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4
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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-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 **REPLY TO OPPOSITION OF DEFENDANTS RE. ORDER TO SHOW CAUSE**

18
19 Plaintiff LAURA LEIGH submits the following Reply Memorandum of Points and
20 Authorities in support of her Motion for Order to Show Cause / Contempt Motion (“OSC
21 Motion”):

22 **WHAT’S GERMANE RE THE ISSUE OF PUBLIC ACCESS**

23 The OSC Motion addresses only this: Whether the Defendants effectively
24 precluded Plaintiff and other members of the public from viewing the **Owyhee Gather**;
25 and, whether these efforts by the Defendants contravened the court’s July 17 Order on
26 the First Amendment issue.

27 This Motion sought help July 19 because the Owyhee Gather would soon end.
28 What the Defendants did *thereafter* or elsewhere (such as Rock Creek or Little

1 Humboldt) to minimize the issue, is not germane. This Motion's focus is on whether the
2 Defendants "substantially complied" to allow public access to the **Owyhee Gather**.

3
4 **Defendants Admittedly Controlled Access to the Trap Site**

5 The Defendants admit this: whenever the Defendants asked the landowner for
6 permission to bring members of the public to the Owyhee trap site, the owner granted
7 their requests. No evidence suggests the Defendants were ever refused a request to
8 bring members of the public onto the land. The Defendants admit they asked that four
9 individuals of their choosing, from the public and not otherwise associated with the
10 gather, be allowed to the gather trap site. These requests were granted by the
11 landowner. The many supporting Declarations of Defendants make no mention
12 whatsoever of anyone having made the effort to ask whether the Plaintiff or other
13 observers may be allowed to come to observe the gather, particularly after the court
14 ordered the Defendants to lift the closure.

15 The Defendants needed only to ask for permission to grant a member of the
16 public access; and the landowner would comply. Once the court issued its order, the
17 Defendants needed only to ask the landowner if Laura Leigh or others could come onto
18 the land to observe the final day of the Owyhee gather. No Declaration of the
19 Defendants suggests they made this effort. No Declaration of the Defendants suggests
20 such a request would have been refused.

21 The issue of who had actual control over who could come into the area of the
22 trap site is found in Mr. Shepard's Declaration. Admittedly, Mr. Shepard states this:

23 During the entire period of time needed to complete the Owyhee HMA
24 portion of the Tuscarora gather, only two groups of individuals outside of
25 the BLM and contractor staff was allowed access through the private
26 property. The first group was two independent veterinarians with the
27 Review Team formed at the BLM Director's direction and the second was
28 two credentialed equine specialists from two universities who were

1 selected by the American Horse Protection Association . . . ***BLM sought***
2 ***and obtained the private landowner's explicit approval to bring these***
3 ***non-BLM and non-contractor individuals into the private lands***

4 Shepard Declaration, (Doc 28), par. 18, p 4.

5 The conclusion compellingly follows, the Defendants maintained control over
6 who could gain access to the trap site. Evidence demonstrates the Defendants needed
7 only to ask for access for a member of the public and their wish would be granted. The
8 Defendants in essence, had the final “say” in who could be present and who could not
9 be present. The Defendants controlled the access and used the facade of “owner
10 permission” to choose who could be present and who would be excluded. It was their
11 choice and the owner facilitated the request. Rather than accommodate the Plaintiff,
12 the Defendants made it more difficult for her.

13
14 ***No one from the Defendants Acknowledges Who Exactly Made***
15 ***Access Arrangements with the Owner. No one Identifies the Owner.***

16 No one among the Defendants have admitted to being the specific individual
17 who spoke, first-hand, with the landowner about allowing access to the public during the
18 gather. The Declarations are entirely vague on the subject. None of these Declarations
19 identify the individual who made these arrangements. Also, none of the many
20 Declarations identify the landowner with whom they (whoever it was) spoke.

21 Should the Defendants deny they could have obtained permission from the
22 landowner to provide Plaintiff access to the property (but simply chose not to make
23 contact for her), in that event, Plaintiff respectfully asks the court to require the
24 Defendant to specifically identify in advance and bring with them for testimony, the
25 particular individual who among them, actually and first-hand, spoke with the landowner
26 concerning access issues at the Owyhee gather. That individual should be compelled
27 to attend the hearing as a witness to discuss specifics of how these “access”
28 arrangement were made. The supporting Declarations are otherwise incompetent and

1 should be stricken for lack of first-hand knowledge.

2 The issue may be deeper. When the landowner and BLM discussed public
3 access when planning the Owyhee gather, perhaps the landowner conceded to the
4 Defendants their (the Defendants') choices of who would be acceptable to them (the
5 Defendants) in having access to the area. Again, should the Defendants remain
6 unwilling to concede they held the ability to gain permission for access to the Owyhee
7 HMA trap areas for most anyone the Defendants desired, including the Plaintiff, but
8 merely chose not to do so, then the Defendants should be compelled to bring that
9 specific individual from among them to court to testify with first-hand knowledge, about
10 the specific arrangements made with the landowner concerning "access."

11

12 **Competence of Affidavits**

13 The Defendants provide no first-hand account from any witness of how the
14 owner refused permission (if this truly occurred) of the public. The Defendants fail to
15 provide the identity of their "point person" who interacted with the landowner to
16 understand this restriction. This is not competent evidence.

17

18 **The Plaintiff Having Access to Speak with the Owner**

19 Defendants assert that Laura Leigh could have contacted the owner as easily as
20 the Defendants could have, to ask permission for access. This contention is made
21 following Defendants' counsel's statement to the undersigned that, paraphrased, "the
22 owner is a crotchety old guy who is difficult to get a hold of." If such is the case, who
23 as between the Defendants and Ms. Leigh, is in the better position to get a hold of the
24 landowner to gain permission for access?

25 When Ms. Leigh was advised by BLM employees at the Elko BLM office July 17,
26 that others had obtained written permission to enter the private property where the traps
27 were located, she asked to see the letter of authorization. This letter presumably
28 contained the owner's contact information. In reply to Ms. Leigh's request, the

1 Defendants advised that she could obtain a copy of the letter by filing a Freedom of
2 Information Request.

3 The Defendants' contention begs the question: Were the two veterinarians who
4 were allowed to view the Owyhee gather, required to ask permission directly with the
5 landowner before they were provided access? Or, did the Defendants accommodate
6 their access?

7 Were the two from APHA (there to observe and report about the gather), allowed
8 by the Defendants to view the Owyhee gather at the trap site, compelled to locate the
9 property owner and ask his permission before being granted access? Or, did the
10 Defendants accommodate their access as well?

11 A fallacy of the Defendants' contention is this: The Defendants imply that
12 gathering horses is tricky and dangerous. If such is the case, why then would the
13 property owner have ultimate control over who comes and goes in the area when the
14 Defendants are engaged in a dangerous activity? How tenable is it to have the property
15 owner approve others' access while the Defendants are gathering wild horses? For the
16 sake of safety and common sense, would it not be logical for the entity conducting the
17 Owyhee gather, the Defendants in this instance, be given the final authority to control
18 access during this activity?

19

20 **The Defendants Did Not Address The Significant Issue**

21 Ms. Leigh's Declaration (Doc. 19-2) made one salient point that is not rebutted
22 by the Defendants. At paragraphs 23-26 of her Declaration (pp. 6-7), Ms. Leigh relayed
23 the following discussion with the BLM District Manager, Mr. Ken Miller.

24 23. On July 18, 2010, I received a call from Ken Miller, District
25 manager of BLM, on my cell. Mr. Miller said that the landowner would
26 allow me to visit but was concerned about liability and if the BLM would
27 assume my liability, that I could enter and witness the Gather. Mr. Miller
28 then conveyed the BLM was not willing to accept that responsibility.

1 24. I replied to Mr. Miller that the BLM was apparently accepting
2 that responsibility for the two veterinarians to observe who were identified
3 in the letter sent them by the landowner. I replied that at the previous
4 gather in Calico that the BLM brought the public out to view and limited
5 their access to certain areas and for limited periods of time. I offered Mr.
6 Miller that I could follow that same protocol or whatever protocol the BLM
7 imposed when clearing others to enter the Gather area. Mr. Miller then
8 stated I should call Debbie Collins whom, I am informed and believe, is a
9 public relations employee of the BLM, so as to determine the process and
10 then apply for admission to the Gather area. I was under the impression
11 that this process would take several days. I had been in contact with the
12 BLM on multiple occasions prior to this Gather, to obtain access for
13 observing this Gather. I am informed and believe I was already on a list of
14 persons allowed in the Rock Creek gather.

15 25. I then reminded Mr. Miller that Owyhee would most likely
16 complete by tomorrow and that Owyhee was a separate Gather from
17 Rock Creek as had likewise been recognized by Judge Hicks. Mr. Miller
18 replied he would see what he could do and I asked that he call me back to
19 leave Debbie's telephone number for me on my voice mail.

20 26. Approximately 20 minutes after concluding this conversation
21 with Mr. Miller, I received a call from him. I did not answer the phone as
22 we had agreed because I assumed he was merely leaving me Ms. Collins'
23 phone number. Rather than leave a phone number ***I received a voice***
24 ***mail message indicating that in order to facilitate my observation of***
25 ***the Gather, that the "Solicitor" needed to approve my admission and***
26 ***that since I was actively engaged with the Solicitor perhaps because***
27 ***of this litigation, that this (my approval to gain access) was not likely***
28 ***to occur.*** He did not identify the "Solicitor" or provide his or her contact

1 information. (Doc 19-2) pp 6-7 (Emphasis added).

2 Mr. Miller's statement is an admission indicating that it came down to the
3 Solicitor's (Solicitor General's Office) approval and that it, was not likely to occur."

4 Did the Defendants' Solicitor General's office know of the court's order? Granted
5 Elena Kagan (the current Solicitor General) was embroiled in Congressional hearings.
6 Wasn't a person present at the Defendant's counsel's table who was a representative
7 of the Solicitor General's office?

8 Mr. Miller's statement also admits on July 19 he *did* have permission from the
9 landowner to bring the Plaintiff onto the Owyhee HMA trap site; but the BLM
10 nevertheless chose not to accommodate her.

11 Once again, the Defendants maintained control over the Owyhee gather trap site
12 area. The Defendants refused to accommodate her entry during the Owyhee gather.

13

14 **Closure Signs Remained in Place**

15 As late as July 20 official BLM closure signs remained posted in the Owyhee
16 HMA, contrary to the Declarations submitted by the Defendants. These were observed
17 after the Owyhee HMA gather was completed. See Declaration of Katie Fite.

18

19 **The Defendants' Website Did Not Remove the Closure**
20 **Until After the Owyhee Gather was Done**

21 Plaintiffs believe the BLM notice on their website, indicating the gather areas
22 remained closed, was not removed until after the Defendants placed the new protocol
23 concerning public viewing, on their website. This change of notice didn't take place
24 until after the Owyhee Gather was completed.

25

26 **The Handling of Plaintiff When She Returned to Elko**

27 Plaintiff is prepared to testify at the hearing, in support of her Declaration on the
28 issues raised therein. A friend who accompanied here will likewise be available to the

1 court to testify on the issues. The court should be given the opportunity to size up
2 these witnesses.

3
4
5 **Public Access to the Owyhee Gather was More Restrictive than Prior Gathers**

6 Plaintiff's experience is that the Owyhee and also the Rock Creek and Little
7 Humboldt gathers are much more restrictive to the public than other gathers have been
8 in the past. Even where gathers in the past concluded on private lands the public (and
9 Plaintiff) Plaintiff recall being given access to these private land areas.

10 Attached with this Motion is a photo of a gather the Plaintiff attended on a prior
11 occasion. Plaintiff was not allowed this access at Owyhee. In fact, she was refused
12 *any* access.

13 How the Defendants handled public access with prior gathers is relevant where
14 the court allowed the Defendants to promulgate reasonable restrictions for health/safety
15 concerns when lifting the BLM's closure.

16
17 **Legal Discussion**

18 The court prefaced its order with the conclusion that there had in fact, been a
19 prior restraint on the Plaintiff's First Amendment right of free speech and freedom of the
20 press. She is after all, a journalist. She's credentialed. (See e.g., letter from Steven
21 Long, editor of Horseback Magazine, attached).

22 The court's TRO order was clearly based on the fundamental right of the Plaintiff
23 to observe government in action. Her observation and reporting would involve the
24 Defendants' handling of a matter of significant public interest. Her preclusion was
25 contrary to First Amendment notions and the Plaintiff's (and the public's) right to
26 observe first-hand what the government was doing with a "public resource." Plaintiff
27 clearly was credentialed and had business there in attending, in observing and in
28 reporting the events of the day.

1 Where the Defendants held the keys to who could come in and who could be
2 excluded from trap sites, whether or not located on public or on private lands, in that
3 event the Defendants maintained an obligation to make every reasonable effort to
4 accommodate the plaintiff to comply with the order. Where the Defendants specifically
5 arranged to have the Owyhee gather trap site placed on private property *for whatever*
6 *reason*, the Defendants' choices caused the Plaintiff and the public to be excluded from
7 the process.

8 The Defendants' defense appears to be that they somehow, "substantially
9 complied" with the Order. Substantial compliance is available only where the
10 Defendants made, "**every reasonable effort . . . to comply.**" *Go-Video, Inc. v. Motion*
11 *Picture Ass'n of America*, 10 F. 3d 693, 695 (9th Cir. 1993).

12 The Declarations of Defendants contend they took down all signs, promptly. But,
13 observers found official BLM "closure" signs remaining in place after the Owyhee gather
14 was over. This advised the public that public lands remained closed until after the
15 Owyhee gather was completed.

16 The Declarations of Defendants contend they published a new protocol on their
17 website in response to the court's order. This change in the website from what was
18 published there previously as a closed-to-the-public notice, did not occur until after the
19 Owyhee gather was completed.

20 The Plaintiff came to the BLM Elko office early in the morning to determine the
21 protocol for proceeding so she would not run afoul of new restrictions, if any, that may
22 have been put in place after the court's order. The Defendants there called the Sheriff
23 on her rather than help her.

24 The Plaintiff asked for assistance from the Elko County Sheriff Deputy who was
25 there at the instance of the BLM to deal with the Plaintiff. He refused her request for
26 help. She asked for assistance on boundaries of private property so she would not
27 cross private land. He refused her request for help. Plaintiff contends the Elko County
28 Sheriff's Office, who admittedly (by Defendants' Declarations) was there because the

1 BLM previously arranged for their assistance, are the ostensible agents of the
2 Defendants.

3 The Plaintiff finally found the road which led her closest to the trap site. But the
4 Plaintiff was met by a roadblock consisting of “official” vehicles, BLM included, who
5 advised, if they went further they would be arrested for trespass. The Plaintiff
6 determined by GPS coordinates and a map that the location where they were stopped
7 and threatened with arrest, was public; and that the road continued on as a public road
8 well beyond where she was stopped.

9 If these are instances or examples of the Defendants and their ostensible agents
10 making, “every reasonable effort . . . to comply” with the order, then the Defendants
11 were able to escape public scrutiny, public comment and public thought relative to their
12 action in the controversial “management” of a “public resource” without violating court’s
13 order or the spirit and intent of the order.

14

15 **SECOND ISSUE RE “EMERGENCY” CONDITIONS IN OWYHEE**

16 Mr. Shepard testified, there were “no cows.” Mr. Shepard testified, there were,
17 “no fences.” Mr. Shepard testified, there was, “no water.” Clearly, he was referring to
18 the emergency situation facing the Owyhee HMA; the *entire* Owyhee HMA; and *only*
19 the Owyhee HMA when he gave the court these observations.

20 When the court was concerned with the issue of placing seventy-five percent of
21 the Owyhee HMA herd in jeopardy with a single ruling, the court was asking straight
22 forward questions that concerned the court about the Owyhee HMA. The court was
23 looking for straight forward answers. Most in the courtroom, including the undersigned,
24 were of the belief Mr. Shepard was in fact, testifying about the *entire* Owyhee HMA and
25 *only* the Owyhee HMA when he was describing the emergency. He made no mention
26 in open court that he was referencing only small portions of the entire Owyhee HMA.

27 If only small areas within Owyhee HMA were his concern, Mr. Shepard was given
28 ample opportunity to clear the air and explain this when asked these three , simple

1 questions: Was there water? Were there cows? Were there fences? His “no” to each
2 of these questions left all in the courtroom concluding that all herds of wild horses in the
3 entire Owyhee HMA were in jeopardy for lack of water. It was this testimony and
4 presentation that caused the court to rule by lifting the injunction to allow the BLM’s
5 gather to proceed.

6 When someone independently went to check the area to determine if there were
7 cows, if there was water and if there were fences, only then do we learn Mr. Shepard
8 either didn’t understand the questions or he was somehow not given the opportunity to
9 explain, or he was somehow confused.

10 These three questions from counsel (cows, water, fences) were germane to the
11 issue since the Defendants contended the Owyhee HMA horses were out of water and
12 no fence precluded these wild horses from obtaining water *if water were available*
13 *which it was not*, according to Mr. Shepard.

14 After hearing the surprise witness, Mr. Shepard, the court was torn, using the
15 phrase of being given a “classic Hobson’s choice” on how best to rule. With Mr.
16 Shepard’s testimony and the Defendants’ newly completed report made available at the
17 end of the hearing, the court relied on this evidence to lift the injunction and deny the
18 TRO as it pertained to the gather.

19
20 **Katie Fite’s Investigation July 25 and 26, 2010**

21 Filed concurrently with this Motion are photos taken by Katie Fite, July 25 and
22 July 26. These are photos of the South Fork of the Owyhee River, within the Owyhee
23 HMA.

24 These photos are noteworthy for several reasons, namely the following:

- 25 1. All photos were taken within the Owyhee HMA;
- 26 2. There’s **more** water in the Owyhee HMA than Mr. Shepard admits, even
27 today in his “explanatory” Declaration;
- 28 3. Wild horses are depicted traveling to the water in groups;

1 4. The pictured dead horse is lying atop boulders, apparently driven there by
2 some event.

3 Ms. Fite will be at the hearing to answer any question the court desires. The
4 undersigned suggests, so there's no potential for an alleged "spin" of her testimony,
5 that the court ask her the questions, should the court desire this opportunity.

6 **CONCLUSION**

7 If the Defendants had nothing to hide, why then did they not make their efforts at
8 Owyhee a transparent process? Bringing in journalists or others of their own choosing
9 doesn't cut it. The Defendants interfered with the Plaintiff's constitutional rights
10 irrespective of the court's order.

11 The Plaintiff has done nothing wrong; yet she's portrayed as the unreasonable
12 one and (according to the Defendants' chosen contractor) the one who caused all the
13 horses deaths.

14 The Plaintiff merely sought transparency in the process. The court agreed. The
15 Defendants nevertheless shut the door and finished the job in the air of secrecy
16 irrespective of the order, foregoing "every reasonable effort to comply."

17 Plaintiff respectfully requests the court grant the relief requested.

18 Dated this 27th day of July 2010

19 RESPECTFULLY SUBMITTED,
20 LAW OFFICE OF GORDON M. COWAN

21 /S/

22 _____
23 Gordon M. Cowan Esq. (SBN 1781)
24 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 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:

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DATED this 27th day of July 2010

/S/

G.M. Cowan