff's First  
2 Amendment rights.

3 The court previously determined a restraining order was proper where the  
4 Defendants closed public lands. Here however, the Defendants effectively preclude the  
5 public once again, from observing the gather where the Defendants intentionally chose  
6 to place the trap sites on private property, giving the government Defendants, through  
7 the use of private land owners, the clout to arrest anyone coming near the trap site with  
8 a charge of trespass. If what transpired in Owyhee holds true for Rock Creek and Little  
9 Humboldt, the Sheriff would be there to arrest and take away on the spot, anyone who  
10 trespasses, the instant trespass occurs.

11 The Defendants, at least according to their own map, also chose also to continue  
12 closing public lands surrounding the trap site. This contravenes the clear intent of the  
13 order the court previously issued.

14 The *effective* closure of the area from the public including journalists, the press  
15 and citizens, amounts to a prior restraint on observation and fair reporting of a  
16 newsworthy event having significant public interest, which interferes with the Plaintiff's  
17 First Amendment rights. What's telling this time is that the chosen area is far to the  
18 south of the HMA from where horses are being gathered. The Defendants in essence  
19 chose an island sanctuary off the HMA to hide their trapping of wild horses from the  
20 public. The Defendants had available to them several hundred, perhaps thousands of  
21 acres of public lands on which to set their traps but chose none of it.

22 Plaintiff believes this is an intentionally contrived plan to prevent the public from  
23 observing gather activities and is meant to skirt the intent underlying court's previous  
24 ruling which compelled the Defendants to open the area up to the public.

25

## 26 **LEGAL STANDARDS**

### 27 **A. Standard of Review Under APA**

28 Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*,

1 “[a]gency action made reviewable by statute and final agency action for which there is  
2 no other adequate remedy in a court are subject to judicial review.” *Id.* § 704.

3 The APA provides that the reviewing court *shall* “hold unlawful and set aside  
4 agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or  
5 limitations, or short of statutory right.” *Id.* § 706(2)( c).

6 “To determine if the Secretary has exceeded his statutory authority under 5  
7 U.S.C. § 706(2)( c), the Court must engage in the two-step inquiry required by  
8 *Chevron.*” *Anna Jacques Hosp. v. Leavitt*, 537 F. Supp. 2d 24, 29-30 (D.D.C. 2008)  
9 [referring to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837  
10 (1984)].

11 “If the intent of Congress is clear, that is the end of the matter; for the court, as  
12 well as the agency, must give effect to the unambiguously expressed intent of  
13 Congress.” *Chevron*, 467 U.S. at 842-43. “[I]f the statute is silent or ambiguous with  
14 respect to the specific issue, the question for the court is whether the agency’s answer  
15 is based on a permissible construction of the statute.” *Id.* at 843.

16 Applying *Chevron* and the APA, we look to the Wild Free-Roaming Horses and  
17 Burro Act of 1971. See, P.L.92-195, 16 U.S.C. 1331 et. seq. (The “Wild Horse Act” or  
18 the “Act”).

19  
20 **B. The Wild Horse Act**

21 It is the public policy of the United States of America to protect and preserve  
22 wild-free roaming horses. Congress states this policy as follows:

23 Congress finds and declares that wild free-roaming horses  
24 and burros are living symbols of the historic and pioneer  
25 spirit of the West; that they contribute to the diversity of life  
26 forms within the Nation and enrich the lives of the American  
27 people; and that these horses and burros are fast  
28 disappearing from the American scene. *It is the policy of*



1 The *humane* capture language repeats in mandatory terms.

2 The *specific issue* here is *not* whether the BLM may proceed with a gather of  
3 wild horses. The issue instead, is whether the BLM may proceed with its helicopter  
4 Gather when utilizing a method and timing that is *inhumane* to the animals it seeks to  
5 capture.

6 If the BLM's method of capture is determined or considered *inhumane*, in that  
7 event the BLM's conduct would appear to be contrary to Congress' expressed intent  
8 when it mandated,

9 The Secretary *shall* cause such number of  
10 additional excess wild free-roaming horses . . .  
11 to be *humanely* captured . . . .

12 16 USC §1333 (b)(2)(iv)(B) (Emphasis Added).

13 The BLM's method if inhumane, would also be contrary to Congress' expressed, stated  
14 public policy that,

15 wild free-roaming horses and burros shall be  
16 protected from capture, branding, harassment,  
17 or death; and to accomplish this they are to be  
18 considered in the area where presently found,  
19 as an integral part of the natural system of the  
20 public lands. 16 USC §1331.

21 The attached Declarations of veterinary doctors Jacobson and Winand clearly  
22 indicate the method employed by the Defendants, the fact that they chose a harsh time  
23 of year, and that the Defendants chose to proceed irrespective of whether there are a  
24 fair number of young foals on the ground, amounts to an *inhumane* method of gathering  
25 these horses.

26 The Plaintiff is not against removing horses when it is necessary. If however, the  
27 Defendants must remove them, in that event the law indicates they must do so  
28 humanely. The Defendants intended plan is not humane and contrary to this clear

1 mandate from Congress.

2           Should the court agree there is a sufficient basis to conclude the method and  
3 timing of the gather is contrary to express provisions of Congress, then the court, “must  
4 give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at  
5 842-43.

6           Without belaboring the point further, there is sufficient evidence that would lead  
7 reasonable persons to conclude the clear, expressed intent of Congress is denigrated  
8 and violated by the BLM’s choice to conduct a helicopter Gather during the *actual*  
9 foaling season and in hot weather conditions which presently exist in Rock Creek and  
10 Little Humboldt HMAs.

11           The Defendants method and timing in conducting these gathers is contrary to the  
12 clear, express intent of Congress. Plaintiff requests the court to, “hold unlawful and set  
13 aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or  
14 limitations, or short of statutory right.” *Id.* § 706(2)( c).

15

16 **C. Injunctive Relief**

17           A plaintiff seeking a preliminary injunction must establish that he/she is likely to  
18 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
19 preliminary relief, that the balance of equities tips in his favor, and that an injunction is  
20 in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, \_\_\_ U.S. \_\_\_,  
21 129 S. Ct. 365, 374 (2008); accord, *American Trucking Associations, Inc. v. City of Los*  
22 *Angeles*, 559 F.3d 1046 (9<sup>th</sup> Cir 2009). “Irreparable harm” and “likely success on the  
23 merits” appear to go hand in hand. *Winter* modified the bulk of the decisions in the  
24 various Circuits (including the Ninth Circuit) which provided for an alternative, more  
25 flexible standard. The *Winter* standard is applied to this discussion.

26           Plaintiff will not repeat the backdrop of the suit and of the TRO Motion explained  
27 previously. Plaintiff does however, incorporate the briefs and in particular, her  
28 supporting Declarations to that Motion, previously filed therewith.

1                   *Irreparable Harm and Success on the Merits – First Amendment*

2                   The Supreme Court has made clear that “[t]he loss of First Amendment  
3 freedoms, for even minimal periods of time, unquestionably constitutes irreparable  
4 injury” for purposes of the issuance of a preliminary injunction. *Elrod v. Burns*, 427 U.S.  
5 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); see also *S.O.C., Inc. v. County of*  
6 *Clark*, 152 F.3d 1136, 1148(9th Cir.1998) (holding that a civil liberties organization that  
7 had demonstrated probable success on the merits of its First Amendment overbreadth  
8 claim had thereby also demonstrated irreparable harm). See also, *Sammartano v. First*  
9 *Judicial District Court, in and for County of Carson City*, 303 F.3d 959 (2002)(The loss  
10 of First Amendment freedoms, for even minimal periods of time, unquestionably  
11 constitutes irreparable injury for purposes of the issuance of a preliminary injunction).

12                   Such is the case here. Where the court in this case found previously that the  
13 Defendants’ conduct amounted to a prior restraint on the Plaintiff’s First Amendment  
14 rights, the Plaintiff has already satisfied irreparable harm and her likely success on the  
15 merits of the claim.

16  
17                   *Irreparable Harm and Success on the Merits – The Gathers*

18                   The only real issue here is whether the Plaintiff would suffer a perceptible harm  
19 from the removal of these horses in a manner which is inhumane and contrary to law. If  
20 so, in that event she has a strong likelihood of prevailing on the merits of the case, on  
21 that issue.

22                   Plaintiff, who spends the bulk of her time in the field studying, viewing  
23 photographing, writing about, and illustrating wild horses, clearly has strong feelings  
24 toward these animals. She makes her living doing this very activity. Her time around  
25 these horses and her likely perceptible harm is gleaned from the Declarations she  
26 provided previously to the court. (See Docket Nos. 3-3 and 5-1).

27                   There is a saying attributed to many but one of them being Will Rogers. The  
28 saying is that, “the outside of a horse is the best thing for the inside of a man.”

1 Plaintiff would suffer perceptible and irreparable harm should the gather harm  
2 young foals and mares when too young to survive a drive from a helicopter and when  
3 too young to withstand environmental and temperature conditions. She would suffer  
4 irreparable harm where she has witnessed these horses in these particular HMAs, and  
5 then come to understand that these same animals would be harmed in these gathers.  
6 (See Docket Nos. 3-3 and 5-1). Plaintiff requests being provided the opportunity in  
7 hearing to expand on her perceived harm should the court deem it necessary.

8 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992)  
9 the Court stated, "It is clear that the person who observes ... a particular animal  
10 threatened by a federal decision is facing perceptible harm, since the very subject of his  
11 interest will no longer exist." *Lujan*, 504 U.S. at 566, 112 S.Ct. 2130.

12 Again, such is the case here.

13 Where Plaintiff is likely to demonstrate a perceptible harm such as that identified  
14 in *Lujan*, then Plaintiff has a very good chance, once again, of succeeding on the merits  
15 of the case.

16 See also, *Colorado Wild Horse and Burrow Coalition, Inc v. Salazar*, 639 F.  
17 Supp 2d 87 (D.D.C. 2008) finding perceptible harm to a similar plaintiff who enjoyed  
18 seeing wild horses roam free on the range.

19  
20 *Balance of Equities*

21 Plaintiff believes the equities here tip heavily in favor of protecting her from  
22 perceived harm, not just from the gather but also from constitutional restraints.

23 On the other side of the balance, the Defendants have no excuse not to delay  
24 this gather to later in the year when it is more appropriate. They proceed recklessly for  
25 the mere sake of a gather schedule, in contravention of the Wild Horse Act.

26  
27 *Injunction in the Public Interest*

28 Clearly there is no argument there is significant public interest in the gathering of

1 wild horses. Plaintiff refers the court to its Second Motion to Take Judicial Notice  
2 which, for purposes of demonstrating the controversy (and not for the purpose of  
3 demonstrating the matters asserted therein to be true), that this particular subject of  
4 gathering and removing wild horses from public lands, is timely, noteworthy,  
5 newsworthy and is truly a public interest "hot button."

6 **CONCLUSION**

7 For reasons discussed Plaintiff respectfully requests the relief requested above  
8 be invoked promptly. The Plaintiff respectfully requests a Temporary Restraining Order  
9 issue precluding the BLM's intended, ongoing and described conduct in the Rock Creek  
10 and Little Humboldt HMAs based on the preliminary finding that the gathers in those  
11 HMAs are in, "excess of statutory jurisdiction, authority or limitations, or short of  
12 statutory right." 5 USC §706(2)( C).

13 Dated this 23<sup>rd</sup> day of July 2010

14 RESPECTFULLY SUBMITTED,  
15 LAW OFFICE OF GORDON M. COWAN

16 /S/

17 \_\_\_\_\_  
18 Gordon M. Cowan Esq. (SBN 1781)  
19 Attorney for Plaintiff LAURA LEIGH

**CERTIFICATE OF SERVICE**

[Pursuant to Fed. R. Civ. P. 5(b) & Local Rules for Electronic Filing]

I certify that I am employed at 1495 Ridgeview Drive, #90, Reno, Nevada, 89519; and, on this date I served the foregoing document(s) on all parties to this action by:

X  Electronic service:

Erik Petersen, Esq.	erik.peterson@usdoj.gov
Ayako Sato, Esq.	ayako.sato@usdoj.gov
Greg Addington	greg.addington@usdoj.gov

\_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope with postage prepaid in the United States Mail at Reno, Nevada, following ordinary business practices

Erik Peterson, Esq.  
U.S. Dept. of Justice  
Wildlife & Marine Resources Section  
Ben Franklin Station  
P.O. Box 7369  
Washington, D.C. 20044

Ayako Sato, Esq.  
U.S. Dept. of Justice  
Natural Resources Section  
Ben Franklin Station  
P.O. Box 663  
Washington, D.C. 20044

Gregory W. Addington  
U.S. Attorney's Office  
100 West Liberty Street.  
Suite 600  
Reno, NV 89501

\_\_\_\_\_ Overnight or hand delivery to:  
Erik Peterson, Esq.  
U.S. Dept. of Justice  
Wildlife & Marine Resources Section  
601 D Street, N.W., Room 3909  
Washington, D.C. 20004

Ayako Sato, Esq.  
U.S. Dept. of Justice  
Wildlife & Marine Resources Section  
601 D Street, N.W., Room 3133  
Washington, D.C. 20004

Gregory W. Addington  
U.S. Attorney's Office  
100 West Liberty Street.  
Suite 600  
Reno, NV 89501

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  
28

Facsimile to:

Erik Peterson, Esq.  
Ayako Sato, Esq.  
Greg Addington, Esq.

202 305 0275  
202 305 0506

DATED this 23<sup>rd</sup> day of July 2010

/S/

\_\_\_\_\_  
G.M. Cowan