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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, BOB ABBEY, in his official
13 capacity as Director of the BUREAU OF
LAND MANAGEMENT; AMY LUEDERS in
14 her official capacity as Nevada State Acting
Director of the BUREAU OF LAND
15 MANAGEMENT,

16 Defendants.

17
18 **SUPPLEMENT TO**
MOTION TO RECONSIDER RULING (Dk. 30) DENYING WITHOUT PREJUDICE,
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (Dk. 12)

19
20 Plaintiff LAURA LEIGH through counsel provides the following Supplement to her
21 Motion to Reconsider denial of preliminary injunctive relief. This supplement is based on
22 a decision issued today by the U.S. Court of Appeals for the Ninth Circuit in the case in
23 which the government defendants recently filed a FRAP Rule 40 "panel rehearing"
24 request, and which the government defendants inferred, held no precedential effect
25 following their FRAP Rule 40 filing.

26 **THE NINTH CIRCUIT DECISION ISSUED TODAY**

27 The U.S. Court of Appeals for the Ninth Circuit issued a decision today in *Leigh v.*
28 *Salazar*, (9th Cir. No. 11-16088)(9th Cir. Dkt. 59). See **EXHIBIT 5** attached. The

1 modified opinion follows the government defendants' request for a FRAP Rule 40 "panel
2 rehearing." That request was denied without the right to an *en banc* hearing request.
3 See, electronic filing email received this a.m. from the Circuit Court at **EXHIBIT 4**
4 attached.

5 The appellate court's email notice of the electronic court filing, provides the
6 following statement:

7 AMENDED MEMORANDUM/OPINION of USCA 11-16088 ,
8 Ninth Circuit, as to [57] Amended Notice of Appeal and [58]
9 Memorandum/Opinion. Amending Disposition Opinion
10 REVERSED AND REMANDED:

11 The opinion filed on February 14, 2012 is amended as
12 follows:

13 On slip opinion page 1775, line 33, add the following
14 sentence after wild horses that should be removed.: And the
15 BLMs Record of Decision authorizes the BLM to gather
16 additional Silver King horses through 2013. With this
17 amendment, the panel has voted to deny the petition for
18 rehearing. Subsequent petitions for rehearing or rehearing
19 en banc may not be filed. (MLC).

20 See Exhibit 4 attached.

21 The Circuit Court modified its previous opinion by adding a new sentence to its
22 previously issued opinion found at *Leigh v. Salazar*, 668 F.3d 1126 (9th Cir. 2012). The
23 relevant portion of the modified opinion now reads, in relevant part as follows:

24 [t]he [preliminary injunction] motion applies to all future horse
25 gathers at Silver King. Although the government asserts that
26 there are no current plans for future roundups at Silver King,
27 it cannot rule out the possibility because the Wild Free-
28 Roaming Horses and Burros Act requires the BLM to
29 "immediately remove" excess horses from overpopulated
30 federal lands. 16 U.S.C. § 1333(b)(2). Indeed, there is an
31 estimated horse population annual growth rate of 20 to 25
32 percent in the Silver King Herd Management Area.
33 Furthermore, the BLM only gathered 504 wild horses during
34 the 2010 roundup, even though it had determined that there
35 were 546 excess wild horses that should be removed. *And*
36 *the BLM's Record of Decision authorizes the BLM to gather*
37 *additional Silver King horses through 2013.* Thus, there is a
38 real possibility of another horse gather in Silver King.
39 Although the preliminary injunction does not apply to horse
40 gathers conducted in other locations, it is not moot as applied
41 to future gathers in Silver King.

42 See **EXHIBIT 5** attached, p.4024
43 (Emphasis denotes addition by the court).

44 The modified Ninth Circuit opinion stands as published precedence. The official

1 citation to the modified version is not known, currently.

2 Plaintiff contends the same discussion as she offered previously, remains valid
3 even with the Circuit Court's modification. Future roundups at Triple B are by law,
4 "immediately" necessary and inevitable. Future roundups at Triple B are unavoidable
5 based on the BLM's own statistics on range populations and population growth within
6 the Triple B Complex. These statistics and the Plaintiff's calculations demonstrating the
7 BLM's avoidance of its duties as mandated by law, were never challenged in the
8 government defendants' opposition.

9 Nonetheless, should the Ninth Circuit's modified opinion cause this court's inquiry
10 to more directly focus on the length of time the BLM anticipated it may need to complete
11 roundups at Triple B, in that event, the BLM's Record of Decision would appear
12 germane to the issue. The BLM's Record of Decision states the following:

13 "If gather efficiencies do not allow for the completion of the
14 Proposed Action in Summer 2011 or during FY 2012, the
15 Egan and Wells FOs would return to the project area in 2013
16 or 2014 to gather a sufficient number of wild horses to
17 achieve the low range of the appropriate management level
(AML) and to implement population control measures for
released horses."

See, BLM's Record of Decision for Triple B
at **EXHIBIT 6** attached.

18 The Plaintiff, the public and this court can only assume the BLM would follow the
19 law requiring the "immediate removal" of excess horses. "While bureaucratic inertia may
20 be a risk, we presume that agencies will follow the law." *Pit River Tribe v. U.S. Forest*
21 *Service*, 615 F.3d 1069, 1082 (9th Cir. 2010) [citing: *N. Cheyenne Tribe v. Hodel*, 851
22 F.2d 1152, 1157 (9th Cir.1988) ("Bureaucratic rationalization and bureaucratic
23 momentum are real dangers, to be anticipated and avoided by the Secretary.... We
24 assume the Secretary will comply with the law")].

25 Respectfully, this 16th day of April 2012

26 LAW OFFICE OF GORDON M. COWAN

27 s/

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

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EXHIBITS

- Exhibit 4 - Email from Ninth Circuit re notice of electronic filing.
- Exhibit 5 - Amended Opinion, *Leigh v. Salazar* (9th Cir. No. 11-16-088)(Dkt.59)
- Exhibit 6 - BLM's Decision Record for Triple B Complex.

CERTIFICATE OF SERVICE

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

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

Erik Petersen, Esq.	erik.petersen@usdoj.gov
Ayako Sato	ayako.sato@usdoj.gov

Dated this 16th day of April 2012

/S/

G.M. Cowan