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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAURA LEIGH,

Plaintiff,

vs.

Case No. 3:10-cv-0597-LRH-VPC

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

Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' BRIEF (Doc 38) RE "SCOPE OF REVIEW"

Plaintiff LAURA LEIGH responds to the Defendants' Brief (Doc 38) as follows:

The Plaintiff continues to seek the same emergency, injunctive relief she sought several months past when initiating this suit.

Defendants' Request to Strike Live Testimony

The defendants ask that the court strike live testimony provided at the hearing because they, "were not provided with adequate notice ." [Doc 38, p. (*sic*) 1, line 8].

The court provided all parties including the defendants, fifteen (15) days notice in advance of the hearing. On November 1, 2010, the court sent the Minute Order advising of the hearing date. (See Doc 27).

Also, the defendants were keenly aware the hearing would be *evidentiary in*

nature when days before the hearing, BLM employee, Chris Hanefeld, received a Subpoena for his appearance at the hearing. (See return of service on Subpoena, Doc 32). The defendants spent their time challenging Hanefeld's Subpoena with a Motion to Quash. (See Doc 29 filed November 12, 2010). The court in turn, denied the defendants' Motion to Quash, stating the following:

> "Here, Hanefeld had five days notice of the subpoena which the court finds *sufficient notice* in this instance . . . ."
>
> (Order, Doc 33, page 2, lines 7-8) (Emphasis).

Defendants' Alternative Request to Remove Testimony From the Record

The defendants alternatively ask the court limit the testimony to the hearing and not have the evidence, "as part of the record as the case moves forward." [Doc 38, p. (*sic*) 1, lines 10-11]. This request is contrary to the relevant rule.

The court held the hearing based on Fed.R.Civ.P. 65. The Rule states, in relevant part, the following:

> [e]vidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
>
> Fed.R.Civ.P. 65(a)(2).

The court recognized the application of this very provision when stating the following at hearing:

> Rule 65 of the federal rules certainly provides that evidence on -- at an injunctive stage can be used at trial on the declaratory relief as well. This is not the trial on the declaratory relief. This was set as a hearing on the injunctive relief.
>
> Transcript, page 5 lines 16-19.

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> Essentially, right now, what I'm proceeding from is Rule 65, which authorizes the Court to consider evidence presented in support of an injunction with other evidence that may be presented at a later time on a trial concerning declaratory relief or motions relative to declaratory relief.
>
> Transcript, page 8 lines 14-19.
>
> I view the evidence that would have been relevant to the injunctive relief also to be relevant to plaintiff's complaint for declaratory relief. And so I would propose that plaintiff proceed at this time with that evidence,. . . .
>
> page 5 line 20 - page 6 line 1.

Although the evidence was not received by a jury, to require the plaintiff to return to the courthouse with the same witnesses, to provide the same testimony which this court found admissible in the first instance, does nothing to promote judicial economy.

This is yet one more desperate ploy by the defendants to hide their inappropriate action toward the public and toward Ms. Leigh when Ms. Leigh and citizens merely seek access to observe the defendants' handling of America's wild horses, in this instance Silver King horses.

The Evidentiary Hearing and Notice

The Defendants claim they were somehow prejudiced by the lack of notice that the November 16th hearing would be an evidentiary hearing.

Fed.R.Civ.P. 65, under which the hearing was clearly conducted, specifically contemplates that evidence would be received at such a hearing. The Rule, once again, emphasizes the following:

> [e]vidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any

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party's right to a jury trial.

Fed.R.Civ.P. 65(a)(2).

Nothing in the record indicates the court would merely entertain oral argument without evidence. To the contrary, all indications were that evidence would, in fact, be received. (See, e.g., Order, Doc 33). Based on the defendants' past practice of calling eleventh-hour, surprise witnesses (see discussion below) plaintiffs were in fact, prepared for defense witnesses at the November 16th hearing even *sans* a defense witness list. It was after all, a Rule 65 hearing.

The defendants knew several days in advance of the scheduled hearing that evidence would be received. They sought to quash service of a subpoena for Mr. Chris Hanefeld's attendance therein as a witness. (See Doc 29 filed November 12, 2010). The defendants at this point had no reason to believe an evidentiary hearing would *not* take place.

Defendants next attempt to hold the Plaintiff to a higher standard than what the defendants would otherwise practice. The defendants instruct that Plaintiff should "forewarn" the defendants in advance of issuing a subpoena against one of their employees, before having it served. [See, Doc 38, footnote 1, pages (*sic*) 1-2]. Plaintiff is not aware of such a requirement.

The court will recall, the Plaintiff and defendants last met in court July 15, 2010 to hear *Leigh v. Salazar*, Case 3:10-cv-417 concerning injunctive relief against the Tuscarora wild horse roundups. The court instructed the parties to exchange their respective witnesses the day prior to the hearing. The Plaintiff complied. The defendants did not comply. Nonetheless, the Plaintiff again followed that same suggestion in this instance when providing a witness list the day prior to the November 16, 2010 hearing. (See Doc 34).[1]

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[1] In advance of that prior hearing in 3:10-cv-417 held July 15, 2010, the plaintiff provided an email message to defense counsel which on July 14, 2010, read as follows:

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The defendants next complain the CM/ECF system precluded them from obtaining the Plaintiff's witness list. There is some implication "between the lines" that plaintiff somehow orchestrated who the CM/ECF system copies or doesn't copy with filed court documents; and perhaps the result (of the defendants' inability to open the witness list) was somehow calculated and controlled by Plaintiff.

Plaintiff is not responsible for CM/ECF difficulties if, as the defendants contend, the court's electronic filing system interfered with their ability to obtain the witness list filed by Plaintiff the day previous to the hearing. On November 15, 2010 Plaintiff received the CM/ECF email with the witness list attached. There was no "glitch" when opening it. That email notice indicated the following:

> 3:10-cv-00597-LRH-VPC Notice has been electronically mailed to:
>
> Erik Petersen   erik.petersen@usdoj.gov, EFILE_WMRS.ENRD@usdoj.gov

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> "The only witnesses I may bring forward are Ms. Leigh to lay foundation for photos, if this is necessary. I will have photos for your review later today. And, Craig Downer unless you have no objection to his Declaration on file in terms of his personal observations and also as to his qualifications in testimony as a wildlife ecologist who is familiar with the area of the Gather; and should you not have objections to Mr. Downer's testimony which you already have in Declaration form, then I won't be calling him. That's it."

In return, Plaintiff received no hint that the defendants would bring witnesses. Rather, a little more than *an hour prior to that July 15th hearing,* these same defendants *advised for the first time,* they were *bringing four (4) BLM witnesses* to testify at the hearing. Over Plaintiff's objection (for this reason) the court took one of these witnesses (BLM's Alan Shepard) to the stand. The court limited the plaintiff's "cross" of Mr. Shepard to but a few questions. The court relied on Mr. Shepard's testimony when formulating the order denying Plaintiff's requested TRO relief, based in part on his testimony.

The plaintiff was likewise blind-sided by the defendants when they offered the court a new BLM report the Plaintiff had never seen, even dated the same date as the hearing (July 15, 2010). The report was offered for the first time *at the conclusion of the hearing*. (See also, the undersigned's letter to the court of July 15, 2010).

Despite having been "sandbagged" by the defendants previously over witnesses and documents at that July 15th hearing, plaintiff nonetheless provided these same defendants in the instant case, her witness list the day prior to the November 16th hearing (See Doc 34), offering the defendants more courtesy than what had been received from them thus far.

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(See Doc 34).

To claim surprise or prejudice because the defendants were not prepared for an evidentiary Rule 65 hearing, under these circumstances, is entertaining at best.

The "Vagueness" Argument

The defendants are the first to claim foul when new issues or evidence are purportedly raised by Plaintiff. For the first time the defendants now contend the Complaint is somehow vague.

This new "vagueness" argument seeks to steer the court astray into thinking the case should be embroiled in administrative proceedings or records which discuss challenges to the inhumanity of the defendants' wild horse removal and warehousing process. Although the BLM and Interior Department's Wild Horse and Burro removal and warehousing process is one America's greater embarrassing atrocities, this issue is not the focal point of the case. "Inhumanity" although ongoing with the BLM's "management" of America's wild horses is, unfortunately, secondary. (See Doc 1).

The case, pretty clearly, seeks to challenge the defendants' ***continuing removal of interested citizens*** (not horses) from observing the defendants' handling of America's wild horses, particularly those horses entering the defendants' process from Silver King. The Complaint and all motion practice supports this concept. If the Complaint is not somehow clear, an amended Complaint is an easy cure; but the defendants' continued offensive conduct remains irretrievable, it continues to cause irreparable harm to Ms. Leigh, and the defendants' nonsense should be addressed with dispatch.

Plaintiff is not aware that federal civil "pleading" now requires more than "notice" pleading, or requires something beyond, "a short and plain statement of the claim showing the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

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The defendants don't articulate how the Complaint is vague. They merely convey this thought more with conclusory terms without the benefit of specific detail or with factual examples.

Contrary to the defendants' "vagueness" contention, the prayer of the Complaint is rather specific. As but one example of requested *injunctive relief* that addresses ongoing, offensive conduct clearly not mooted, paragraphs 1(h) and 1(k) of the prayer of Complaint seek the following relief:

> 1. That a mandatory or prohibitive injunction issue preliminarily and permanently, mandatorily precluding or requiring as the case may be, the Defendants from the following:
>
> * * *
>
> (h) Prohibit the preclusion or restriction of the Plaintiff, her colleagues and also others similarly situated, from accessing temporary holding facilities, long-term holding facilities, or any other facilities whether public or private, to which Silver King horses are transported and while such horses remain the property of citizens of the United States held in trust by the Defendants for them; and if the Defendants choose private facilities to ship Silver King horses, that as a condition of using such private facilities, the operators of such private facilities shall make available the facilities for inspection of the Silver King horses to members of the public including Plaintiff and others, if they so choose, in such a manner that the horses may clearly be viewed and documented such that a wellness or clinical assessment of such horses may be accomplished, if so desired by the person(s) seeking to observe these horses; and that such

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> facilities shall be open for such inspections during normal business hours;
>
> * * *
>
> (k) Prohibit the preclusion or restriction of the Plaintiff, her colleagues and also others similarly situated from photographing or documenting their observations of Silver King operations and Silver King horses wherever situated . . . . See Doc 1.

The wild horses captured from Silver King remain hidden from the public. They remain in the defendants' possession. These horses have remained off-limits to the Plaintiff and the public since the dates of their capture. The Plaintiff and others remain precluded despite repeated tries, from observing these horses (Silver King horses) and the manner in which they are handled and "managed."

Purported Administrative Issues

The Wild Horse and Burro Act of 1971 (the "Act") is the only one of its kind where an entire act of Congress has been devoted to an animal. That Act, thorough in many ways, does not address how the BLM should govern citizens who desire to see these horses handled by their managers, the defendants in this instance.

In cases where an agency's construction of a statute that the agency administers is in issue, a court applies the two-step analysis laid out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984). It must first be determined whether Congress has directly spoken to the precise question at issue. *Id.* at 842, 104 S.Ct. 2778. If Congress' intent is clear, the court must give effect to that intent, and the analysis is complete. *Id*. at 842-43, 104 S.Ct. 2778. If, however, the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency's interpretation is based on a permissible construction of the statute. *Id*. at 843, 104 S.Ct. 2778.

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Any "opinion" of the BLM or Department of the Interior as to the constitutionality of its regulations is not entitled to deference. If the court determines the agency's rules violate the Constitution, they must be invalidated. See, *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir.1979). See also, *Small v. Operative Plasters' and Cement Masons' International Ass'n Local 200 AFL*, 611 F. 3d 483 (9th Cir. 2010).

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

Plaintiff contents any interpretation of the Wild Horse and Burro Act which effectively causes prior restraints on protected speech and the right of citizens including Plaintiff to observe government in action on matters involving significant public interest, in violation of the First Amendment, were certainly never intended by Congress. The defendants continue to evade how an administrative process works when injunctive relief is sought on an emergency basis where their conduct denigrates citizens' First Amendment rights. Certainly further delay is not in order.

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

Conclusion

A reason why injunctive relief remains crucial and viable and should be instilled immediately, is this:

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The Plaintiff continues to suffer irreparable injury from being precluded from observing other aspects of the defendants' the handling of Silver King horses, not just those involved in the roundup. Her preclusion does not start and stop with a roundup of wild horses. Her preclusion continues with her being removed, held back, denied access, to other portions of the defendants' process which remain ongoing well after the Silver King roundup.

These horses, (Silver King horses in this instance) are being handled, processed and/or disposed of, or moved, or "lost" or warehoused even as of this writing. The process doesn't come to a halt just because the defendants completed their roundup. The process is ongoing. The roundup is only the beginning of the defendants' process. In this instance the defendants' process remains entirely secretive and hidden from the public's eye. In this instance, Silver King horses entered the process at the front end, beginning with the roundup. They (Silver King horses) are still there, somewhere, within the process, within the Defendants' wild horse handling system.

There is not one document or notice from the defendants indicating that *all handling* of Silver King horses are concluded. Only the roundup stopped. No document or record of the defendants states or even implies that they (the defendants) have concluded all handling, processing and warehousing of Silver King horses.

Resultantly, whenever Ms. Leigh or members of the public are denied access to observe these horses, even were this to occur at the moment the court reads this brief, whether occurring on the range during a roundup (part one of the process) or at some other stage of the defendants' ongoing process, Ms. Leigh's and the public's First Amendment right to observe and/or to report the government's activities, is violated again and again.

These First Amendment violations occur and are repeated each and every time Ms. Leigh or citizens are turned away or refused access, or are kept back, or are denied appropriate observation, entrance or access to any portion of the defendants' processes. The most outrageous part of it all, is that the defendants continue on the

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same secretive, private course as if citizens possessed no right at all to observe government in action. This is shameful.

Ms. Leigh brought ample evidence of numerous, including atrocious, instances where her First Amendment rights were violated. Other witnesses corroborated her story. Ms. Leigh's"offer of proof" provides the court with additional instances of First Amendment violations that would have been offered in evidence if the court would have allowed the evidence. (See Doc 39).

It is the preclusion from observation that causes the violation. The cessation of the roundup doesn't end or cut-off Ms. Leigh's or the public's rights to observe America's wild horses, Silver King horses in this instance, within the defendants' super secret processes.

Once again, *this* case is about access to observe the handling of the Silver King horses by the defendants wherever they remain situated in the defendants' process.

Epilogue

No document or evidence offered by the Plaintiff ever suggested that the interests of this suit ended when the last stock trailer at Silver King, loaded with Silver King horses, left the range.

Dated this 11th day of December 2010

RESPECTFULLY SUBMITTED,
LAW OFFICE OF GORDON M. COWAN

/S/

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

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CERTIFICATE OF SERVICE

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

I certify that on the date indicated below, I filed the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which would provide notification and a copy of same to counsel of record, including the following counsel:

Erik Petersen, Esq. erik.peterson@usdoj.gov

Dated this 11th day of December 2010

/S/

G.M. Cowan

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