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6 **IN THE UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 LAURA LEIGH,

9 Plaintiff,

10 **Case No. 3:10-cv-0597-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 SUPPLEMENTAL BRIEF  
FOLLOWING HEARING NOVEMBER 16, 2010**

19 At hearing conducted November 16, 2010 ("hearing") the court allowed the  
20 parties to submit additional briefing, which follows:

21 **OFFER OF PROOF**

22 At the hearing the court allowed the Plaintiff to submit an offer of proof of the  
23 testimony and other evidence the court refused Plaintiff to present at the hearing.  
24 (Hearing Transcript, p. 140-141).

25 **Claimed "Mootness" – Repetitive Conduct**

26 The government defendants contend the entire matter is mooted because the  
27 roundup is completed at Silver King. This is their principal and only viable defense. In  
28 fact, the defendants relied nearly exclusively on this "mootness" defense when

1 choosing to avoid responding to other matters raised in Plaintiff’s Amended Motion for  
2 Preliminary Injunction. [See Plaintiff’s Amended Motion (Doc 16, filed 10/01/10); and,  
3 compare Defendants’ “opposition” (Doc 22 filed 10/15/10, p. 2 of 4)].

4 The court remains persuaded by the defendants’ “mootness” argument. (See  
5 transcript, page 5 lines 2-7; page 5 lines 20-22; page 141 lines 4-8) [The court:  
6 “[i]nsofar as injunctive relief is concerned, it’s moot, for the reason that I don’t see  
7 anything to enjoin at this stage because the gathers have been completed.” (Page 141  
8 lines 5-8)].

9 *Mootness is inapplicable where the defendant ceases*  
10 *the offending conduct voluntarily but can repeat it*

11 The mere cessation of illegal activity in response to pending litigation does not  
12 moot a case, unless the party alleging mootness can show that the “allegedly wrongful  
13 behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v.*  
14 *Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610  
15 (2000) (citation omitted). Without such an exception, “the courts would be compelled to  
16 leave [t]he defendant ... free to return to his old ways.” *Porter v. Bowen*, 496 F.3d 1009,  
17 1017 (9th Cir.2007) (alterations in original) (quoting *United States v. Concentrated*  
18 *Phosphate Exp. Ass’n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)).  
19 *Accord, Rosemere Neighborhood Ass’n v. U.S. Environmental Protection Agency*, 581  
20 F.3d 1169 (9<sup>th</sup> Cir 2009).<sup>1</sup>

21 \_\_\_\_\_  
22 <sup>1</sup> See also, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705,(1973) (Were pregnancy  
23 termination make a case moot, litigation involving pregnancy would seldom survive  
24 stages of litigation. “If that termination makes a case moot, pregnancy litigation seldom  
25 will survive much beyond the trial stage, and appellate review will be effectively denied.  
Our law should not be that rigid. . . . Pregnancy provides a classic justification for a  
conclusion of nonmootness. It truly could be ‘capable of repetition, yet evading  
review’)(cites omitted). *Id.*, 410 U.S. at 125, 93 S.Ct. at 713.

26 Similarly with BLM roundups, if the termination of a roundup makes make moot a  
27 filed case, then because of the roundups’ typical short duration, the government’s  
28 offensive conduct at roundups would never be subject to judicial scrutiny. The typical  
roundup lasts in time ranging from four days to about 30 days. In 2010, there were  
thirty-two (32) BLM roundups completed, twenty (20) of which occurred in Nevada. In  
2011 for the first quarter alone, there are sixteen (16) upcoming roundups scheduled by

1 In this instance the Plaintiff is compelled to carry the burden of producing  
2 evidence that the defendants' offending conduct would repeat time and time again.  
3 The court placed this burden on the wrong party.

4 Clearly, the BLM and Dept of Interior must demonstrate such proof where *they*  
5 claim the matter has been mooted by their cessation of the offending conduct. See,  
6 *Adarand Constructors Inc. v. Slater*, 528 U.S. 216, 120 S.Ct. 722 (2000); Voluntary  
7 cessation of challenged conduct moots a case, however, only if it is "*absolutely clear*  
8 that the allegedly wrongful behavior could not reasonably be expected to recur." *United*  
9 *States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361  
10 (1968) (emphasis added). And the " 'heavy burden of persua[ding]' the court that the  
11 challenged conduct cannot reasonably be expected to start up again ***lies with the***  
12 ***party asserting mootness.***" *Friends of Earth, Inc. v. Laidlaw Environmental Services*  
13 *(TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693 (2000)(emphasis added) (quoting  
14 *Concentrated Phosphate Export Assn., Inc., supra*, 393 U.S. at 203, 89 S.Ct. 361).

15 "It is no small matter to deprive a litigant of the rewards of its  
16 efforts, particularly in a case that has been litigated up to this  
17 Court and back down again. Such action on grounds of  
18 mootness would be justified only if it were absolutely clear  
19 that the litigant no longer had any need of the judicial  
20 protection that it sought. Because that is not the case here,  
21 the petition for writ of certiorari is granted, the judgment of  
22 the United States Court of Appeals for the Tenth Circuit is

23 \_\_\_\_\_  
24 the BLM in Nevada (i.e. this very judicial district). Ms. Leigh was prepared to testify at  
the hearing to this information.

25 By example, the Silver King roundup activities lasted nineteen (19) days. This  
26 case commenced September 22, 2010. (See Doc 1). Plaintiff sought emergency relief  
27 via a TRO and Preliminary Injunction September 24, 2010 (See Docs 6 and 9). The  
28 court has yet to rule on the Preliminary Injunction originally brought sixty-eight (68) days  
past; yet the case is allegedly "moot" according to the defendants. "Our law should not  
be that rigid." *Roe v. Wade, supra*.

1 reversed, and the case is remanded for further proceedings  
2 consistent with this opinion.” *Adarand, supra*, 528 U.S. at  
3 224, 120 S.Ct. 722.

4 Where the same cast and characters from the BLM and Dept. of Interior conduct  
5 these roundups in the same fashion, on a national scale and repeatedly, it is not likely  
6 these defendants are able to surpass this heavy burden.

7 *The court in hearing refused to allow Plaintiff to put in evidence of what*  
8 *transpired at roundups occurring both prior and subsequent to Silver King*  
*that relates to the defendants’ claim of “mootness”*

9 The court allowed evidence of what transpired *only* at the Silver King roundup  
10 (euphemistically referenced by the defendants as a “gather”) but refused the Plaintiff’s  
11 offer to provide evidence of the same type offensive conduct occurring at other  
12 roundups.

13 *How the precluded evidence is relevant and helpful*

14 The purpose of such evidence is to demonstrate that the offensive conduct is  
15 likely to be repeated, time and time again in the future, based on the defendants’  
16 continuing, historical perspective. This precluded evidence is clearly relevant on the  
17 issue of “mootness” and demonstrates that “mootness” does not apply in this  
18 circumstance.

19 Precluding the Plaintiff from introducing evidence of what transpired at other  
20 roundups in comparison to what occurred at Silver King also precludes her from  
21 demonstrating that the defendants’ reasoning behind the restrictions are arbitrary,  
22 capricious and are not consistent from roundup to roundup. This is relevant on  
23 injunctive relief.

24 Precluding the Plaintiff from introducing evidence of what transpired at other  
25 roundups in comparison to what occurred at Silver King also precludes her from  
26 demonstrating how outrageous the defendants’ conduct has been toward her when  
27 these defendants single-out the Plaintiff for more restrictive measures than those  
28 imposed on others, time and time again, roundup after roundup. This evidence is a

1 relevant showing that repeatedly, the plaintiff has been discriminated against, which in  
2 turn is relevant to the issue that such offensive conduct would most likely repeat at  
3 future roundups. Of course, this is relevant to First Amendment offenses.

4 The denied evidence would also demonstrate the motive of the defendants in  
5 controlling and hiding the content of information that reaches the public through Laura  
6 Leigh. When the defendants are able to control her, they are able to control her ability  
7 to report back to the public of what is transpiring with the government's handling of a  
8 public resource – wild horses. The evidence is highly relevant on the inappropriate and  
9 illegal content-based restrictions to fully protected speech.

10 The Precluded Evidence

11 The Plaintiff Laura Leigh was prepared at hearing, to testify to the following:

12 Twin Peaks Roundup

13 Plaintiff attended the defendants' Twin Peaks roundup north of Susanville,  
14 California, August 16 to September 13, 2010. During this time the following occurred:

- 15 1. On August 24, 2010 a New York Times reporter and photographer were  
16 allowed directly into the horse capture trap during the moment of wild  
17 horse captures. At that exact same time, Laura Leigh's press credentials  
18 were not being recognized by defendants officials there; and she was  
19 precluded from having access to the trap area and held back nearly a  
20 half-mile from the trap.
- 21 2. On August 24, 2010, Laura Leigh was not allowed to walk on public land  
22 to a public road to photograph horses leaving the traps after they had  
23 been captured and loaded onto a trailer. When standing in the identical  
24 area where other members of the public were allowed to freely pass to  
25 and from their cars to the viewing area, Ms. Leigh was instructed to move  
26 and go back to the viewing area; that if she refused, it could elevate to  
27 the "next level," which she was advised by defendants, meant she could  
28 be arrested;

1 3. August 27, 2010, Mr. Dave Cattoor was caught on video admitting the  
2 following:

3 If somethin' happens we're gonna correct it quickly;  
4 just like we talked about. If it's a broken leg, gonna  
5 put it down. We're gonna slide it on the trailer; same  
6 thing; we're gonna go to town with it. **We're not**  
7 **gonna give them that one shot they want.**

8 (Cattoor, August 27, 2010, Twin Peaks roundup) (Emphasis)  
9 See Plaintiff's Complaint (Doc 1) p. 16, para. 43.

10 4. August 29, 2010, Ms. Leigh was denied the same access to a "press box"  
11 that was used by a videographer approved by the BLM. When Ms. Leigh  
12 asked for the same access, the BLM pulled the videographer from the  
13 "press box." See, Doc

14 Tonopah Roundup

15 1. This roundup removed horses from two separate BLM herd management  
16 areas ("Paymaster" and "Montezuma"). This roundup lasted seven days.  
17 The public was given access just one day. On this day, the public did not  
18 see the actual capturing of any those horses.

19 2. On September 16, 2010, Ms. Leigh was advised by Tom Seley (BLM  
20 Tonopah Field Manager) there would be no press access to the wild horse  
21 trap site. After several loads of horses were captured that morning, Ms.  
22 Leigh and the group could not see the horses being captured because  
23 she and the group were held behind a hill which prevented observation of  
24 the trap area. After the horses were captured, and after many were  
25 loaded and shipped, Ms. Leigh and group were then allowed to take a  
26 look over the hill to see what horses were left. At this point, Ms. Leigh  
27 observed an individual she knew to be a reporter for the Las Vegas Sun,  
28 who was at the horse trap who had been allowed to photograph at the

1 trap the entire morning while Ms. Leigh was precluded from the trap and  
2 held behind the hill. Ms. Leigh informed Ms. Heather Emmonds (BLM  
3 public relations specialist) of this disparity who in turn, conveyed this to  
4 Tom Seley (BLM Tonopah field manager) whom Ms. Leigh observed  
5 standing at the trap with the Las Vegas Sun reporter. Tom Seley then  
6 comes to speak with Ms. Leigh. Ms. Leigh asked for the same access as  
7 the Las Vegas Sun reporter. Tom Seley refused her request. Tom Seley  
8 was told earlier that morning Ms. Leigh was press with Horseback  
9 Magazine. Tom Seley told Ms. Leigh that morning he did not need her  
10 press credentials as he refused to take them from her hand. Ms. Leigh  
11 informed her Editor who in turn called Tom Gorey, National office BLM.  
12 The public was allowed to view the rest of loading and the days activities  
13 were terminated.

- 14 3. Ms. Leigh filed her case on Silver King because of what had transpired  
15 previously. This case was filed September 22, 2010. (Doc 1).
- 16 4. The following video clip accurately depicts that which is shown, as follows:  
17 <http://www.youtube.com/watch?v=p2p3KwmgJ6I>

18 Warm Springs – (after Silver King)

- 19 1. This BLM roundup lasted twelve (12) days from November 2 through  
20 November 13, 2010.
- 21 2. The BLM scheduled two public observation days although they limited the  
22 public and press to only one of these days. Ms. Leigh was advised there  
23 was no additional time allowed the press.
- 24 3. On November 5, 2010, Ms. Leigh arrives at Warm Springs. This is Ms.  
25 Leigh's assigned day to observe the roundup.
- 26 4. On November 5, 2010, the BLM did not roundup any horses.
- 27 5. On November 5, 2010, Ms. Leigh was allowed to see horses gathered the  
28 day previously at "temporary holding." Ms. Leigh and others were held

1 farther than 50 feet from this holding pen. Ms. Leigh and others were not  
2 allowed to walk around the holding pen, even at 50 feet distance from this  
3 holding pen. Ms. Leigh and others were allowed a total of five minutes at  
4 this location, after which they were asked to leave. The stated reason (by  
5 BLM official Tara Martinak) is they (the BLM) did not want to disturb the  
6 roundup contractor's family which included a toddler playing within ten  
7 feet of the same holding pen. Ms. Leigh observed the contractor's family  
8 including the toddler and his toys next to the same holding pen. Ms. Leigh  
9 was not able to observe any of the mares or foals within the same holding  
10 pen. The BLM had installed the snow fencing around this same holding  
11 pen.

12 6. Ms. Leigh asked if she could come back the second day. Her request  
13 was refused. However, a videographer from an online video magazine,  
14 present the same day Ms. Leigh was allowed to be present, was granted  
15 access to the second observation day because she was not able to see  
16 horses rounded up the first day (the day Ms. Leigh didn't see wild horses  
17 rounded up).

18 Beth Slagsvol was prepared at hearing, to tell the court the differences in her  
19 access at Moriah versus Silver King. Ms. Slagsvol traveled from South Carolina to  
20 testify September 16, 2010. She testified of her observations at Silver King when she  
21 was present there late September 2010. In addition to other comparisons Ms. Slagsvol  
22 was prepared to testify to the following:

- 23 1. Ms. Slagsvol attended the Moriah roundup (also in the Ely, Nevada BLM  
24 district) which occurred August 27, 2010, prior to Silver King.
- 25 2. At Moriah, Ms. Slagsvol and her companion Rachel were allowed full  
26 access to trap pens and had no visual obstructions to seeing horses  
27 captured, loaded, transferred, and handled.
- 28 3. At Moriah, Ms. Slagsvol and her companion were allowed to hear the

1 helicopter pilot's radio transmissions and comments.

- 2 4. When Ms. Leigh was present at Silver King, the access for all, particularly  
3 Ms. Leigh, became much more controlled; and Ms. Leigh appeared to be  
4 *persona non grata* with the BLM.

5 Deniz Bolbol was present in court September 16, 2010. Ms. Bolbol was  
6 prepared to testify to the following:

- 7 1. Ms. Bolbol was present and personally observed when the New York  
8 Times reporter and photographer were in the trap area at Twin Peaks  
9 (see above).
- 10 2. Ms. Bolbol was present at the "roadblock" which occurred during the  
11 Owyhee roundup; that Ms. Bolbol and Ms. Leigh were refused access to  
12 the trap area at Owyhee while others from the public were granted  
13 access.
- 14 3. Ms. Bolbol confirms all that Ms. Leigh indicates occurred at Broken Arrow  
15 (see above).
- 16 4. Ms. Bolbol was present at the Wild Horse and Burro meeting in Reno,  
17 Nevada November 2009 when Mr. Don Glen (BLM Director of Wild Horse  
18 and Burro Program) when he stated, all BLM roundups are open to the  
19 public every day.
- 20 5. That the following video link is an accurate depiction of what is displayed  
21 and said by Mr. Don Glen: <http://www.youtube.com/watch?v=fvCE5PTIARA>
- 22 6. Ms. Bolbol was present at the BLM Wild Horse and Burro workshop in  
23 Denver, Colorado in June 2010 when Ms. Leigh questioned Lilly Thomas  
24 (BLM employee in charge of long-term holding facilities and public access  
25 protocol) why wild horse holding facilities were being closed to public  
26 access and why roundups were being restricted from public observation.  
27 Ms. Bolbol taped the following responses from Ms. Thomas:

28 "Because working with wild horses is not a pretty sight and its very

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complicated.”

“We’re not that good as far as education.”

“Its caused us to have a really hard time to try to explain what’s happening.”

7. That the following video link is an accurate depiction of what is displayed and said by Ms. Thomas: <http://www.youtube.com/watch?v=jQ--2u6pvCY>

Debbie Coffey was present in court September 16, 2010. Ms. Coffey was prepared to testify to the following:

1. Ms. Coffey was present and personally observed when the New York Times reporter and photographer were in the trap area at Twin Peaks (see above).
2. Ms. Coffey was present and personally observed when the Las Vegas Sun reporter/photographer was photographing in the trap area at the Tonopah roundup (see above).
3. Ms. Coffey was present and personally observed when the discriminatory access at Warm Springs (see above).
4. Ms. Coffey personally made requests to observe Silver King horses warehoused at Broken Arrow (“Indian Lakes”) for the purpose of adopting horses. She was denied access by BLM.
5. Ms. Coffey sent the FOIA request causing her to receive **EXHIBIT 1** attached. Her request included all documents including an accounting to show additional expenses or other reasons why Broken Arrow had closed to the public. She was told by BLM’s Dean Bolstad there were no documents demonstrating additional costs or expenses associated with having Broken Arrow open to the public.

**Claimed “Mootness” – It’s not just roundups**

The second reason “mootness” is not applicable is because the suit does not

1 address just roundups. (See Complaint, Doc 1). Injunctive relief is sought to gain  
2 immediate access to horses being warehoused in facilities closed to the public, and to  
3 have the public and press observe these horses not just during their capture, but at all  
4 stages of their journey through the BLM's wild horse removal program. (See Complaint,  
5 Doc 1. See TRO and Amended TRO Motions, Docs 6 and 15. See Preliminary  
6 Injunction and Amended Preliminary Injunction Motions, Docs 9 and 16; and all related  
7 documents filed therewith).

8 *The Precluded Evidence*

9 The Plaintiff Laura Leigh was prepared at hearing, to testify to the following:

- 10 1. During the Calico roundup in January 2010, the defendants began  
11 shipping horses to a facility know then as "Broken Arrow," now referred to  
12 by the BLM as "Indian Lakes." This is designated by the BLM as a short-  
13 term holding facility where horses are "processed" before most are  
14 shipped to "long-term" holding facilities closed to the public.
- 15 2. Prior to mid-June 2010, the BLM gave tours to the public once per week  
16 at Broken Arrow. Ms. Leigh toured this several times prior to mid-June  
17 2010. She took photos and video of horses there.
- 18 3. Ms. Leigh and her colleagues were, during this time, able to photograph  
19 and/or video difficult images involving the horses kept at Broken Arrow  
20 including a foal starving to death, an eight month old colt dying because  
21 his feet were damaged from the roundup that brought him there, horses  
22 with abscesses from pigeon fever, etc. These images were included in  
23 published articles and TV news broadcasts.
- 24 4. Dean Bolstad, the BLM official who gave tours of Broken Arrow, often  
25 complained to Ms. Leigh of the email he would receive as a result of these  
26 published images. Mr. Bolstad told Ms. Leigh when he came into his  
27 office each Monday, there was so much email, it took him several days to  
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- respond; that he was overwhelmed by the public's displeasure they conveyed to him in these emails over the images so published.
5. Mr. Bolstad's email at **EXHIBIT 1** attached, was obtained from a Freedom of Information Request ("FOIA"). This email requests that his (Mr. Bolstad's) superiors close Broken Arrow ("Indian Lakes") to the public because there is "damage that is being done to BLM's image as a result of the tours." And, "John Neil's and our veterinarians reputability is seriously being compromised by the fall out from the Indian Lakes tours." (NOTE: John Neil is BLM's acting manager of Broken Arrow).
6. Mr. Bolstad's email (**EXHIBIT 1**) suggests as a reason for closing, that there had been terrorists threats. Ms. Leigh knows of no such threats and knows of no calls for investigation into purported terrorist threats.
7. Mr. Bolstad referred to Ms. Leigh as a terrorist because of her publishing images she obtained from the Broken Arrow tours.
8. On June 10, 2010 the BLM closed Broken Arrow ("Indian Lakes") to the public. All subsequent requests to open the facility back up to the public have since been denied.
9. Resultant of this closure of Broken Arrow, no horses from Silver King and other roundups brought there can be viewed by any member of the public, even those interested in adopting wild horses. Ms. Leigh is informed and believes also that most all horses brought through Broken Arrow have been and are continuing to be slated to be shipped to long-term holding facilities where the public is likewise precluded from observing these horses. And, the defendants continue this private warehousing to this day.
10. Ms. Leigh asked Tom Gorey (BLM's head public relations person located in Washington D.C.) whether the public ever was given the opportunity to

1 have input on whether these facilities should be closed to the public. Ms.  
2 Leigh was not able to find public documents that referenced a “public  
3 comment” period. Mr. Gorey’s response to Ms. Leigh was that he could  
4 find no document giving the public opportunity to comment and therefore,  
5 the public was not given such opportunity.

6 11. Ms. Leigh is informed and believes these closed holding facilities where  
7 horses are warehoused in private, away from the public’s eye, are funded  
8 by public funds.

9 12. Mr. Gorey confirmed with Ms. Leigh that she (Ms. Leigh) was the only  
10 person sent notification that if she were to pick up a horse from Gunnison  
11 Prison, Utah, that SWAT needed to be notified.

12 **Conclusion**

13 The defendants continue to demonstrate their lack of recognition of authority  
14 other than their own. The latest example is Mr. Shepard’s statement in declaration that  
15 his agency (BLM) has the authority to close public lands for roundups. (See, Doc 20-3,  
16 paragraph 6). Mr. Shepard was, when making this statement, aware of the court’s  
17 decision in *Leigh v. Salazar*, 3:10-cv-417 wherein the court advised these same  
18 defendants that the closure of public land was an unconstitutional prior restraint of Ms.  
19 Leigh’s First Amendment rights. See, *Leigh v. Salazar*, 2010 WL 2834889 (D. Nev. Jul.  
20 16, 2010)(published slip opinion). Irrespective of the court’s prior ruling, the BLM *did*  
21 announce public land closure at Silver King but lifted the closure when becoming aware  
22 of this suit.

23 Dated this 1<sup>st</sup> day of December 2010

24 RESPECTFULLY SUBMITTED,  
25 LAW OFFICE OF GORDON M. COWAN

26 /S/

27 \_\_\_\_\_  
28 Gordon M. Cowan Esq. (SBN 1781)  
Attorney for Plaintiff LAURA LEIGH

