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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 _____ /
18 **MOTION FOR RECONSIDERATION OF DENIAL OF PLAINTIFF'S**
19 **REQUESTED EQUITABLE RELIEF BASED ON**
YESTERDAY'S CHANGE IN THE LAW, AND
FOR MISCELLANEOUS RELIEF

20 Yesterday, July 28, 2010, the Ninth Circuit Court of Appeals modified its position
21 on the test used to determine the element, "likelihood of success on the merits" when
22 granting / denying injunctive relief under the *Winters* decision (cited below). The circuit
23 court reaffirmed the use of its sliding scale method, finding it consistent with *Winters*.
24 See, *Alliance for Wild Rockies v. Cottrell*, --- F.3d ----, (9th Cir. Jul 28, 2010). A true and
25 correct copy of the official publication of *Alliance* is at **EXHIBIT "A"** attached to the
26 Supplemental filing supporting this Motion.

27 ///

28 ///

1 This motion for reconsideration is made on the following grounds:

- 2 1. The law changed since the court's orders were entered, affecting the very
3 rationale underlying the decisional basis which caused the denial of the
4 Plaintiff's requested relief (Docket Nos. 18 and 37);
- 5 2. In both orders denying Plaintiff's relief, the court relied on and applied the
6 First Circuit's stringent approach to assess Plaintiff's "likelihood of success
7 on the merits." The First Circuit's strict approach is not the approach
8 approved by the Ninth Circuit;
- 9 3. The court did not use the sliding scale method affirmed by *Alliance* when
10 denying Plaintiff's requested relief. *Alliance* reversed and remanded a
11 Montana District Court's denial of injunctive relief when failing to apply the
12 sliding scale method on the "likelihood of success on the merits" factor;
- 13 4. The court did not take into consideration evidence offered by Plaintiff that
14 at a minimum, raises serious questions supporting the merits of her claims
15 and which demonstrates a hardship balance which tips sharply in her
16 favor.

17 Should the court deny the requested relief herein, Plaintiff respectfully requests
18 the court modify the orders currently standing (Dockets 18 and 37) to include an
19 additional finding which makes those orders final and appealable, or appealable as an
20 interlocutory order..

21 This Motion is based on the Plaintiff's briefs, supporting papers, exhibits and
22 Declarations on file with the court.

23 Dated this 29th day of July 2010

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

26 /S/

27

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION FOR RECONSIDERATION OF DENIAL OF PLAINTIFF'S**
3 **REQUESTED EQUITABLE RELIEF BASED ON**
4 **YESTERDAY'S CHANGE IN THE LAW, AND**
5 **FOR MISCELLANEOUS RELIEF**

4 **Background**

5 Plaintiff Laura Leigh sought to postpone the Defendants wild horse helicopter
6 gathers occurring on three separate "Herd Management Areas" ("HMA") in northwestern
7 Elko County. She sought to force the Defendants to gather the horses at a time other
8 than when temperatures in the Nevada desert were searing and to avoid the actual
9 foaling season; that because of the Defendants' *timing* of their gathers, it resulted in an
10 inhumane method, contrary to specific provisions of the Wild Horse and Burrow Act of
11 1971 ("Wild Horse Act").¹

12 The TROs also sought to have the gather process be made transparent and
13 available for public observation. The Defendants shut the public out completely from the
14 Owyhee gather. Of the fifteen days it took the Defendants to gather and remove nearly
15 1,200 horses, the Defendants allowed the public to observe two days where they
16 gathered about 100 horses. In perspective, the Defendants kept public scrutiny away
17 from ninety percent (90%) of the Defendants' process. Within that ninety percent
18 blanket of secrecy at least twenty-two horses perished while in the custody and control

19
20 ¹ Plaintiff brought multiple theories to the court on why these gathers were not
21 appropriate *at this time*. The initial TRO sought relief for three reasons: (1) The
22 Defendants gather was contrary to their own management plan as being conducted in time
23 during the peak "foaling period." There was controversy over the language of the BLM's
24 own management handbook. (2) The Defendants gather was being conducted during the
25 *actual* foaling season. This coupled with high temperatures occurring in July in the Nevada
26 desert, made it *inhumane* to gather at this particular time. This is contrary to the specific
27 provision of the Wild Horse and Burro Act of 1971 which requires that *if* removal of excess
28 horses is required, in that event removal must be accomplished "humanely." (3) The
shutting out of the public and plaintiff, a journalist, from observing the Owyhee HMA
altogether, and the restrictive manner in which the public had *minimal* access to Rock
Creek and Little Humboldt HMA gathers, are prior restraints on the First Amendment to the
U.S. Constitution pertaining to Plaintiff's right to observe and report government in action
involving matters of significant public interest.

Meanwhile, to be clear, the Plaintiff never sought to stop these gathers altogether,
merely to postpone them so their removal, if necessary was "humane."

1 of the Defendants.

2 In two separate orders (Docket Nos. 18 and 37) this court denied Plaintiff Laura
3 Leigh's two, separate TROs (Dockets 3, 5 and 24). In articulating both TRO denials the
4 court relied on a strict interpretation of the "likelihood of success on the merits" factor
5 which the court found had not been satisfied. The court used facts from the first TRO to
6 deny the second TRO and employed the same basis. (See Dockets 18 and 37).

7

8 **Legal Analysis**

9 In both orders (Dockets 18 and 37) the court focused on the "likelihood of
10 success on the merits" element to deny Plaintiffs' TROs. The court adopted language
11 from the First Circuit decision, *New Comm Wireless Services Inc. v. SprintCom*, 287 F.
12 3d 1 (1st Cir. 2002).

13 *New Comm* is but one example of the most exacting approach used among the
14 Circuit Courts when assessing a plaintiff's request for equitable injunctive relief and
15 determining whether the "likelihood of success on the merits" requirement could be
16 satisfied. Just like it was when *New Comm* was decided in 2002, the First Circuit
17 continues today as the leader of this stiff approach. See, e.g., *Waldron v. George*
18 *Weston Bakeries Inc.*, 570 F.3d 5, 8 (1st Cir.2009)(the first factor, "likelihood of
19 success," is usually *given particularly heavy weight*); *ANSYS, Inc. v. Computational*
20 *Dynamics North America, Ltd.*, 595 F.3d 75 (1st Cir. 2010) (the likelihood of success
21 factor is usually given particularly heavy weight in deciding a motion for preliminary
22 injunction). The First Circuit approach to "likelihood of success on the merits" is
23 diametrically opposed to the method the Ninth Circuit employs on the subject.

24 In *Alliance for Wild Rockies v. Cottrell*, --- F.3d ----, (9th Cir. July 28, 2010), a
25 decision published yesterday, the court concluded a Montana District committed
26 reversible error when denying injunctive relief without employing the Ninth Circuit's
27 sliding scale approach. The court held the "serious questions" approach survives
28 *Winters*.

1 Alliance reaffirms employment of the test that, “**serious questions going to the**
2 **merits’ and a hardship balance that tips sharply toward the plaintiff can support**
3 **issuance of an injunction.**” Alliance. Emphasis added.

4 Alliance did not stop there. The decision emphasized the importance of the
5 sliding scale approach where, “[f]lexibility is the hallmark of equity jurisdiction”
6 (quoting Justice Ginsburg’s dissent in the *Winters* decision). The court brought to
7 attention *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir.2009), where the district court
8 applied the “serious questions” test and held that “there are serious questions on the
9 merits and the balance of hardships tips sharply in favor of plaintiff.” The Ninth Circuit
10 affirmed the decision because the record supported a finding of a “likelihood of
11 irreparable harm.” *Id.* at 1085.

12 The Alliance court quoted the Seventh Circuit’s approach with approval. The
13 Seventh Circuit likewise found the sliding scale approach palatable with *Winters*, quoting
14 Judge Easterbrook who wrote:

15 Irreparable injury is not enough to support equitable relief.
16 *There also must be a plausible claim on the merits, and*
17 ***the injunction must do more good than harm (which is to***
18 ***say that the “balance of equities” favors the plaintiff).***
19 *How strong a claim on the merits is enough depends on the*
20 *balance of harms: the more net harm an injunction can*
21 ***prevent, the weaker the plaintiff’s claim on the merits can***
22 ***be while still supporting some preliminary relief.***

23 *Hoosier Energy Rural Elec. Co-op., Inc. v. John*
24 *Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th
Cir.2009) (internal citations omitted) (Emphasis Added).

25 Alliance also pointed to the Seventh Circuit’s employment of the same test.
26 Alliance quoted with approval, the Judge Walker’s explanation of the “serious questions”
27 test:
28

1 better position to predict the likelihood of harm than the
2 likelihood of success.

3
4 But predicting the likelihood of success is another matter
5 entirely. As mentioned, the whole question of the merits
6 comes before the court on an accelerated schedule. The
7 parties are often mostly guessing about important factual
8 points that go, for example, to whether a statute has been
9 violated, whether a noncompetition agreement is even valid,
10 or whether a patent is enforceable. The arguments that flow
11 from the facts, while not exactly half-baked, do not have the
12 clarity and development that will come later at summary
13 judgment or trial. In this setting, it can seem almost inimical to
14 good judging to hazard a prediction about which side is likely
15 to succeed. There are, of course, obvious cases. But in
16 many, perhaps most, cases the *better* question to ask is
17 whether there are serious questions going to the merits. That
18 question has a legitimate answer. Whether plaintiffs are likely
19 to prevail often does not.

20
21 **The Facts and Serious Questions on the Merits**

22 The court denied Plaintiff's requested relief from both TRO Motions concluding
23 the Plaintiff had not established facts demonstrating a "likelihood of success on the
24 merits." The court coined the First Circuit's phrase, that this element is the *sine qua non*
25 of the analysis and if not clearly established, the other factors become, "matters of idle
26 curiosity." (Dockets 18 and 37, quoting the First Circuit's *New Comm* decision).

27 For discussion, Plaintiff attaches the Declarations and supporting exhibits to her
28 TRO Motions, comprising Exhibits "B" through "N" which are incorporated herein. These

1 comprise much of the evidence before the court and on which the court entered its
2 orders denying Plaintiff's equitable relief.

3 The Declarations submitted in support of the requested TRO Motions established
4 several noteworthy matters, namely the following:

- 5 1. The Plaintiff hold various positions in different organizations that are dedicated to:
6 (1) the preservation and humane treatment of wild horses; and (2) educating the
7 public about the abuse, mistreatment and management of the wild horses by the
8 Bureau of Land Management (BLM). She has a direct responsibility to research
9 and report observations regarding wild horses and their management. **Exhibit B.**
- 10 2. Plaintiff is the Project Manager (and creator) of Herd Watch, a Cloud Foundation
11 project. She is responsible for collection of field data and data pertaining to wild
12 horses during round ups and in captivity. The "mission" of Herd Watch is to
13 "watchdog" America's wild horses and burros, provide increased public visibility,
14 monitor the range conditions and the mustang, burro and livestock numbers and
15 keep advised and informed on the BLM's plans for "management" of each
16 American Herd, for the purpose of creating a concise database of information that
17 tracks public lands range health, gather operations and the disposition of
18 American wild equids. **Exhibit B.**
- 19 3. This Herd Watch program is meant to educate and inform the public, to provide
20 accurate responses in the public process of democratic government; and, the
21 database she assembles could also be utilized by groups, even government
22 agencies, tasked with the historical documentation of American heritage. **Exh B.**
- 23 4. Plaintiff is the "subject mater expert" for The Equine Welfare Alliance in its
24 research department. The Equine Welfare Alliance is dedicated to ending the
25 slaughter of American Horses and the protection of our Wild Horses & Burros on
26 public lands. Her responsibilities include observation and research used to inform
27 the public and representatives of government about issues surrounding our
28 equines. She performs duties such as, by example, assisting in preparation of

- 1 documents for the GAO (Government Accounting Office). **Exhibit B**
- 2 5. Plaintiff write articles for numerous publications including Horseback magazine,
3 Examiner and True Cowboy. She maintains an internet “blog” that receives
4 thousands of views. The purpose of the blog is to create dialogue and answer
5 questions pertaining to wild horse management. **Exhibit B**
- 6 6. As a videographer Plaintiff taped footage of roundups by the Defendants which
7 have appeared in numerous venues including CNN and the “I Team Reports” of
8 George Knapp of KLAS-TV, in Las Vegas.
- 9 7. She is a credentialed journalist. **Exhibit B.**
- 10 8. Resultant of her chosen vocation and her many assignments, Plaintiff considers
11 herself a vital link in the chain that supplies information to the public and equine
12 welfare agencies while conforming with the system of government that creates
13 and protects that opportunity with certain Constitutional guarantees. **Exhibit B**
- 14 9. She has spent nearly half her lifetime and considerable resources to accomplish
15 the tasks in which she engages in the wild horse world. **Exhibit B**
- 16 10. Plaintiff told the court that, “when government bars or limits my access to allow
17 my observation of government in action, that barring and limiting conduct
18 obstructs my ability to fulfill my obligations” **Exhibit B.**
- 19 11. Plaintiff told the court her freedom of thought and expression and of the ability to
20 report her observations of BLM management practices of America’s wild horses,
21 is wholly dependant on witnessing the practices of the BLM first hand.
- 22 12. Plaintiff receives revenue from fair reporting to the public, the activities involving
23 the BLM and horses she observes.
- 24 13. Plaintiff has for several years past, enjoyed observing first hand, wild horses in
25 their natural environment on public lands, primarily in Nevada. She states this:
26 The past year I have spent more time than not, conducting
27 research and observations in the field, particularly in the wild
28 horse environment. Resultantly, I have an affinity and love of

1 seeing first hand, wild horses grow, move, be social and
2 arrange themselves in family bands. Some individual horses
3 I have followed a significant period of time to observe them
4 overcome challenges they face with their environment, both
5 natural and manmade. I have learned by observing them
6 survive and overcome threats to themselves, to family bands
7 and to whole herds. To me, this personal experience has
8 been profound, life altering and rewarding in a manner and to
9 the extent I would never forget. It is perhaps, at least to me,
10 one of the most rewarding, life changing experiences I may
11 ever experience; and I continue to experience these
12 observations.

Exhibit C.

13 14. Foals are of particular interest to Plaintiff. Foals in the wild are the subject of two
14 books for children on which she is currently working. Foals involved in BLM
15 gathers have also been the subject of many articles and news clips the Plaintiff
16 authored. **Exhibit C.**

17 15. Plaintiff stated the following:

18 To see foals threatened to the point where they are injured,
19 maimed, suffering or expire, is hard to fathom but it happens
20 when the BLM conducts its gathers. I've seen this first hand
21 now, multiple times. I've seen the BLM and their contracted
22 help run foals and their moms with helicopters where they
23 bear down on them with the helicopter's rotor to within feet of
24 the animals. I've watched them die in BLM holding pens
25 following BLM gathers. I've seen foals hardly able to walk
26 after having been run on rocky ground for unknown, lengthy
27 distances, causing severe and irreparable injury to their soft,
28 young hoofs. To me, these personal observations are most

1 disheartening, disturbing and unforgettable. To me, to see
2 this tragic event repeat itself as what is likely to occur with
3 this federal decision to drive baby horses with a helicopter
4 from the Tuscarora Gather area, in desert heat, before they
5 are mature enough to survive the trip, causing their demise,
6 is unspeakable and causes me personal grief the extent of
7 which I cannot measure. I am in disbelief that my own
8 federal government which I love, cherish, support and
9 appreciate, and which I am informed and believe, recognizes
10 these horses as “living symbols of the historic and pioneer
11 spirit of the West,” could cause the demise of young foals
12 who have not been provided the chance of a full life in their
13 native habitat. **Exhibit C**

- 14 16. The Plaintiff personally observed numerous young foals and pregnant mares in
15 the areas of the intended gathers at Owyhee, Rock Creek and Little Humboldt
16 HMAs before these gathers. She reported these facts to this court. **Exhibits C, I.**
- 17 17. The Plaintiff offered competent testimony that confirmed harm to the wild horse
18 herds would result if gathers occurred in the heat of the summer and where
19 numerous foals were on the ground. **Exhibits D, E, F.**
- 20 18. The Plaintiff offered competent testimony disputing the surprise “interim report”
21 dated July 15, 2010 published by the Defendants which defended their
22 emergency gather. The Plaintiff offered clear, compelling evidence by top
23 veterinarians who opined that gathering wild herds in those HMAs at this time was
24 clearly, *inhumane*. **Exhibits G, H, I.**
- 25 19. During the pendency of this case, she and her colleagues and the court were
26 advised there was an emergency issue at Owyhee, according to the Defendants.
27 That resultantly, if the court did not allow the Defendants to immediately conduct
28 their gather, that seventy-five percent (75%) of the Owyhee herd would be lost.

1 (Reference to testimony at July 16, 2010 hearing). Faced with this purported
2 “emergency issue” to which she could not rebut because of the last minute,
3 “eleventh hour” report and surprise testimony the Defendants offered the court to
4 prove the point, Plaintiff and her colleagues set out to ferret out the truth. They
5 found the Defendants misrepresented the facts and brought it to the attention of
6 the court in a factual manner. **Exhibits G, H, I, J, K, L.**

7
8 None of these statements are refuted on the record by the Defendants.

9
10 *Serious Questions are Raised Concerning the Merits of Plaintiff’s Case*

11 The Plaintiff’s Complaint in essence, seeks two types of relief: Injunctive and a
12 Declaration of Rights among the parties. No one has contended thus far that these
13 claims are somehow inadequately plead.

14 *Declaratory Relief and Injunctive Relief*

15 A judgment declaring rights or establishing the legal status or interpretation of a
16 law or instrument is binding although distinguished from other judgments or court
17 opinions. The principal distinguishing feature of Declaratory Relief is, there is no
18 executive element or an order that something be affirmatively completed like for
19 instance, the payment of money. To prevail, Plaintiff need only demonstrate a violation
20 of law or of a governing principal or document such as a contract, which based on
21 interpretation, has some effect on the parties. Thereafter, a court simply declares or
22 defines rights to be observed or wrongs to be eschewed by litigants, or the court
23 expresses the court's view on a contested question of law.

24 Injunctive relief on the other hand *is* the claim resulting in the executive order
25 which compels or mandates that a party either do something or refrain from doing
26 something. To prevail here, the Plaintiff must satisfy the factors expressed in *Winter v.*
27 *Natural Resources Defense Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 374 (2008) as
28 now interpreted by *Alliance*.

1 Serious Questions relative to the Merits

2 If the Plaintiff is able to demonstrate with competent evidence the Defendants
3 violated or are violating the law, then the Plaintiff has established the case on the merits.
4 If the Plaintiff can make it that far, then Plaintiff has in fact, brought forth at a minimum,
5 serious questions establishing the merits of the case.

6 Plaintiff has clearly demonstrated in this instance, a controversy exists between
7 her and the Defendants. Plaintiff contends the Defendants are violating the law which
8 causes a deleterious effect not only on her but on the public, on the press and on a
9 recognized historic American resource.

10 For injunctive relief, Plaintiff again, needs to show a violation of the law by the
11 Defendants. If competent evidence addresses a violation of the law, then a plaintiff has
12 overcome the burden of producing evidence on the cause.

13 In support of Plaintiff's claims for relief, there are at least two separate violations
14 of law. The principal law disregarded by the Defendants involves The Free Roaming
15 Wild Horse and Burrow Act of 1971 ("Wild Horse Act"), discussed significantly in the
16 Plaintiffs TRO briefs. This law mandates that the removal of excess wild horses, if
17 necessary, shall be accomplished *humanely*. See, 16 USC §1333 (b)(2)(iv)(B). If the
18 Defendants do not gather *humanely*, then they have violated the *clear* language, the
19 *clear* intent, and the *clear* purpose of 16 USC §1333 (b)(2)(iv)(B).

20 This particular provision in the law (Section 1333) and its application to the
21 Defendants' activities is *not* the controversial issue. Rather, the controversial issue is
22 whether the Defendants are engaged in a process of removing excess horses in a
23 *humane* way. This defines the controversy between the parties.

24 The wild horse gathers in the Owyhee, Rock Creek and Little Humboldt HMAs
25 violate this clear provision of 16 USC §1333 (b)(2)(iv)(B) when the Defendants schedule
26 their gather at the height of the hot summer and in conjunction with the *actual* foaling
27 season. Driving horses in heat and dry conditions harms horses. **Exhibits G, H.** Driving
28 young foals three months or less with helicopters is inhumane. **Exhibits G, H, N.** These

1 gathers jeopardize the health and safety of the very animals with which the Defendants
2 are charged to protect, when they run horses in the heat of the summer and when they
3 run them in the *actual* foaling season.² See **EXHIBITS G, H, N.**

4 Here the Plaintiff established that the method by which the Defendants were
5 gathering horses was *inhumane*. **EXHIBITS G, H.** No one challenged the qualifications
6 of the two veterinarians who provided the court this opinion. Clearly the Plaintiff's
7 identified equine veterinarians are experts in the field. One is also adjunct faculty at
8 perhaps the best vet teaching school in the country.

9 In denying the TRO motions, does the court imply on its own that the Declarations
10 of Doctors Winand and Jacobson are somehow incompetent? Do they not have
11 qualifications to render expert opinions in their field of expertise? Did the court make a
12 credibility judgment as to the experts?

13 The Defendants *never* challenged the qualifications of these witnesses. They
14 only disagree with the opinion.

15 If it comes down to the issue of whom the court finds more persuasive in the
16 absence of meeting these witnesses face-to-face, or hearing these witnesses provide
17 live testimony on whether it is *humane* to drive by helicopter, wild horses which include
18 many young foals and pregnant mares, during high temperatures, how does one find
19 fault with Drs. Winand and Jacobson's testimony? Where does "common sense" come
20 into play? What must these veterinarians do to be credible or have their opinions taken
21 seriously? Must they witness the gather? Well, they *can't*, because the Owyhee gather
22 was completely closed to the public; and the Little Humboldt and Rock Creek gather
23 "vistas" were sufficiently afar from the horses such that a veterinarian in the gallery
24 would not have been close enough to conduct clinically appropriate observations.

25 Let's discuss it from a different approach. The Defendants clearly knew there
26

27 ² The Plaintiffs provided first-hand accounts of seeing many foals less than three
28 months of age within the intended gather zones with their mothers; and obviously pregnant
mares were also observed in the intended gather zones. See e.g., **EXHIBITS D, E, F, I.**

1 was litigation looming. What did the Defendants do to preserve the evidence that
2 absolves them of wrongdoing? In the usual course, parties, even *prior* to filing a lawsuit,
3 *preserve the evidence* which caused the other's harm. If they don't then the one who
4 "spoils" the evidence faces the *presumption* that the evidence is unfavorable to his/her
5 cause.

6 When the court ruled against the Plaintiff's Motions for TRO, did it consider that
7 the entire Owyhee event was cast in a shadow of secrecy from the public's eye? Did the
8 court consider that the Defendants did not share their evidence of being *humane* when
9 the process was in motion? Did the court consider that the Defendants failed to
10 preserve any independent assessment of their purported "right-doing"?

11 Plaintiff hereby asks the court to strike Dr. Kane's Declaration based on the
12 Defendants' failure to preserve evidence, and to enter an evidentiary presumption that
13 the Defendants' conduct was *inhumane* and thus, contrary to existing law.

14 The Plaintiffs provided clear, cogent evidence with Drs. Winand and Jacobson's
15 Declarations that driving horses, young foals and pregnant mares in high temperatures
16 and when foals are this young, is inhumane. Conversely, the Defendants' veterinarian,
17 Dr. Kane, provided incompetent evidence vis-a-vis inappropriate credibility opinions of
18 those who pay him to be there. The Plaintiff caught it and asked that the testimony be
19 stricken. The court disregarded the request.

20 The second violation of law comes from the Defendants' gather of wild horses off
21 the Little Humboldt HMA. In a film the BLM recently produced in which it justifies the
22 reasons for removing wild horses in the Tuscarora Gather (found on the internet in the
23 BLM's website) the narrator discusses the gather at Little Humboldt. There, the
24 Defendants admit the purpose of the Little Humboldt gather is really, to remove horses
25 not because they are "excessive" but, rather, to manage them so they won't leave the
26 HMA in the future. The Defendants clearly have no authority whatsoever to gather
27 horses from the HMAs that are not "excess" horses.

28 In *Colorado Wild Horse and Burrow Coalition, Inc v. Salazar*, 639 F. Supp 2d 87

1 (D.D.C. 2008) the court there determined that the removal by the BLM of the Douglas
2 wild horse herd from the range was contrary to the clearly stated purpose and intent of
3 Congress and that Congress didn't intend for the federal Defendants (nearly one and the
4 same as are Defendants here) to remove horses not determined to be "excess." The
5 *Colorado* court stated the following:

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

18 The *Colorado* court concluded the, BLM's decision to remove an entire herd of
19 non-excess wild free-roaming horses and burros is an impermissible construction of the
20 of the Wild Horse Act (under step two of *Chevron* , discussed in Plaintiff's Motions for
21 TRO). *Id.* p 96

22 These principles were articulated in Plaintiffs' TRO briefs. The Defendants are
23 not allowed to remove horses that are not "excessive."

24 Based on these clear violations of relevant law, do these facts not cry out with
25 "serious questions" concerning the merits of the case?
26

27 *The Other Factors*

28 Clearly the hardships tip heavily toward the Plaintiff were injunctive relief not

1 issued. She loses assignments in her job as a journalist when she cannot reasonably
2 observe and visualize the gather. She cannot observe and report which is part of the
3 Plaintiff's job. She is denied First Amendment protections from a prior restraint in being
4 shut out from effectively reporting events involving government in action in an issue of
5 significant public interest.

6 The court assumed, without reading the affidavits in support of her Order to Show
7 Cause Motion, that Plaintiff was shut out only from private property. This is not true. A
8 close reading of Ms. Leigh's Declaration in support of the OSC Motion, clearly
9 demonstrated the Defendants and their ostensible agents *stopped* her from proceeding
10 further *while she was on public lands*. The court disregarded this evidence.

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

22 Given the Plaintiff's chosen vocation and her station in life and her dedication to
23 wild horses, the Court's thoughts in *Lujan* are instructive. In *Lujan v. Defenders of*
24 *Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992) the Court stated, "It is clear that
25 the person who observes ... a particular animal threatened by a federal decision is facing
26 perceptible harm, since the very subject of his interest will no longer exist." *Lujan*, 504
27 U.S. at 566, 112 S.Ct. 2130.

28 On the other side of the scale, what are the harms to the Defendants caused by

1 making them wait a couple of months, until Fall, before resuming their gathers? Or,
2 does it interfere with their gather schedule so much so that it tips the scale heavily to the
3 Defendants' disadvantage when causing them to alter their scheduling?

4 There has been no question that the gathering of wild horses in Nevada, involves
5 a matter of significant public interest. This is not a controversial element, here.

6
7 **CONCLUSION**

8 The Plaintiff respectfully submits there is ample, competent evidence
9 demonstrating the Plaintiff prevails on the merits. At the very least the Plaintiff has
10 raised serious questions concerning the merits, and the balancing of interests tips
11 heavily against her should the requested relief not be granted.

12 Plaintiff respectfully requests the following:

- 13 1. The court reconsider its rulings denying the Plaintiffs' relief;
- 14 2. The court rule in such a fashion as to make its ruling a final, appealable
15 order;
- 16 3. Should the court deny the requested relief, that it modify its previous orders
17 denying the TRO Motions, providing Plaintiff permission to appeal, should
18 the Orders be construed interlocutory decisions.

19 Dated this 29th day of July 2010

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

22 /S/

23 _____
24 Gordon M. Cowan Esq. (SBN 1781)
25 Attorney for Plaintiff LAURA LEIGH

Attachments

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- Exhibit A** *Alliance for Wild Rockies v. Cottrell*, ___ F.3d ___ (9th Cir. Jul 28, 2010)
- Exhibit B** Declaration Laura Leigh filed July 14, 2010 (Docket 5-1)
- Exhibit C** Declaration Laura Leigh filed July 12, 2010 (Docket 3-3)
- Exhibit D** Declaration Craig Downer filed July 12, 2010 (Docket 3-2)
- Exhibit E** Declaration James Stewart filed July 16, 2010 (Docket 16-1)
- Exhibit F** Declaration Laura Leigh filed July 16, 2010 (Docket 16-2)
- Exhibit G** Declaration Nena Winand, DVN filed July 23, 2010 (Docket 24-1)
- Exhibit H** Declaration Lisa Jacobson DVM filed July 23, 2010 (Docket 24-2)
- Exhibit I** Declaration Laura Leigh filed July 23, 2010 (Docket 24-3)
- Exhibit J** Six Photos filed July 23, 2010 (Docket 24-4)
- Exhibit K** Declaration Katie Fite filed July 23, 2010 (Docket 24-5)
- Exhibit L** Katie Fite Report filed July 23, 2010 (Docket 24-6)
- Exhibit M** BLM map filed July 23, 2010 (Docket 24-7)
- Exhibit N** Bruce Nock PhD Article (Docket 24-8)

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:

Electronic service:

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

DATED this 30th day of July 2010

/s/

 G.M. Cowan