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6 **IN THE UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 LAURA LEIGH,

9 Plaintiff,

10 **Case No. 3:11-cv-0608-HDM-WGC**

11 vs.

12 KEN SALAZAR, in his official capacity as  
Secretary of the U.S. DEPARTMENT OF  
THE INTERIOR, *et al.*,

13 Defendants.  
14 \_\_\_\_\_/

15 **REPLY BRIEF IN SUPPORT OF**  
16 **MOTION FOR TEMPORARY RESTRAINING ORDER**

17 Plaintiff LAURA LEIGH submits the following Reply Memorandum of Points &  
18 Authorities in support of her Motion for a Temporary Restraining Order:

19  
20 ***The Relief Requested Is Minimal***

21 Plaintiff merely seeks to halt the use of the helicopter to round up horses at the  
22 Jackson Mountain HMA, until July 1, 2012, when “foaling season” is “officially” over. If  
23 relief is granted, this would amount to a ten (10) day prohibition, through June 30, 2012,  
24 to using a helicopter to round up horses. The use of the helicopter during this time is  
25 “prohibited” by the defendants’ own policies and procedures.  
26

27 ***Omissions by the Defendants***

28 Defendants give a factual background of the operation, yet omit several facts.

1           Within the defendants' own EA (environmental assessment) the area of concern  
2 is of limited scope in the context of emergency removal and not within the normal scope  
3 of operations (July 1-March1). The defendants do not reveal this in their factual  
4 account.

5           The defendants' Record of Decision, page 1, states the following: Although  
6 helicopter gathers generally are not conducted before July 1st, this does not apply if  
7 emergency conditions exist, as is the case in the Jackson Mountain HMA where an  
8 emergency exists in the south west portion of the gather area and where an immediate  
9 removal of excess wild horses is necessary to protect wild horse health.

10           The Defendants successfully utilized this "emergency" strategy in a previous  
11 case (Tuscarora) where the defendants claimed a drought emergency which caused  
12 this court (The Hon. Larry R. Hicks) to allow the gather to proceed unimpeded. The  
13 defendants at that time, did not advise the court that the emergency at that location was  
14 of limited geographical scope. Multiple unnecessary deaths of horses occurred from  
15 that roundup. And, advocates found plenty of water to support wild horse populations in  
16 the HMA elsewhere after the BLM reopened the gather area back up to the public.

17           According to Congressman Raul Grijalva's letter (the ranking member of the  
18 House Subcommittee on National Parks, Forests and Public Lands) "The situation in  
19 Jackson Mountains HMA does not meet BLM's own criteria for an emergency."  
20 The HMA has two distinct populations of horses, the herd area is geographically  
21 bisected by a mountain peak nearly 10,000 feet high. In the North there is no emergent  
22 situation of any nature and is not noted in the EA or record of decision. The populations  
23 bear unique colorations indicating a lack of interaction.

## 24 25 ***The Challenged Conduct - The Helicopter Roundup***

### 26 *The BLM's own Policies and Procedures Prohibit the Conduct*

27           The challenge involves the BLM's admitted use of a helicopter to round up  
28 horses during "foaling season" in the northern part of the HMA where no current

1 emergency exists. The activity contravenes the BLM's own policies and procedures  
2 which are supposedly rooted in "humane" methods of capturing wild horses.

3 The public and Ms. Leigh share a significant interest and maintain a reasonable  
4 expectation that the BLM would follow its own stated policies and procedures in how the  
5 BLM says it would round up wild horses, particularly where those policies and  
6 procedures are meant to foster the "humane" capturing of excess wild horses. The  
7 "humane" handling of wild horses, involves a matter of significant public interest.

8 According to the BLM's own rules, made available to the public (the BLM  
9 Handbook, Dk. 43-1), helicopter roundups are "prohibited" (BLM's terminology) during  
10 foaling season. (Dk. 43-1).

11 According to the BLM's own rules that are NOT shared with the public (BLM  
12 Memorandum at Dk. 47-2), helicopter roundups remain "prohibited" during foaling  
13 season in areas where there is no emergency. (Dk. 47-2). This Memorandum, by its  
14 own terms, expired September 30, 2011. (Dk. 47-2).

15 When the BLM gathers wild horses with a helicopter during foaling season,  
16 where no emergency exists such as in the northern portion of the HMA, the BLM  
17 contravenes its own policies and procedures, no matter which version of the policies  
18 they seek to "sell" to the court.

19 These policies and procedures are presumably in place to protect wild horses  
20 from "inhumane" conduct during their removal from public lands.

21  
22 *The BLM's Discretion*

23 The requested relief does not challenge appropriate discretion, even where the  
24 BLM changes its mind or misleads the public.

25 This motion challenges the BLM's abuse of that discretion when the conduct  
26 contravenes laws which prohibit "inhumane" treatment of the very wild horses they are  
27 charged with protecting.

1           Humane Discussion

2           The helicopter-driving removal method used by the BLM, relies on the horses’  
3 “flight” (fear or fright) reaction, which causes the horses to run or retreat from the threat.  
4 In this instance, the wild horses are run or galloped at significant distances measured in  
5 miles.

6           At Jackson Mountain, the BLM is not keeping accurate track (or any track) of the  
7 number of miles the horses targeted for removal, are run or galloped. The Jackson  
8 Mountain Record of Decision states that the horses could be run as much as five to  
9 seven miles per roundup. Observers at this roundup calculate that some of the horses  
10 removed thus far, have been run or galloped at distances greater than five to seven  
11 miles, and that these groups of horses included young foals and pregnant mares.

12           To run newly born foals at distances measured in miles, particularly five to seven  
13 miles, is inhumane for reasons that are obvious to the reasonable person, and which  
14 doesn’t necessarily require further explanation by an expert witness to appreciate.

15           As an example of why newly born foals should not be run at significant distances  
16 is that the hooves of young foals are soft and pliable and not yet capable of surviving a  
17 run or gallop of significant distances measured in miles, particularly on rocky terrain.  
18 The young horses’ hooves have not yet developed into the hardened soles that more  
19 mature horses enjoy. This concept is illustrated in Ms. Elise Gardner’s Declaration (with  
20 photos) included at **Exhibit 8** attached.

21           It is also inhumane, for obvious reasons, to chase wild horses via helicopter for  
22 distances measured in miles (five to seven miles or even more in this instance) when  
23 temperatures exceed the mid-80°s. It is not responsible for the BLM to not keep track of  
24 temperatures when chasing horses for miles by helicopter when the temperature is  
25 obviously, hot.

26

27           The Law and Humane Handling

28           The Wild Horse and Burro Act passed unanimously in both houses of Congress

1 and was signed into law December 1971. The Congressional findings and declaration  
2 of policy of the Act are as follows:

3 Congress finds and declares that wild free-roaming horses  
4 and burros are living symbols of the historic and pioneer  
5 spirit of the West; that they contribute to the diversity of life  
6 forms within the Nation and enrich the lives of the American  
7 people; and that these horses and burros are fast  
8 disappearing from the American scene. It is the policy of  
9 Congress that wild free-roaming horses and burros shall be  
10 protected from capture, branding, harassment, or death; and  
11 to accomplish this they are to be considered in the area  
12 where presently found, as an integral part of the natural  
13 system of the public lands.

The Wild Free-Roaming Horses and Burro Act of 1971,  
P.L.92-195, 16 U.S.C. §1331.

10 Congress defines the powers and duties of the Secretary of the Interior, relative  
11 to the management of wild horses on public lands, in Section 1333 of the Act. That  
12 Section defines by mandatory language the Secretary's obligation to *humanely* capture  
13 certain wild horses.

14 16 USC §1333 (b)(2)(iv)(B) provides that,

15 The Secretary shall cause such number of additional  
16 excess wild free-roaming horses and burros to be  
17 **humanely captured** and removed for private  
18 maintenance and care for which he determines an  
19 adoption demand exists by qualified individuals, and  
20 for which he determines he can **assure humane  
21 treatment** and care (including proper transportation,  
22 feeding, and handling) . . . .

16 USC 1333 (b)(2)(iv)(B) (Emphasis added).

20 43 CFR § 4740.1 provides in relevant part, the following:

21 [a]ircraft may be used by the authorized officer  
22 in all phases of the administration of the Act, .

23 . . All such use shall be conducted in a  
24 **humane** manner. 43 CFR § 4740.1. (Emphasis added).

24 Section 4700.0-5 of Title 43 of the CFR provides in relevant part, as follows:

- 25 (e) Humane treatment means handling compatible with  
26 animal husbandry practices accepted in the veterinary  
27 community, without **causing unnecessary stress or  
28 suffering to a wild horse or burro.**
- (f) Inhumane treatment means any intentional or  
negligent action or failure to act **that causes stress,**

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***injury, or undue suffering to a wild horse or burro***  
and is not compatible with animal husbandry  
practices accepted in the veterinary community.  
43 CFR §4700.0-5 (Emphasis added).

There is no room for disagreement that excess horses slated for removal from Jackson Mountain HMA must be treated *humanely* during their removal. To run or gallop herds of wild horses while knowing that “foaling season” is in place, creates an unreasonable and irresponsible risk that young foals would incur stress, injury or undue suffering as the result of such activity

The “Emergency”

The BLM admits the emergency existed in the southern part of the HMA. The roundup there is over. But the BLM’ continues using the helicopter to roundup horses elsewhere in the HMA during foaling season, including those horses residing within the northern part of the HMA. There is no emergency in the northern part of the HMA.

The BLM does not deny that others with grazing allotments in the northern part of the HMA are keeping their livestock on public rangeland in that area. Currently there are no private livestock restrictions within the entire HMA. A single rancher in the South-West portion of the HMA voluntarily removed cattle. Cattle are still permitted to graze and actively graze as horses are removed in the purported emergency.

Certainly if there were such a dire lack of water or forage which causes such an emergent situation in the remaining parts of the HMA, that the BLM would have moved into action to restrict or prohibit, or at least ask those having grazing allotment permits in that region, to remove their grazing animals.

***What is NOT Challenged***

There is no challenge here, on the authority of the BLM to remove excess horses from BLM managed “herd management areas” (“HMA”s). There is no challenge to how “excess” horses are determined, or how AML is determined. There is no challenge to

1 roundups occurring via other means (other than helicopter). There is no challenge to  
2 the use of a helicopter *after* foaling season is completed, if such a roundup is  
3 necessary.

4 There is no challenge that one fraction of the southern part of the Jackson  
5 Mountain HMA experienced a depletion of forage and water, that horses there were  
6 stressed and likely needed removal.

7  
8 ***Ms. Leigh's Standing***

9 Ms. Leigh incorporates her proposed Second Amended Complaint allegations  
10 relating to her standing.

11 This court has previously recognized Ms. Leigh's standing to bring the Triple B  
12 lawsuit in the first instance.

13 Ms. Leigh maintains standing under 5 U.S.C. § 702 of the Administrative  
14 Procedures Act to seek judicial review of the BLM's action (or failure to act) where she  
15 has suffered and would continue to suffer actual injury or injury in fact that is within the  
16 zone of interests protected by the relevant federal statutes indicated herein which  
17 Defendants fail and refuse to enforce. The Administrative Procedure Act allows a party  
18 "suffering legal wrong because of agency action, or adversely affected or aggrieved by  
19 agency action" to seek judicial review. 5 U.S.C. § 702.

20 Ms. Leigh believes she has suffered and continues to suffer an invasion of a  
21 legally protected interest amounting to the harms as averred in her Second Amended  
22 Complaint, caused when she is compelled time and time again, to watch the  
23 Defendants engage Jackson Mountain HMA wild horses in an inhumane manner  
24 contrary to laws and policies of the United States. Ms. Leigh maintains a right to  
25 observe the *humane* removal of, at the bare minimum, those wild horses from public  
26 lands with which she has gained appreciation and for which she has gained respect.

27 Ms. Leigh is adversely affected and aggrieved where she suffers perceptible  
28 harm which is imminent and continuing when having repetitively been subjected to

1 observations of overt displays of inhumane treatment toward Triple B Complex wild  
2 horses and where she is likely to incur the same conduct in the future, toward those  
3 certain wild horses with which she's gained appreciation and respect, during their  
4 removal from public lands. Ms. Leigh alleges in her proposed Second Amended  
5 Complaint that the offending conduct is within the zone of interest contemplated by  
6 Congress which clearly calls for the *humane* removal of excess wild horses.

7 Ms. Leigh's requested relief is traceable to the BLM's practice of ignoring the  
8 expressed intent of Congress when Congress unanimously adopting the Wild Free-  
9 Roaming Horses and Burro Act 16 U.S.C. §1331 *et seq.*, where Congress  
10 unambiguously requires the Defendants to remove excess horses *humanely*. See, 16  
11 USC § 1333 (b)(2)(iv)(B) (as amended in 1978)(see above). That the "humane"  
12 handling of free-roaming wild horses when removing their excess brethren, is part and  
13 parcel with the Wild Horse and Burro Act and is stated in mandatory, not permissive  
14 terms. 16 USC § 1333 (b)(2)(iv)(B)(see section verbatim, above). [See also, 16 U.S.C.  
15 § 1338a (the use of helicopters, "shall be in accordance with *humane* procedures . . .  
16 ."), 16 U.S.C. §1333(c)(calling for "humane conditions" by adopters), 1338(a)(3)(criminal  
17 penalty for "maliciously causes the death or harassment of any wild free-roaming horse  
18 or burro") and 1338(a)(6) (willfully violates a regulation issued pursuant to the Wild  
19 Free-Roaming Horse and Burro Act)].

20 The Wild Free-Roaming Horse and Burro Act remains clear, cogent and  
21 unambiguous in regard to the mandatory *humane* handling of wild horses by the BLM  
22 during their removal of excess horses. 16 USC § 1333 (b)(2)(iv)(B); 16 U.S.C. §  
23 1338a.

24 The definition of what the United States considers "humane" and also  
25 "inhumane" is specifically referenced at 43 CFR § 4700.0-5, above. Ms. Leigh believes  
26 the Defendants' conduct as described and identified herein and elsewhere in support of  
27 her requested TRO relief, is contrary to that considered humane as defined in 43 CFR  
28 §4700.0-5 and further, meets the definition of what would be considered inhumane as

1 that term is likewise described in 43 CFR §4700.0-5.

2 The BLM maintains authority to enforce the *humane* laws of the United States,  
3 and they maintain authority to correct or to modify the conduct by stopping helicopter  
4 roundups until the end of the foaling season, in compliance with such humane laws,  
5 and the BLM's own policies, procedures and "humane" regulations; that the failure to  
6 enforce such laws and provisions is an abuse of discretion that causes Ms. Leigh's  
7 harm as herein described.

8

9 ***APA Application***

10 The Defendants' failure and/or refusal to act to enforce the humane laws of the  
11 United States is in fact, agency action defined at 5 U.S.C. § 551(13) (a failure to act),  
12 that is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance  
13 with law, and/or is agency action implemented without observance of procedure  
14 required by law, as is contemplated in the Administrative Procedures Act, 5 U.S.C. §§  
15 706(2)(A) and/or (D).

16 Ms. Leigh plans to observe further roundup operations at Jackson Mountain  
17 should the helicopter continue to fly during the "foaling season."

18 There remains a real and immediate threat that the injuries to Ms. Leigh's  
19 personal interests as herein described would repeat and reoccur where she would be  
20 present at remaining Jackson Mountain roundup if the helicopter is allowed to fly during  
21 foaling season. A ruling in Plaintiff's favor, to cease helicopter flying the next ten (10)  
22 days, through June 30, 2012, would likely address and resolve the Plaintiffs' harm that  
23 would likely occur in the future without assistance of the court.

24

25 ***The First Amendment Violation***

26 When the public and Ms. Leigh travel significant distances, at their own expense,  
27 in rough terrain that takes a toll on their personal vehicles, to obtain ***reasonable***  
28 ***observation*** of the defendants' handling and management of wild horses, only to be

1 snubbed or denied reasonable observation of the horses, a First Amendment issue is  
2 raised. Plaintiff, as a credentialed journalist, has her right to observe and report  
3 newsworthy matters, censored each time she is deprived reasonable access to report  
4 on the condition of the horses. Ms. Leigh maintains a constitutional right to gather and  
5 report the news of such events.

6 The defendants cannot deny in this instance, that the public holds a historical  
7 right to observe wild horses removed from Nevada open rangelands. It was, after all,  
8 the State of Nevada, outside Dayton, Nevada, where the movie, *The Misfits*, starring  
9 Clark Gable and Marilyn Monroe, was filmed, bringing to light early mustangers, who  
10 were, themselves, members of the public who gathered wild horses on their own before  
11 the Free Roaming Wild Horse and Burro Act was signed into law.

12 The defendants are not able to demonstrate that the viewing restrictions facing  
13 Ms. Leigh, as outlined in the declarations attached with this Reply, were somehow,  
14 narrowly tailored to serve an overriding government interest to that of the public's and  
15 Ms. Leigh's constitutional right of access to observe those activities.

16 Examples of Ms. Leigh's preclusion of reasonable observation are contained in  
17 her declarations, attached hereto. The other example is found in the declaration of Ms.  
18 Julie Barraque, also attached, where the BLM told Ms. Barraque they were halting  
19 roundup activities the remainder of the day, causing Julie to leave the area and after  
20 which the BLM continued with the helicopter roundup after she left.

21  
22 *Reasonable Observation*

23 Plaintiff merely seeks reasonable observation. "Reasonable observation" in this  
24 instance, means that she should be able to see at least close enough, to adequately  
25 assess on her own (rather than having to rely on the word of BLM officials or their  
26 chosen representatives) the health of horses at the time of their capture, at their  
27 temporary corrals, and when they are loaded and shipped. Because some were trailed  
28 off the range away from the trap and holding areas, Ms. Leigh and the public have a

1 right to observe the condition of those horses as well. As matters currently stand, those  
2 horses that are trailed away in secrecy are *never* viewed by the public. The BLM hides  
3 them from public observation or precludes public observation of them.

4 The practices of the defendants as outlined in the declarations attached are not  
5 acceptable and constitute violations of basic First Amendment principles.

6  
7 ***Amending the Complaint to Include a New Roundup is Not  
8 Precluded by the Rules; Instead, it Promotes Judicial Economy  
9 and Avoids Splitting Causes of Action.***

9 On January 26<sup>th</sup> 2012 this Court noted that this Plaintiff could bring issues  
10 addressing specific roundup activity back into the Court but that the Court could not  
11 issue an order for programmatic change.

12 The Jackson HMA roundup involves “humane issues.” The Triple B Complex  
13 roundup involves “humane issues.” Both involve the same or similar type conduct. Both  
14 involve the same contractor. Both involve the same parties. The issues involving Triple  
15 B and Jackson Mountain are nearly parallel to one another.

16 No rule prevents such a filing. Amendments to pleadings are usually, freely  
17 given.

18 The defendants have shown no prejudice in the filing. They have yet to file an  
19 answer to the First Amended Complaint.

20 If there is criticism to be assessed in the in the filing of the Motion to Amend, it  
21 should be that the Motion seeks to file a Second Amended Complaint when it is in truth,  
22 it is both an amended and supplemental pleading. Plaintiff asks the court to allow the  
23 Plaintiff to restyle her Second Amended Complaint and Motion accordingly to call it a  
24 Second Amended and Supplemental Complaint and to call the Motion to Amend, a  
25 Motion to Amend and Supplement the First Amended Complaint.

26 Ms. Leigh should not be required to expend a new filing fee each and every time  
27 a new claim arises which is substantially similar to a pending claim in which the  
28 defendants had not yet responded to the complaint.

1 ***Injunctive Relief Issues***

2 The defendants contend Ms. Leigh does not show irreparable harm.

3 *Irreparable Harm - Inhumane Gather During Foaling Season*

4 Given the Plaintiff's chosen vocation and her station in life and her dedication to  
5 wild horses, the Court's thoughts in *Lujan* are instructive. In *Lujan v. Defenders of*  
6 *Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992) the Court stated, "It is clear that  
7 the person who observes ... a particular animal threatened by a federal decision is  
8 facing perceptible harm, since the very subject of his interest will no longer exist." *Lujan*,  
9 504 U.S. at 566, 112 S.Ct. 2130. Ms. Leigh suffers "perceptible harm."

10 Ms. Leigh, a member of the public and also as a photojournalist, is entitled to  
11 rely on the BLM to enforce its own parameters and conditions involving roundups. The  
12 BLM is entrusted with the health, the safety, the welfare of these horses. When the  
13 BLM fails or refuses to do its job to either prevent or halt or stop abusive, harmful and  
14 inhumane treatment of wild horses that occurs during roundups, Ms. Leigh gains  
15 standing to force the BLM's hand, to make them comply with their own published  
16 standards and promises made to the public, that they would treat these horses  
17 humanely during the removal process.

18  
19 *Irreparable Harm - First Amendment*

20 The First Amendment prohibits any law "abridging the freedom of speech, or of  
21 the press [.]," U.S. Const., amend 1. "When wrongdoing is underway, officials have  
22 great incentive to blindfold the watchful eyes of the Fourth Estate." See, *Leigh v.*  
23 *Salazar*, 677 F.3d 892, \_\_\_ (9th Cir. 2012).

24 "[t]he loss of First Amendment freedoms, for even minimal periods of time,  
25 unquestionably constitutes irreparable injury" for purposes of the issuance of a  
26 preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d  
27 547 (1976)).

28 Admittedly, if the court granted a ten-day TRO on the helicopter portion of the

1 roundup, there would be no argument of irreparable harm on this theory.  
2

3 Likelihood of Success on Merits

4 Ms. Leigh's strongest contention to demonstrating "success on the merits," is  
5 that the BLM does not enforce its own published rules which "prohibits" helicopter  
6 roundups during "foaling season." And, that in disregarding this humane step, Ms. Leigh  
7 must endure watching the defendants violate laws which forbid the inhumane treatment  
8 of wild horses during their removal.  
9

10 **Exhibits Attached**

11 Plaintiff includes a number of exhibits supplied as attachments, which support  
12 factual matters provided herein. Noteworthy are statements from observers, including  
13 one who was the former Wild Horse and Burro Specialist for the BLM who oversaw this  
14 very Jackson Mountain HMA. Also attached are independent photos depicting  
15 conditions and conduct.  
16

17 **Conclusion**

18 For reasons discussed Plaintiff respectfully requests an immediate, emergency  
19 Temporary Restraining Order issue precluding the BLM's further use of the helicopter  
20 for their roundup activities at Jackson Mountain HMA, until "foaling season" has ceased.  
21 ***This would amount to a ten (10) day TRO order*** since, according to the defendants,  
22 "foaling season" purportedly ends after June 30, 2012.

23 Respectfully this 20th day of June 2012.  
24

LAW OFFICE OF GORDON M. COWAN

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Gordon M. Cowan Esq. (SBN 1781)  
Attorney for Plaintiff LAURA LEIGH  
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**LIST OF EXHIBITS**

- Exhibit 8 Declaration Elise Gardner (with photos)
- Exhibit 9 Declaration Julie Barraque
- Exhibit 10 Declaration Laura Leigh
- Exhibit 11 Declaration Laura Leigh (Second to Reply Brief)
- Exhibit 12 Laura Leigh Photo Log
- Exhibit 13 Barraque Photo Log
- Exhibit 14 Heidi Hopkins Statement
- Exhibit 15 Henneke Scale

**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.

Dated this 20th day of June 2012

s/

\_\_\_\_\_  
G.M. Cowan