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5 Attorney for Plaintiff LAURA LEIGH

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
18 **PLAINTIFF'S REPLY BRIEF TO RENEWED / SECOND MOTION
FOR TEMPORARY RESTRAINING ORDER**

19 Plaintiff submits the following Reply brief in support of her Second Temporary
20 Restraining Order:

21 **Background**

22 Defendants inject a "personal" element unnecessarily into the mix, claiming there
23 is an undercurrent agenda involved. Let's get to the heart and cease personal attacks.
24 The heart of the matter is this: *These gathers will be concluded and finished this Friday.*

25 **Horse Condition and Management**

26 The Defendants reiterate *their* veterinarian (Dr. Kane) relays the many horse
27 deaths to dehydration occurring prior to the gather. This is an apparent controversy
28 among experts. Plaintiffs are prepared to have Nena Winand, DVM, available by phone

1 for testimony should the court so require. If horse conditioning is an issue of concern
2 for the court, Plaintiff specifically asks that the court make Dr. Winand available by
3 phone where she resides in upstate New York. The undersigned is prepared to offer
4 the court her telephone number for this purpose. She just needs to know the date and
5 time of the scheduled hearing and timing of her anticipated contribution.

6 Meanwhile, Dr. Kane's "death journal" does not appear to include the dead horse
7 found on the rocks as is depicted by Katie Fite's photos. Why is that if he is the
8 veterinarian in charge and who is also in charge of keeping a death toll? What was the
9 cause of death of the horse depicted in Katie Fite's photo?

10 Dr. Kane said he traveled to the Owyhee site where horses were gathered. His
11 conclusions were based in part on his observations of having found no water. Why did
12 he not report the water that Katie Fite documents in her photos along the South Fork of
13 the Owyhee River? Katie Fite's photos are within the same vicinity referenced in the
14 BLM Supplemental Report of July 15, 2010.

15 Plaintiff respectfully requests the final paragraph of Dr. Kane's Declaration be
16 stricken as incorporating opinions to which he is not qualified to testify. These
17 statements reference his personal beliefs as to the compassion the BLM has toward
18 wild horses, a subject inappropriate for the purpose of his Declaration.

19 **Inhumane Method**

20 Defendants' comments appear merely as argument, without additional
21 substance. Plaintiff relies on the material and information she's provided the court with
22 her Motion.

23 Dr. Kane acknowledges his observations of foals within ten weeks of age, being
24 gathered at these sites.

25 Plaintiff is ready with Dr. Winand's testimony should this be necessary, so long
26 as she is permitted to testify by telephone, to address "humane" issues and other
27 relevant veterinary medicine and related matters to the case.

28 Plaintiff is informed and believes Dr. Kane was present at the Calico gather

1 earlier this year. More than 100 horses perished from that Calico gather while Dr. Kane
2 stood by as the BLM's official veterinarian, there.

3 **Public Access**

4 The Plaintiff is prepared to discuss at the hearing, access to the Rock Creek and
5 Humboldt HMAs that were offered.

6 Plaintiff's experience is that the Rock Creek and Little Humboldt gathers are
7 much more restrictive to the public than other gathers have been in the past. The
8 public access areas were significantly farther away than on previous occasions. Even
9 where gathers in the past concluded on private lands the public (and Plaintiff) Plaintiff
10 recalls being given access to these private land areas, close to the trap sites.

11 The timing of when the public was given access in Little Humboldt and Rock
12 Creek HMAs is also significantly more restrictive than on past gathers. The Plaintiff and
13 others who attended the Rock Creek public viewing day, were allowed to view the
14 captured horses some three hours after they had been gathered. This belated viewing
15 interferes with the Plaintiff's right to record and document on her own, condition of the
16 horses shortly after they arrive. Respiration rates, perspiration and other outward
17 physical signs demonstrating the condition of horses gathered, are antiseptically
18 removed from the public's view where the Defendants delay by some three hours, the
19 opportunity to see the captured horses.

20 Also, the length of time of the official public viewing compared with the numerous
21 days it took to gather horses is likewise unreasonable. The Defendants allowed only
22 two public viewing days compared with the numerous days each lasting several hours,
23 the Defendants expended in gathering wild horses from among three separate HMAs.
24 The restriction to only two viewing days, for only a minimal viewing periods, and at a
25 distance that prevents the public from accurately observing the physical and some
26 outward signs of physiological conditions of these horses, is unreasonable,
27 unnecessarily restrictive and also contrary to how the Defendants allowed public access
28 to previous gathers.

1 Attached with this Motion is a photo of a gather the Plaintiff attended on a prior
2 occasion. Plaintiff was not allowed nearly this same type access at Rock Creek or Little
3 Humboldt. In Owyhee she was refused *all* access to the trap site.

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

7 Plaintiff believes the location in which the public was allowed access on prior
8 gathers, is reasonable and a good representation of how gathers should incorporate
9 public access for these gathers.

10 Regarding Mr. Overcast's Declaration of how the contractor gently moved wild
11 horses in the HMAs including the Owyhee HMA, if his testimony is the case, then why
12 not be transparent about it? What the BLM did instead, was to conceal *all* activity
13 occurring there.

14
15 **Defendants Did Not Refute Noted Range Conditions**

16 There is no apparent discussion from the Defendants countering both the
17 Plaintiff's observations from the air, and Ms. Katie Fite's observations on the ground,
18 relative to range conditions, horse herd population conditions, cattle presence, water,
19 and the like they observed of the Little Humboldt and Rock Creek areas.

20
21 **Little Humboldt Gather**

22 The Defendants apparently do not rebut what their own public relations film says
23 about the reasons why the Defendants were gathering in Little Humboldt. This gather is
24 not to remove excess horses.

25 Where they apparently acknowledge the gather's purpose is to *not* gather excess
26 horses, the removal of horses from that area would be contrary to the Free Roam Wild
27 Horse and Burro Act of 1971. See, *Colorado Wild Horse and Burrow Coalition, Inc v.*
28 *Salazar*, 639 F. Supp 2d 87 (D.D.C. 2008).

1 **Irreparable Harm and Success on the Merits**

2 The Defendants discussion appears more argumentative and conclusory rather
3 than factual or substantive. The Defendants have not rebutted any fact Ms. Leigh
4 presented with her Declarations concerning her irreparable harm from the gather itself
5 and also from being denied access.

6 **CONCLUSION**

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

12 Dated this 27th day of July 2010

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

15 /S/

16 _____
17 Gordon M. Cowan Esq. (SBN 1781)
18 Attorney for Plaintiff LAURA LEIGH

18 **CERTIFICATE OF SERVICE**

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

20 I certify that I am employed at 1495 Ridgeview Drive, #90, Reno, Nevada,
21 89519; and, on this date I served the foregoing document(s) on all parties to this action
22 by:

23 Electronic service:

24 Erik Petersen, Esq.
25 Ayako Sato, Esq.
26 Greg Addington

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27 DATED this 27th day of July 2010

28 /S/

G.M. Cowan