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6 **IN THE UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 LAURA LEIGH,

9 Plaintiff,

10 **3:13-cv-00006-MMD-VPC**

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 **MOTION FOR PRELIMINARY INJUNCTION**

16 Plaintiff LAURA LEIGH seeks a preliminary injunction order precluding
17 Defendants from the harmful conduct described herein below.

18 This Motion is made in accordance with Fed.R.Civ.P. 65(a). The Motion is
19 based on the pleadings and papers on file herein, the accompanying Memorandum of
20 Points and Authorities and supporting documents and on such other matters as may be
21 presented before the court.

22 Respectfully, this 10th day of January 2013

23 LAW OFFICE OF GORDON M. COWAN

24 s/

25 _____
26 Gordon M. Cowan Esq. (SBN 1781)
Attorney for Plaintiff LAURA LEIGH
27
28

1 **Why Preliminary Injunctive Relief Causes No Harm**

2 The BLM already removed 819 horses from the “Owyhee Complex.” Significant
3 pressure has already been relieved from whatever “stress” the BLM contends the range
4 suffers. Leaving the next 50 horses planned for removal, in the second phase of the
5 BLM roundup, would not create a significant change within a *one million acre complex*.

6 The Plaintiff asks only that the Owyhee Complex removal operation remain
7 enjoined until “inhumane conduct” issues are addressed and corrected; and that a plan
8 be implemented to accurately identify, prior to any further removals, “excess wild
9 horses.”

10 **BACKGROUND**

11 During the first phase (largest phase) of the BLM’s wild horse removal operation
12 at the Owyhee Complex, repetitive, inappropriate conduct was documented. The
13 conduct included and was not limited to the following: routine, repetitive use of hotshots
14 (including younger animals); gates slammed on horses as restraining devices; wild
15 horses driven into barbed wire; horses driven in extreme cold; animals driven to
16 exhaustion. Plaintiff was compelled to document the conduct to demonstrate the
17 likelihood of it continuing with other phases, as the “norm” or custom and practice, for
18 all phases.

19 Exhaustive attempts (including comment on the EA) were made by Plaintiff
20 previously, to cause the BLM to adopt an enforceable humane care policy toward wild
21 horses, before the start of operations of the Owyhee Complex. See plaintiff’s
22 declaration, Exhibit 2 attached. The parties were also engaged in settlement
23 negotiations involving 3:11-cv-608 (the “humane care” case involving the last Triple B
24 Complex roundup) when the Owyhee Complex commenced, resolution of which would
25 have resolved many of the issues being addressed by the court currently.¹

26 _____
27 ¹ The fact of settlement negotiations is not privileged since the court in both
28 3:11-cv-608 and 3:10-cv-597 were made aware of such discussions. The content of
discussions remains privileged.

1 Attempts were made to address these inhumane issues as they occurred during
2 the BLM's operations. Letters were written to local BLM, state and national offices by
3 Ms. Leigh as well as by members of the public. See Ms. Leigh's Declaration, Exhibit 3
4 to Complaint (Doc.1-3), Exhibit 2 to TRO Motion (Doc.2-2), and Exhibit 2 attached.

5 The BLM's response involved a litany of denials that anything was wrong,
6 inhumane or otherwise, and further, that no improvement was needed. BLM went so far
7 as to publish an open letter to the public (citing Plaintiff's organization, Wild Horse
8 Education) that was, literally, a denial of wrongdoing. The BLM's letter made assertions
9 that a humane policy was in place but instead, cited a Standard Operating Procedure
10 ("SOP") in the EA as a qualifying document. See the referenced SOP at Exhibit 1 to
11 Complaint (Doc.1-1, pp.37-43) and Exhibit 1 to TRO (Doc 2-1, pp.37-43). The SOP
12 simply outlines physical parameters (e.g., lengths of alleys, height of panels, etc.) and
13 authorities for removal. When the SOP references "humane care," it leaves the
14 interpretation to the discretion of the COR. The BLM's letter of denial, addressed to
15 Wild Horse Education, may be found at the following link:

16 [http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/pr
ograms/wild_horse_burro/owyhee_complex_docs.Par.13071.File.dat/Form%20Lette
r%20Response%20DEC%2013%202012-final.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/pr
17 ograms/wild_horse_burro/owyhee_complex_docs.Par.13071.File.dat/Form%20Lette
r%20Response%20DEC%2013%202012-final.pdf).

18 BLM published a video that addressed an issue (horses in the barbed wire
19 fencing) that did not show the entire event. The agency admitted to only one horse of
20 four having been entangled in the barbed wire. See Leigh Declaration.

21 BLM took a break for the holiday that was not in the original plan. The original
22 plan was to operate through January 5 and complete the first two phases on the
23 operation, concurrently. Weather delays caused the Winnemucca portion to last longer
24 than expected and the schedule was changed.

25 On December 31 (prior to the start of operations on January 4), Plaintiff
26 attempted a final time to write local, state and national representatives of the BLM,
27 requesting that a minimum humane requirement be stated and enforced by the BLM at
28 the operations. Plaintiff and her letters were dismissed, without the courtesy of a reply.

1 On January 3 BLM announced that the Owyhee Complex roundup would resume
2 and noted no change, revision, attempt to address any of the conduct issues.

3 On January 4th Plaintiff filed suit where all other options that addressed
4 inhumane conduct, went unheard. Plaintiff was then compelled, again, to take-on the
5 massive, time consuming, expensive and heart-wrenching task of bringing another suit
6 to this court.

7
8 ***AML, Drought and BLM's Ten Year Plan***

9 The Owyhee Complex comprises five designated wild horse Herd Management
10 Areas (HMA) as existing in a "complex"; Little Humboldt (17, 151 acres), Owyhee
11 (338,287 acres); Rock Creek (121,433); Little Owyhee (460,227 acres); and Snowstorm
12 (117,109 acres). Area designated as the "Owyhee Complex" comprises 1,054,207
13 acres in Humboldt and Elko counties. The Complex is managed by two BLM district
14 offices, the Winnemucca and Elko districts.

15 An Environmental Assessment (EA) and subsequent Records of Decision (ROD)
16 were filed and signed by these districts, respectively. The EA was presented as a
17 singular document citing the area in discussion as a "Complex." The Records of
18 Decision were filed with each district determining separate alternatives for the HMA's
19 (that are outlined in the EA) with a ten-year plan present in each alternative.

20 According to BLM website, and information used to create the underlying
21 documents of decision, the following claims are made:

22 The Owyhee, Rock Creek, and Little Humboldt HMAs in the Elko District
23 as well as the Little Owyhee, and Snowstorm HMAs within the
24 Winnemucca District are all contiguous and generally separated only by
25 fencing. Movement does occur (and has been observed) between these
26 HMAs through open gates and crossings, but ***no formal research has***
27 ***been completed to determine the extent of this movement.***

28 Management of the wild horses in these HMAs at the established AML

1 ranges and as an interacting population regardless of boundaries (i.e., as
2 an HMA Complex) would ensure continued genetic diversity and health.
3 Even slight movement helps to diversify the herds.

4 (Emphasis added).

5 According to BLM the assertion is made that there is movement by the horses
6 among the HMA's; but there is no formal research on which to base this assertion. The
7 oversight of formal research leads to a lack of knowledge of any seasonal migration of
8 the wild horse herds within this Owyhee Complex.

9 BLM claims in the EA and their website and also in combined ROD's, that there
10 is an estimated population of 2,267 animals. The number of horses targeted for
11 removal from the Complex are based on this estimate. BLM claims only 621 to 999
12 animals can exist within the *over one-million acre Complex*. This leaves a *maximum* of
13 one horse per 1,000 acres!

14 The first phase, the largest phase of the operation, is now completed. 819
15 animals were removed from the Little Owyhee HMA.

16 The second phase of the operation (currently restrained) seeks to remove only
17 50 animals. That number was increased from 11 to 50 as noted in BLM's updated
18 gather schedule. See Exhibit 2 (Doc.1-2) to the Complaint. Or see the following link:
19 http://www.blm.gov/wo/st/en/info/newsroom/2012/december/nr_12_07_20120.html "The
20 gather of Owyhee Herd Management Area in Nevada will seek to remove 50, rather
21 than 11, horses because of severely limited water sources."

22 Other HMA's in the Complex are also noted in that same press release, as
23 follows: 1. The horse removal number of the Little Owyhee Herd Management Area
24 was increased from 544 to 800 because of severely limited water sources. (completed)
25 2. The gather of Snowstorm Mountains Herd Management Area in Nevada is cancelled
26 because the animals are not in immediate declining condition.

27 Little Humboldt (not over AML) and Rock Creek were not on the winter schedule
28 as they were not "prioritized" areas for this roundup.

1 Based on the foregoing, if the BLM's population estimate is accurate at 2,267
2 animals within the Complex at the start of the operation, there now remains a total of
3 1,448 animals residing in the Complex (which subtracts the 819 horses removed from
4 Little Owyhee HMA). Significant pressure has been removed from any "stressed range"
5 resultant of the completed first phase.

6 Based on the foregoing, how would leaving 50 more animals on the range keep
7 in place an emergency if one truly existed in the first instance? Meanwhile, the BLM
8 had no intention of bringing this phase to AML within the Complex.

9 In letters written to the public in response to BLM's action during the first phase
10 of the Owyhee BLM's removal operation, Exhibit 9 to the Plaintiff's Reply brief for
11 Emergency TRO relief (#13-1), the BLM states:

12 This initial gather focused on those areas where the health and well-being
13 of the wild horses and rangeland health were at greatest risk. Follow-up
14 gather activities, potentially as early as next summer, will be used to
15 implement fertility control measures and remove additional excess wild
16 horses.

17 From the BLM's own information, the conclusion compellingly follows, due to
18 movement within the HMAs the BLM's roundup activities would leave an unknown
19 distribution of wild horses when BLM begins the next significant phase of the operation.
20 In other words, in the aftermath of the removal of 819 animals, and where no empirical
21 data confirms migration or movement patterns of horses in the Complex, logic dictates
22 that animals would redistribute themselves until roundup activities begin anew in
23 summer 2013. Actions would then be arbitrary in determining whether AML would truly
24 be "excess" in population beginning the summer of 2013.

25 This plan of operation would cycle every 2-3 years over the next ten years
26 without any further environmental assessment, inventory, migratory study, impact from
27 previous roundups studied or any other aspect of gathering any new information.

28

1 ***BLM's Actions Post Filing***

2 Within hours of the Complaint having been filed and distributed, the BLM
3 updated their webpage to include a "Leaders Intent." See the following link:

4 [http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/pr
5 ograms/wild_horse_burro/owyhee_complex.Par.36753.File.dat/Leaders%20Intent%
6 20For%20Owyhee%20Complex%20Gather.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/programs/wild_horse_burro/owyhee_complex.Par.36753.File.dat/Leaders%20Intent%20For%20Owyhee%20Complex%20Gather.pdf)

7 The Leaders Intent is a letter that is first referenced that day in it's publication on
8 January 4, 2013 on the BLM website. Members of the public who wrote to the BLM
9 received an email from BLM after the second phase of operation began noting this
10 letter (i.e. January 4, 2013, the day the operation began, after the Complaint was filed).

11 BLM's website makes an assertion that this "Intent" had been in place since the
12 start of the Owyhee Complex operation although it is not noted in any attachment to the
13 EA or ROD, nor is it referenced at all by BLM until this suit commenced. Curiously, the
14 document is purportedly dated November 25, 2012.

15 If this "Intent" had been in place, in that event, there were many instances of
16 violations of several provisions of this very document, as indicated by the attached
17 declarations, photo logs and video links.

18
19 **DISCUSSION**

20 ***The Plaintiff, Laura Leigh and Standing***

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

28 This court has recognized Ms. Leigh's standing previously, to bring actions

1 against the inhumane treatment of wild horses. See e.g., *Leigh v. Salazar*, 3:11-cv-608.
2 See also, *Leigh v. Salazar*, 3:10-cv-417

3 Plaintiff is an award winning illustrator, journalist / videographer and report on
4 issues dealing with the American West. Her published articles and video have
5 appeared in many venues including Horseback Magazine, KLAS-TV and CNN. Ms.
6 Leigh is President and founder of Wild Horse Education, a non-profit group devoted to
7 documenting, reporting to the public and advocating on issues involving wild horses on
8 public lands. See, www.wildhorseeducation.org.

9 Ms. Leigh has attended more BLM roundups the past thirty (30) months than any
10 BLM, DOI or other government personnel, any journalist, any photojournalist, and any
11 other member of the public, in her attempts at accurately documenting wild horses in
12 the wild, and in documenting the Defendants' management of wild horses. In the past
13 two years Ms. Leigh filmed/recorded thousand of hours of video and has amassed
14 more than a hundred-thousand photos of wild horses on public lands.

15 Ms. Leigh traveled nearly 200,000 miles since September 2010 to observe and
16 document wild horses and the BLM's management practices. Ms. Leigh has thus far,
17 traveled in six states to accomplish this work, she visited and attempted to visit multiple
18 wild horse holding facilities operated or managed by the government. She attended
19 numerous Advisory Board meetings and also traveled to Denver, CO to participate in
20 what BLM referenced as a "workshop" toward "problem solving." And, she attended
21 numerous meetings in BLM district offices, she attended RAC meetings ("RAC" is the
22 BLM acronym for Resource Advisory Council) whenever opportunity presents to provide
23 public comment.

24 Ms. Leigh has endured personal searches, vehicle and property searches, road
25 blocks, background checks, extreme temperatures from minus 10 degrees Fahrenheit
26 to over 100 degrees Fahrenheit, vehicle breakdowns in remote regions, all in attempts
27 at gaining access to view and observe and document wild horses on public lands and at
28 government wild horse facilities and during capture, corralling and transportation for

1 their removal from public lands.

2 Ms. Leigh has endured death threats, discriminatory access, vandalism to her
3 personal property, significant wear and tear to her personal property, countless hours of
4 off-road travel and on-road travel, all in attempts at gaining access to view and observe
5 and document wild horses on public lands and at government wild horse facilities and
6 during capture for their removal from public lands.

7 When not in the field, Ms. Leigh is conducting research on a multitude of wild
8 horse related topics particularly those involving public lands and interests that compete
9 with wild horses; she arranges for adoptions of wild horses captured by the BLM from
10 public lands and is responsible for having caused the adoption of a significant percent
11 of all horses adopted out by the BLM; Ms. Leigh is a regular publisher of articles
12 concerning the management of wild horses on public lands.

13 Ms. Leigh's life is devoted to documentation and education of the care of wild
14 horse herds. Ms. Leigh is dedicated to helping create reform where appearing
15 necessary, in the management of America's wild horses.

16 As a documentarian and photojournalist Ms. Leigh is dedicated to creating
17 honest dialogue based on the truth about wild horses and burros on public lands; her
18 goal is to educate the public about wild horses on public lands, including educating on
19 how wild horses live, thrive, survive, travel, their social order and interaction, how they
20 become impacted by competing private and also public interests that affect their
21 remaining habitat, how they are impacted by man and by those charged with the
22 responsibility of protecting them, who, in this instance, are the Defendants herein.

23 As a documentarian and a current historian of America's wild horses, Ms. Leigh
24 has gained a deep appreciation of, and respect for, wild horses, not just for a particular
25 horse or two, nor in a general sense toward all wild horses, but rather, to certain groups
26 of horses, certain herds exhibiting genetic similarities within defined geographical
27 regions, and to certain herds of horses who thrive viably where the BLM has had little
28 involvement, and with specified groups or families of wild horses who thrive and interact

1 in a dynamic social order among themselves as particular herds in certain remote
2 regions within public lands, and which Ms. Leigh photographed or documented multiple
3 times in the past and also recently, and with whom Ms. Leigh spent countless hours
4 and days visiting, watching, appreciating and understanding while observing them in
5 their environment, on rangelands comprising public lands managed by the Defendants.

6 Ms. Leigh maintains significant history with the Owyhee Complex horses and the
7 issues surrounding the management of wild horses at the Owyhee Complex. Ms. Leigh
8 filed suit previously in this court in 3:10-cv-5417 where the Hon. Larry Hicks agreed with
9 Ms. Leigh when finding the blanket closure of public lands during roundup activities
10 occurring there in the summer of 2010, violated First Amendment notions. Judge Hicks
11 allowed an emergency roundup based on perceived drought conditions to continue.
12 BLM claimed at the time, the Owyhee horses were in such degraded condition that 75
13 percent of the population would expire in three days' time if not immediately removed.
14 With this unprecedented assertion, the court allowed the removal of those horses on an
15 emergency basis. BLM allowed no independent or public confirmation or observation of
16 a single horse rounded up in Owyhee in 2010 and intentionally chose private land to
17 place its traps and alerted the Sheriff to arrest those who trespassed on private land if
18 public observers attempted to independently view the capture of these horses. And, an
19 independent range expert who visited the same area immediately following the
20 conclusion of the Owyhee 2010 roundup, where the purported "drought emergency"
21 existed, found no evidence of a drought emergency and instead, found normal range
22 conditions for that time of year. Meanwhile, not a single horse perished at Owyhee in
23 2010 until the BLM commenced its roundup. And several horses perished when the
24 BLM engaged the roundup process.

25 The foregoing paragraph is significant in this instance for this reason: The BLM
26 uses the identical trap for the Owyhee roundups commencing January 4, 2013 as was
27 used in the controversial Owyhee 2010 roundup. The BLM is using this identical trap as
28 its only trap for the entire Owyhee HMA, meaning, horses that BLM, once again

1 contends, show signs of significant impact from drought conditions, would be driven as
2 much as 25 miles to this single trap location. Plaintiff is informed and believes this
3 circumstance would place those wild horses in harm's way and those horses would not
4 be humanely managed when having to travel such a distance in winter conditions.

5 As a consequence of no corrective action having been taken at Owyhee
6 Complex roundups thus far, Ms. Leigh finds herself in a position without remedy or
7 recourse, to stop further acts of inhumane conditions and methods toward those wild
8 horses at the Owyhee Complex. Ms. Leigh' only apparent avenue of relief is through
9 assistance of this court with this suit, to halt further inhumane treatment of Owyhee
10 Complex wild horses.

11 Ms. Leigh engaged the BLM on the inhumane issues raised by this suit, at this
12 roundup, in the avenues open to her. Ms. Leigh commented on the Preliminary EA.
13 She commented at the RAC meeting. She wrote letters. She disclosed her
14 documentation to the public and encouraged the public to write as the Owyhee
15 Complex roundups continued with instances of inhumane conditions and methods
16 remaining uncorrected.

17 Ms. Leigh's repeated attempts at addressing the inhumane conditions and
18 methods remaining uncorrected at the current Owyhee Complex roundups, caused the
19 BLM to publish an open letter naming Ms. Leigh's organization, Wild Horse Education,
20 on the BLM's roundup update web page. The BLM's open letter does not address Ms.
21 Leigh's concerns and instead, denies wrongdoing.

22 Understanding that she as but a mere citizen having no other recourse
23 whatsoever to act when an agency who operates with broad discretion, contrary to
24 laws, where the activity or inaction causes her harm as averred herein, Plaintiff is
25 compelled to bring the improper conduct to the attention of the courts, to ask for the
26 court's help, to stop and enjoin further inhumane conduct toward the Owyhee Complex
27 wild horses during the BLM's described processes, and to prevent her further
28 perceptible harm.

1 Plaintiff maintains a right to seek judicial review of agency action (or lack of
2 action) under the Administrative Procedure Act, which allows a party "suffering legal
3 wrong because of agency action, or adversely affected or aggrieved by agency action"
4 to seek judicial review. 5 U.S.C. § 702.

5 Plaintiff suffered and continues to suffer an invasion of a legally protected
6 interest amounting to the harms as averred herein, caused when she is compelled, time
7 and time again, to watch the Defendants engage Owyhee Complex wild horses with
8 inhumane methods and conditions, contrary to laws and policies of the United States;
9 that Ms. Leigh maintains a right to observe the *humane* removal of Owyhee Complex
10 wild horses from public lands.

11 Plaintiff is adversely affected and aggrieved where she suffers perceptible harm
12 which is imminent and continuing when having repetitively been subjected to
13 observations of inhumane treatment toward Owyhee Complex wild horses and which
14 she would likely observe with ongoing Owyhee Complex roundups; that the offending
15 conduct is within the zone of interest contemplated by Congress which clearly calls for
16 the *humane* removal of excess wild horses.

17 Plaintiff's perceptible harm is concrete and particularized, and imminent, and not
18 conjectural or hypothetical, that there is a causal connection between her perceptible
19 harm and the conduct complained of. And, the continuing threat of such perceptible
20 harm to her person would be redressed with the imposition of preliminary and
21 permanent injunctive relief as requested herein.

22 Plaintiff believes her requested relief is traceable to the Defendants' practice of
23 ignoring the expressed intent of Congress when Congress unanimously adopted the
24 Wild Free-Roaming Horses and Burros Act 16 U.S.C. §1331 *et seq.* ("Wild Horse Act"),
25 where Congress unambiguously requires the Defendants to remove excess horses
26 *humanely*. See, 16 USC § 1333 (b)(2)(iv)(B) (as amended in 1978). That the "humane"
27 handling of free-roaming wild horses when removing their excess brethren, is part and
28 parcel with the Wild Horse Act and is stated in mandatory, not permissive terms. 16

1 USC § 1333 (b)(2)(iv)(B). [See also, 16 U.S.C. § 1338a (the use of helicopters, “shall
2 be in accordance with *humane* procedures”), 16 U.S.C. §1333(c)(calling for
3 “humane conditions” by adopters), 1338(a)(3)(criminal penalty for “maliciously causes
4 the death or harassment of any wild free-roaming horse or burro”) and §1338(a)(6)
5 (willfully violates a regulation issued pursuant to the Wild Free-Roaming Horse and
6 Burro Act)].

7 Plaintiff has no other avenue of recourse but to seek injunctive relief in the courts
8 when the Defendants repeatedly choose not to follow and enforce the laws of the
9 United States with regard to the humane removal of excess wild horses from public
10 lands, and where they intend to remove horses not considered excess horses from
11 public lands, and which conduct causes Plaintiff a perceptible harm as averred

12
13 ***Inhumane Roundup Observations and
14 Expert Witness Discussions Confirming Inhumane Conduct***

15 For the sake of brevity of what Ms. Leigh and others observed, Plaintiff
16 references and incorporates herein, the following:

- 17 Exhibit 2 Declaration of Laura Leigh
18 Exhibit 3 Leigh Photo Log
19 Exhibit 4: Declaration of Keegan Kuhn
20 Exhibit 5: Declaration of Stephanie Martin
21 Exhibit 6 Stephanie Martin Photo Log.

22 For the sake of brevity of how veterinarian and equine professionals consider the
23 BLM’s conduct, Plaintiff references and incorporates herein, the following:

- 24 Exhibit 7 Declaration of Nicholas H. Dodman, BVMS, DVA, DACVA, DACVB
25 Exhibit 8 Declaration of William LeRoy
26 Exhibit 9 Declaration of Tina Hutton
27 Exhibit 10 Declaration of Jennifer Madden, DVM.

1 ***Repeated Violations of Law Amounting to Inhumane***
2 ***Treatment of Captured Wild Horses Are Never Enforced***

3 *Laws Requiring Humane Action*

4 The Wild Horse Act passed unanimously in both houses of Congress and was
5 signed into law December 1971. The Congressional findings and declaration of policy
6 of the Act are as follows:

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

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

20 Congress defines the powers and duties of the Secretary of the Interior, relative
21 to the management of wild horses on public lands, in Section 1333 of the Act. That
22 Section defines by mandatory language the Secretary's obligation to *humanely* capture
23 certain wild horses. Section 1333 provides in relevant part, that the removal of excess
24 horses from public lands,

25 [s]hall be taken, in the following order and priority until all
26 excess animals have been removed so as to restore a
27 thriving natural ecological balance to the range, and protect
28 the range from the deterioration associated with

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overpopulation:

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

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

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

(e) Humane treatment means handling compatible with animal husbandry practices accepted in the veterinary community, without **causing unnecessary stress or suffering to a wild horse or burro.**

(f) Inhumane treatment means any intentional or negligent action or failure to act **that causes stress, 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).

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

[a]ircraft may be used by the authorized officer in all phases of the administration of the Act, . . . All such use shall be conducted in a **humane** manner.

43 CFR § 4740.1. (Emphasis added).

1 When reading the Wild Horses and Burros Act, relevant CFR provisions and the
2 BLM's own EA, there no room for disagreement that excess horses slated for removal
3 from BLM managed public lands, must be treated *humanely* during their removal.

4
5 **PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE AND JUSTIFIED**

6 ***Fed.R.Civ.P. Rule 65 Standard of Review***

7 Federal Rule of Civil Procedure 65 governs the issuance of injunctions, the
8 purpose of which are to preserve the *status quo* pending resolution. See, *Chalk v. U.S.*
9 *District Court*, 840 F. 2d 701, 705 (9th Cir. 1988). Review of the district court's denial of
10 a preliminary injunction is determined under an abuse of discretion standard. *Lands*
11 *Council v. McNair*, 537 F. 3d 981, 986 (9th Cir. 2008)(en banc).

12
13 ***Injunctive Relief Standard***

14 A preliminary injunction is warranted when a moving party can demonstrate
15 that (1) they are likely to succeed on the merits, (2) they are likely to suffer
16 irreparable harm in the absence of preliminary relief, (3) the balance of equities
17 tips in their favor, and (4) an injunction is in the public interest. *Winter v. Natural*
18 *Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365 (2008). The Ninth Circuit
19 follows this traditional inquiry but also uses its "serious questions" test when applied to
20 *Winter's* four part criteria. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131
21 (9th Cir. 2011).

22 Denial of injunctive relief is reversed only if the district court has abused its
23 discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).
24 "The district court, however, 'necessarily abuses its discretion when it bases its decision
25 on an erroneous legal standard or on clearly erroneous findings of fact.'" *Earth Island*
26 *Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003) (quoting *Rucker*
27 *v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001) (en banc)). If "the district court is alleged
28 to have relied on an erroneous legal premise, we review the underlying issues of law de

1 novo." *Id.*

2
3 **Legal Discusson**

4 Plaintiff brings her claims under the Administrative Procedure Act ("APA"), 5
5 U.S.C. §§ 701 *et seq.* Judicial review of plaintiff's claims is governed by 5 U.S.C. § 706.

6 Under 5 U.S.C. § 706(2), the court must set aside agency decisions that are
7 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or
8 "without observance of procedure required by law." 5 U.S.C. § 706(2) (A), (D). Although
9 the review of an agency decision is "searching and careful," the "arbitrary and
10 capricious standard is narrow" and the court cannot substitute its judgment for the
11 agency. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir.
12 2005) (internal quotation marks omitted). "This deferential standard is designed to
13 ensure that the agency considered all of the relevant factors and that its decision
14 contained no 'clear error of judgment.'" *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v.*
15 *Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). In deciding whether
16 an agency violated the arbitrary and capricious standard, the court must ask whether
17 the agency "articulated a rational connection between the facts found and the choice
18 made." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir.
19 2001). A decision that is "inconsistent with a statutory mandate or that frustrate[s] the
20 congressional policy underlying a statute" cannot be upheld. *Ocean Advocates*, 402
21 F.3d at 859. Under § 706(2), the court has the authority to enjoin agency action that is
22 not in accordance with law.

23 Under the Wild Free-Roaming Horse and Burro Act ("Wild Horse Act"), 16 U.S.C.
24 §§ 1331 *et seq.*, the Bureau of Land Management must immediately remove "excess"
25 wild horses, which are those that "must be removed from an area in order to preserve
26 and maintain a thriving natural ecological balance and multiple-use relationship in that
27 area." 16 U.S.C. §§ 1332(f), 1333(b)(2). Excess horses must be "humanely captured
28 and removed." 16 U.S.C. § 1333(b)(2)(iv)(B). "[H]umane treatment" is defined as

1 “handling compatible with animal husbandry practices accepted in the veterinary
2 community, without causing unnecessary stress or suffering to a wild horse or burro.”
3 43 C.F.R. § 4700.0-5(e). Inhumane treatment is defined as “any intentional or negligent
4 action or failure to act that causes stress, injury, or undue suffering to a wild horse or
5 burro and is not compatible with animal husbandry practices accepted in the veterinary
6 community.” *Id.* § 4700.0-5(f).

7 In applying the factors required by *Winter*, 129 S.Ct. at 374, and *Alliance for the*
8 *Wild Rockies*, 632 F.3d at 1134-35, in deciding whether a preliminary injunction should
9 issue, the Plaintiff satisfies all *Winter* elements, as follows:

10 1. Plaintiff has shown serious questions going to the merits of her claims that
11 the horses previously and presently being rounded up in the Owyhee HMA are suffering
12 inhumane treatment, that BLM’s determination that an additional 39 horses must be
13 removed from the Owyhee HMA is not be a proper excess determination, and that the
14 BLM really has no method of determining “excess horses.” In essence, the
15 government’s determination of how many horses remain “excess” at the Owyhee
16 Complex is purely conjectural.

17 2. Plaintiff demonstrates an immediate threat of irreparable harm if further
18 inhumane treatment of the wild horses continues. Further irreparable harm is shown
19 where horses are removed with no rational basis beyond “guess work,” in determining
20 excess horses.

21 3. In balancing the interests, the potential harm to defendants is non-
22 existent. The BLM already removed 819 horses from the “Owyhee Complex.”
23 Significant pressure has already been relieved from whatever “stress” the BLM
24 contends the range suffers. Leaving the next 50 horses planned for removal, in the
25 second phase of the BLM roundup, would not create a significant change within a *one*
26 *million acre complex*. Financial harm claimed by the BLM is fictional where their harm is
27 based on their choice of not enforcing humane care. The BLM could resolve the
28 “inhumane” conduct immediately, and could have done so at anytime during the first

1 phase of the operation, but chose instead to deny wrongdoing, or deny that the conduct
2 occurred.

3 Also, where there is no immediate intent on the BLM's part to reach low AML
4 until the end of a ten year period, the balance of hardships tips sharply in plaintiff's
5 favor, at least until the merits of the Complaint are finally determined.

6 4. Clearly, the public interest is served when actions are taken to prohibit
7 inhumane treatment of wild horses.

8 **CONCLUSION**

9 For reasons discussed Plaintiff respectfully requests the following relief:

- 10 1. That the court require that only clearly defined "excess" wild horses be
11 humanely removed from the range as mandated by the Wild Free-
12 Roaming Wild Horses and Burros Act;
- 13 2. Because operations at the Owyhee Complex demonstrate inhumane and
14 questionable conduct in violation of the Wild Free-Roaming Wild Horses
15 and Burros Act, the EA, and RODs, clearly defined expectations for
16 humane handling including distance, temperature, manner of use for
17 handling aids (flags) etc., be given to the BLM COR and contractor; that
18 those parameters also be shared with the public; and that those
19 parameters include provisions for addressing violations as they arise;
- 20 3. Because BLM only has authority to remove "excess" horses from public
21 land, that prior to any removal operations in each HMA during the course
22 of the Record of Decision (ten years), that population surveys be
23 completed to identify excess animals for removal; that the BLM share the
24 population survey with the public 30 days prior to removal. And, these
25 surveys must be completed prior to any removal of wild horses from each
26 individual HMA within the complex, during the life of the referenced final
27 EA and RODs for the Owyhee Complex.
- 28 4. And, for other and further relief deemed appropriate.

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Respectfully, this 10th day of January 2013.

LAW OFFICE OF GORDON M. COWAN

s/

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

LIST OF EXHIBITS

- Exhibit 1 Section 2 and Appendix A to Environmental Assessment
- Exhibit 2 Declaration of Laura Leigh
- Exhibit 3 Leigh Photo Log
- Exhibit 4: Declaration of Keegan Kuhn
- Exhibit 5: Declaration of Stephanie Martin
- Exhibit 6 Stephanie Martin Photo Log.
- Exhibit 7 Declaration of Nicholas H. Dodman, BVMS, DVA, DACVA, DACVB
- Exhibit 8 Declaration of William LeRoy
- Exhibit 9 Declaration of Tina Hutton
- Exhibit 10 Declaration of Jennifer Madden, DVM.

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 10th day of January 2013

s/

G.M. Cowan