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Attorney for Plaintiff LAURA LEIGH

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAURA LEIGH,

Plaintiff,

vs.

Case No. 3:10-cv-0597-LRH-VPC

KEN SALAZAR, in his official capacity as Secretary of the U.S. DEPARTMENT OF THE INTERIOR, BOB ABBEY, in his official capacity as Director of the BUREAU OF LAND MANAGEMENT; RON WENKER in his official capacity as Nevada State Director of the BUREAU OF LAND MANAGEMENT, et al.,

Defendants.
_____/

REPLY BRIEF TO DEFENDANTS' OPPOSITION (Doc 22) TO PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION (Doc 16)

Plaintiff LAURA LEIGH submits the following Reply to the Defendants Opposition (Doc 22), to her Amended Motion for Preliminary Injunction (Doc 16):

I.
FOCUS OF THE CASE

This Motion seeks reasonable access by Ms. Leigh, a journalist, to all aspects of the handling of Silver King horses by the Bureau of Land Management ("BLM") and Department of Interior.

The right of access to observe and report on government activity involving matters of public interest, is a right guaranteed to citizens by the First Amendment to the U.S. Constitution. The Defendants violate Ms. Leigh's First Amendment rights every time they preclude her from observing their handling of horses captured and

removed from the Silver King Herd Management Area ("HMA").

Laura Leigh

Ms. Leigh is a journalist and photojournalist credentialed with Horseback Magazine. She travels to BLM wild horse roundups and other venues to observe and report what she sees. The public reads her material. The public looks at her videos. Both the public and Ms. Leigh formulate thoughts and opinions on what they observe.

The Controversy

When Ms. Leigh went to the BLM's Calico roundup early in the year and at prior roundups, she was brought alongside the wild horse traps when wild horses were captured. At Calico Ms. Leigh photographed what she observed at the trap.

Ms. Leigh also tracked Calico horses to the wild horse holding facility, "Broken Arrow" in Fallon, Nevada (now called by BLM, "Indian Lakes"), where she was allowed access. She photographed the Calico horses in Broken Arrow.

Ms. Leigh shared her video and photos of Calico horses with the public. It was picked up by print and broadcast media including CNN and KLAS TV. Her photos gained international attention and the attention of numerous members of Congress.

After public circulation of Ms. Leigh's Calico photos, the BLM changed course and refused her reasonable access thereafter to view traps at the moment of wild horse captures. In many instances the Defendants chose to deny Ms. Leigh access while allowing other press members such as the New York Times "close in" access to traps.

After public circulation of Ms. Leigh's Calico photos of Broken Arrow, the BLM refused her further access there and closed it to the public.

At Silver King, BLM restrictions removed Ms. Leigh so far from the Defendants' horse handling activities that her effort in having traveled hundreds of miles to be there was clearly frustrated. She was there five days. (See Ms. Leigh's Declaration at **EXHIBIT 14** attached. See Photos at **EXHIBIT 15** attached).

What Is So Secret?

The Silver King Herd Management Area is not "Area 51." It's not the nuclear test

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facility. It's not a top secret government military installation. No state or government secrets are involved. National security is not at stake. This is not a school house or class room. This is not an airport terminal. No mail boxes are involved. This is in fact, desert or remote regions in Nevada. It also involves horse holding facilities.

No one here seeks to leaflet the area. No one seeks to make speeches. No one is soliciting business, soliciting to join a religious group, soliciting for any purpose. No one is seeking donations. No one here are street dancers looking for extra change without having obtained a permit. No one is seeking handouts at roadway stop signs. No one is demonstrating. No one is on the "soap box" espousing commercial speech or even political speech.

Rather, Ms. Leigh, as a journalist and photojournalist who covers wild horse events, merely seeks to observe government activity when they handle wild horses. She seeks to report her observations in traditional photojournalistic fashion to the public.

Why Denying Access Is Wrong

The Defendants have done what they can thus far, to cause Ms. Leigh to endure artificial barriers, fear tactics, threats of arrest, and contrived restrictions all in efforts to remove Ms. Leigh's camera and eyes from witnessing what transpires at BLM wild horse roundups and elsewhere. Because she remains compliant with the Defendants' instructions and restrictions, Ms. Leigh is effectively foreclosed from observing the Defendants activities relative to Silver King and elsewhere.

The Defendants' conduct restricts speech, it denigrates constitutional freedoms and it amounts to clearly unacceptable prior restraints on the right of the press to observe and report. "Prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559, 96 S.Ct. 2791 (1976). Such restraints bear a "heavy presumption" against their constitutionality. *Forsyth County,* 505 U.S. at 130, 112 S.Ct. 2395.

The First Amendment to the United States Constitution provides that "Congress

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shall make no law...abridging the freedom...of the press."

Justice Hugo Black emphasized it best:

> The Press was protected so that it could bare the secrets of the government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people.
>
> *New York Times v. U.S.*, 403 U.S. 713, 714, 91 S. Ct. 2140 (1971).

The Defendants' conduct toward Ms. Leigh are clear examples of a design meant to censor certain content-based speech because they don't like what Ms. Leigh reports or they are embarrassed about what she reports, or they cannot explain to the public what she reports.

II.
THE DEFENDANTS' NON-OPPOSITION

The Defendants used twenty-one days since the original Motion for Preliminary Injunction (Doc 9, filed Sept. 24, 2010) and fifteen days since Plaintiff amended the original Motion for Preliminary Injunction (Doc 16) to file a "blank" opposition or, in essence, a *non*-opposition. They knew the issues but chose not to respond. They chose to rely instead, on the argument that the entire matter has been "mooted" because the roundup of Silver King horses is now over.

LR-7-2(d) makes clear, the failure of an opposing party to file points and authorities in response to any motion, "*shall* constitute a consent to the granting of the motion." *Id.* (Emphasis).

The Defendants failed to respond to any point raised in the Plaintiff's Motion for Preliminary Injunction. They chose to avoid the principal issues of "collateral estoppel," "irreparable harm" and the Plaintiff's "likelihood of success on the merits" discussions.

Instead the Defendants ask the court for, "an opportunity to provide the court with a brief . . . ." should the court desire to hear their "side" of one of these issues.

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(See Doc 22, p. 2, l. 20-22). There is no more "opportunity." Their time to oppose *was* that opportunity. This request for an additional "opportunity" to oppose the motion is *no* response or a request to provide an impermissible *sur reply*.

Based on the Defendants' *non*-opposition, Plaintiff respectfully requests her Motion for Preliminary Injunction be granted *post haste.*

III.
"MOOTNESS" IS NOT AN ISSUE

The Defendants seek to short-cut their effort when relying entirely on the contention that the matter is somehow, "mooted." They contend, since the Silver King roundup is completed, there is nothing left to decide.

For reasons already briefed in the Plaintiff's motion, a defense based on "mootness" is, under this circumstance, irrelevant.

What emerges instead, is the Defendants' apparent design to take advantage of the occasional delays commensurate with a conscientious but busy court, to deny Plaintiff her constitutional freedoms to observe, to formulate impressions, and to publish her observations.

Should the court view the Defendants' Document (Doc 22) as an appropriate "opposition" complying in all respects with LR 7-2(d), in that event Plaintiff hereby incorporates her Reply to her TRO (Doc 21 filed October 12, 2010) and also provides the following discussion should "incorporating" briefs not be considered appropriate.

IV.
THE GOVERNMENT'S CONTENTION – BLM PUBLIC LANDS WHERE WILD HORSES ROAM, ARE NOW "NON-PUBLIC FORUMS" – IS AN INCREDIBLE "FIRST NOTICE" THAT OFFENDS THE SENSES

The Defendants most pronounced argument to preclude the press, the public and Ms. Leigh from having true, reasonable access to observe the Defendants' roundups of wild horses on public lands involves their latest, incredible revelation that "herd management areas" (and perhaps other areas of public lands at their unilateral choosing in the future) can and, in this instance, are considered (by the government Defendants) "non-public forums."

This newest revelation of course, is the latest purported justification for limiting,

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restricting, precluding and censoring the content of speech, and in precluding journalists including Ms. Leigh, from having true, reasonable access to observe and then report to the public, the Defendants' roundup and related activities. If the Defendants were in fact, providing "reasonable" access all along, they would not be offering this newest twist.

This newly raised contention in truth, is the Department of Interior's and BLM's new pronouncement which conveys to the public that they (the public) have no right to know or be advised from independent sources, how the government manages a public resource (wild horses on HMAs in this instance) on public lands.

Nowhere in known "notices" from the Defendants, is there any statement that makes this newly formed, self-declared limitation or designation, that public lands are now *non-public* forums. To the contrary, all of the Defendants' literature, notices, website links refer to the BLM managed lands as the "National System of Public Lands." There are no signs or postings indicating otherwise, found on the Silver King BLM borders or elsewhere, that citizens are entering a special-type enclave where speech, the press and expression are limited. Unless inadvertently missed, no such notice is found in the Federal Register. No official explanation to the public is posted anywhere as to the ramifications of claiming that public lands are really, "non-public forums." The words "non-public forum" are offered for the first time in the Defendants Opposition (Doc 20) to Plaintiff's TRO Motion. This is their first notice to the public.

See and compare, *United States v. Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702 (1983) (expressing concern regarding allegedly nonpublic forums that provide "no separation ... and no indication whatever to persons ... that they have entered some special type of enclave."); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir.1993) (noting that area at issue "is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status"); *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir.), as amended (2000) ("[N]o visual boundaries currently exist that would

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inform the reasonable but unknowledgeable observer that the Fund property should be distinguished from the public park."). "The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people." *Int'l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696, 112 S.Ct. 2701 (1992) (Kennedy, J., concurring).

V.
BLM MANAGED LANDS ARE TRADITIONALLY *PUBLIC* FORA. THE DEPT. OF INTERIOR AND BLM DO NOT HAVE A COMPELLING INTEREST IN LIMITING PLAINTIFF, A JOURNALIST, FROM OBSERVING AND REPORTING THE DEFENDANTS' ACTIVITIES WHEN "MANAGING" PUBLIC RESOURCES

The Defendants' excuse for restricting speech because the designated area is not designated a public forum, is nonsense. It is observed that the, "notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction." *Lee,* 505 U.S. at 696, 112 S. Ct. 2701.

The Defendants admittedly make the following comment (one of many) found on their official website (as of October 11, 2010) at http://www.blm.gov/wo/st/en/prog/Recreation.html, as follows:

> The National System of Public Lands offer more diverse recreational opportunities than are available on the land of any other Federal agency. On more than 245 million acres of public lands, people enjoy countless types of outdoor adventure – participating in activities as widely varied as camping, hunting, fishing, hiking, horseback riding, boating, whitewater rafting, hang gliding, off-highway vehicle driving, mountain biking, birding and wildlife viewing, photography, climbing, all types of winter sports, and visiting natural and cultural heritage sites.
>
> In an increasingly urbanized West, these recreational opportunities and the landscape settings where they take place are vital to the quality of life enjoyed by residents of western states, as well as national and international visitors.

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The Silver King HMA is clearly a public forum for First Amendment concerns. To call it otherwise would provide the Defendants with broad discretion to classify at their convenience, any or all of the 48 million acres of BLM lands situated in Nevada (sixty-seven percent of Nevada's land base) as non-public forums for purposes of censoring public awareness of government activities and limiting speech, expression and freedom of the press.

The "National System of Public Lands" of America are merely under the stewardship of the Defendants. The Defendants manage such lands in trust for the American public. These lands are publically owned and traditionally, always open and freely accessible to any member of the public.

In *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003), the court examined requirements of "public fora" in the context of a publicly owned pedestrian mall (the Fremont Street Experience) situated squarely in the middle of downtown Las Vegas. The court examined city ordinances restricting leafleting and vending message-bearing materials in the mall, concluding as follows:

> [w]e hold that the Fremont Street Experience is a public forum. As a consequence, the restrictions on First Amendment activities must be scrutinized under a strict standard of review in order to protect adequately the right to expression. *Id.*, 333 F. 3d at 1094.

The *Las Vegas* opinion started with the following notion:

> "[t]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.' " *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Although governmental attempts to control speech are far from novel, they have new potency in light of societal changes and trends toward privatization. See *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 704 (7th

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Cir.1998) (expressing concern regarding "what is now a nationwide trend toward the privatization of public property"). *Id.*, 333 F. 3d at 1097

The court relied on Supreme Court statements that,

> "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 497 U.S. 720, 737, 110 S.Ct. 3115 , 111 L.Ed.2d 571 (1990) (Kennedy, J., concurring in the judgment). *Id.*, 333 F. 3d at 1097

The court recognized there is controversy among courts on what constitutes "public fora" for First Amendment concerns although it outlines that on which most all courts agree.

First, and most significantly, there is a common concern for the compatibility of the uses of the forum with expressive activity.

> As the Supreme Court has stated, "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); see also Hale, 806 F.2d at 915-16 (holding that where land "has been withdrawn from public use for the purpose of conducting nuclear testing, [i]ts use for expressive, as well as nonexpressive, activity by the public is limited"); *Warren v. Fairfax County*, 196 F.3d at 192-93 (noting that "[o]ne characteristic has been assumed in all of the Supreme Court cases that address [public forums]: opening the nonpublic forum to expressive conduct will somehow interfere with the objective use and purpose to which the property has been dedicated"); *H.E.R.E. v. City of New York*, 311 F.3d at 552 ("Consideration of the relevant factors ... demonstrates that permitting all forms of expressive activity in the Plaza would be incompatible with its 'intended purpose' ...."); *Lederman v. United States*, 291 F.3d 36, 41

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(D.C.Cir.2002) (stating that "courts have long recognized that [the areas in question] meet the definition of a traditional public forum: *They have traditionally been open to the public, and their intended use is consistent with public expression").* *Id.*, 333 F. 3d at 1100 (Emphasis).

Next, the court in *Las Vegas* recognized that case law demonstrates a commitment by the courts to guarding speakers' reasonable expectations that their speech will be protected, citing *Grace*, *supra*, 461 U.S. at 180., 103 S.Ct. 1702. (See discussion above at pp. 5-6).

The *Las Vegas* decision defines three factors on which the 9th Circuit relies when discerning "public fora" for First Amendment issues:

1. the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area. See, e.g., *Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 941, 944-45, 948 (9th Cir.2001) *Hale v. Dep't of Energy*, 806 F.2d 910, 916 (9th Cir.1986);

2. the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area. See, e.g., *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir.1993);

3. traditional or historic use of both the property in question and other similar properties. See, e.g., *Venetian Casino Resort*, 257 F.3d at 944, *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir.1997). *Id.*, 333 F. 3d at 1100-1101

The first factor: The area of the Silver King HMA is in essence, vast desert rangeland, as is the remaining lands surrounding it. It is touted as an area of recreation, where the public can, among other uses, view wildlife. This is traditional public fora, much like a city park only much more so when incorporated in vast regions of remote Nevada.

The second factor: Once again, the area of the Silver King HMA is in essence, vast desert rangeland, as is the remaining lands surrounding it. There is nothing in the

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area there that marks the entry into a non-public forum. Nothing there would alter one's expectations that he/she is now leaving a public forum and, when crossing into the Silver King HMA, enters a designated *non-public* forum area.

The third factor: The traditional, historic use of the area and its surrounding lands, has been as is stated in the BLM's own website, as follows:

> On more than 245 million acres of public lands, people enjoy countless types of outdoor adventure – participating in activities as widely varied as camping, hunting, fishing, hiking, horseback riding, boating, whitewater rafting, hang gliding, off-highway vehicle driving, mountain biking, birding and wildlife viewing, photography, climbing, all types of winter sports, and visiting natural and cultural heritage sites.
>
> In an increasingly urbanized West, these recreational opportunities and the landscape settings where they take place are vital to the quality of life enjoyed by residents of western states, as well as national and international visitors.

It is an area where citizens can escape and recreate in a multitude of activities, to the discretion of its users, the public. This is its historic use. Prior to that, it was used by all as land on which to survive during the settling of the West. Prior to that it was used presumably as hunting grounds and for other uses by native Americans.

If a city park or a shopping mall is inherently "public fora," how do remote regions of "public lands" become or transform into anything else? Isn't this vast remote region considered perpetual public fora?

Considering all these factors Plaintiff submits national public lands comprise public forums. The public lands are freely and openly accessible to all members of the public at all times of day.

Constitutionally protected First Amendment activity includes gathering information. It includes observing government activity where the government is involved in matters of significant public interest. Protected also is one's right to report

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those observations along with the reporter's thoughts and/or opinions, to the public. By offering public viewing days of roundups, albeit unduly restrictive, the Defendants nevertheless acknowledge the importance of allowing public access to the Defendants' management activities involving their management of wild horses.

For the foregoing reasons the public lands are a public forum for free speech/press purposes.

VI.
THE DEFENDANTS' RESTRICTIONS REMAIN CONTRARY TO FIRST AMENDMENT PROTECTIONS

"[t]he government does not have a free hand to regulate private speech on government property." *Pleasant Grove City, Utah v. Summum*, ___ U.S. ___, 129 S. Ct. 1125, 1132 (2009).

Where government is allowed to regulate public activity on public lands, it cannot make its regulation "content-based." A regulation is "content-based" if either the underlying purpose of the regulation is to suppress particular ideas, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989), or if the regulation, by its very terms, singles out particular content for differential treatment. *See Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642-43, 114 S.Ct. 2445(1994); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 4299 113 S.Ct. 1505 (1993); *Accord*, *Berger v. City of Seattle*, 569 F. 3d 1029,1051 (9th Cir. 2009).

The restrictions placed on the Plaintiff culminate from her prior observation and reporting of how the government Defendants roundup and handle wild horses. Here, Plaintiff's prior photojournalistic reporting of the BLM's activities when rounding up wild horses, caused her to be removed from reasonable access to the Defendants' roundup activities that she enjoyed previously. She is in essence, being punished and precluded from further reporting. (See and compare, generally, exhibits supporting this Motion). The Defendants, not happy with her reporting, chose to regulate and censor her from their activities and thus, they are restricting her with informal, unwritten, "content-based" decisions or policies.

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Government regulation of speech within non-public forums must comport to reasonable time, place and manner constraints. To pass constitutional muster, a time, place, or manner restriction must meet three criteria:

> (1) it must be content-neutral; (2) it must be "narrowly tailored to serve a significant governmental interest"; and (3) it must "leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989) (citation omitted).

First Criterium

The first criterium re content-neutral, is addressed.

Second Criterium

The second criterium (re the regulation must be "narrowly tailored to serve a significant government interest") has no basis or support in favor of the Defendants under these facts.

The Defendants claim they kept back the public and plaintiff from trap sites and other locales for "safety" concerns, either for the Plaintiff's safety, or for the safety of the public, or for the safety of the horses. Contrary to these contentions, the Defendants had allowed her into trap areas previously, until she published her photos and video of what had transpired before her eyes, at these trap sites. She was excluded thereafter, from coming close to horse traps during roundup operations. Meanwhile, she did not pose a safety threat or safety issue when she was at trap sites previously. In fact, no one has yet to claim that Ms. Leigh's presence at traps previously interfered with ongoing activities or caused safety issues.

Moreover, the Defendants have allowed others (to her exclusion) the opportunity to come close, right up to the horse traps, during roundup activities. If the Defendants can allow someone else (non-essential, non-government employees) to the traps during actual roundup activities but not her, how do they distinguish "safety concerns" for them versus *her,* which causes differences in how she, versus others, are allowed or not

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allowed the same"access"? The Defendants have yet to adequately define this distinction. They have yet to distinguish varying "safety concerns" that justify disparate "access" of one person over another. (See Declarations of Laura Leigh and others).

Failing also is that the Defendants have provided no concrete sight or distance limitations. It varies, all of which precludes Plaintiff from gaining reasonable observation of the Defendants' activities during roundups.

Even if a certain limitation on distance were offered, it still may not pass constitutional muster. For example, in *Bay Area Peace Navy v. U.S.,* 914 F.2d 1224 (9th Cir. 1990) the court held the Navy did not provide sufficient justification for a 75-yard "security zone" which it established around a viewing pier and Naval vessels during the military exhibition known as "Fleet Week," where during its naval parade, demonstrators sought to present their political views from their own boats, during the naval parade.

> Because the government has failed to meet its burden of demonstrating that the 75-yard security zone is a reasonable time, place and manner restriction, we hold that the zone is a violation of the First Amendment rights of persons desiring to demonstrate in boats off the Aquatic Park Pier during Fleet Week. *Id.*, 914 F. 2d at 1225

The court in *Bay Area Peace Navy* found a significant government interest in protecting the public and naval officials from "attacks" from unfriendly forces, but found no tangible evidence that the 75 yard security zone was necessary to protect officials during the "Fleet Week" ceremonies.

> Although the government's interest in marine safety is significant, there is no tangible evidence that a 75 yard security zone is necessary to protect that interest. ***In prior years, the Coast Guard has demonstrated ample ability to operate safely without a 75 yard security zone.***
>
> *Id.*, 914 F. 2d at 1227 (Emphasis)

Similarly here, the Plaintiff in the past had been allowed access close to the

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traps when gathers were ongoing. Defendants offer no explanation for the disparate treatment currently, occurring after she published her observations gleaned from the trap sites.

Others, to the exclusion of Plaintiff, who remain non-essential to the government's roundup operations, are allowed at the wild horse traps during the operation. Defendants offer no regulatory explanation for the disparate treatment, or for the selection of favored guests to the trap sites.

Clearly, there is but one glaring reason standing out that causes the Plaintiff to be far removed from viewing the Defendants' activities at traps during roundup activities and to other operations involving the removal and ultimate disposition of Silver King wild horses. It is this: The subjects of her journalism and reporting are not popular with them.

Plaintiff submits the result of her preclusion to access amounts to an impermissible, unconstitutional content-based censorship, contrary to First Amendment notions. Plaintiff submits the Defendants have not met their burden in demonstrating clearly, rationale behind the Plaintiffs' exclusion; and that the same are not justified in view of the resultant prior restraint of her First Amendment constitutional freedoms.

Third Criterium

The regulation must "leave open ample alternative channels for communication of the information."

In *Bay Area Peace Navy*, the court determined there were no ample alternative means of communication available to those demonstrators on the boats, despite the Navy's suggestion that they (the Peace Navy) obtain larger vessels from which larger banners could be displayed, to communicate the content of their message to those on the docks and ships.

In the instant matter, the Defendants have offered no other alternatives but to effectively exclude Plaintiff from these roundups. She is precluded from reporting the government's activities – a goal the Defendants have so cleverly and effectively

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Ph 775 786 6111

achieved when eliminating her from viewing the roundups and subsequent handling and housing of such wild horses.

Courts must subject any restrictions on free speech in public fora to a high degree of scrutiny. *Collins v. Jordan*,102 F.3d 406, 413 (9th Cir. 1996). The burden of justifying any restriction on free speech in a public forum rests squarely on the party seeking to restrict that speech. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). Any time, place and manner restriction imposed by the government which effectively restricts free speech must "pass constitutional muster." *Kuba v. 1-A Agr. Ass'n.*, 387 F.3d 850, 857 (9th Cir. 2004).

Plaintiff submits the Defendants fail in their burden to justify restrictions imposed on her during her when she attempts to observe the Defendants management of wild horses, from the inception of their capture, to their ultimate disposition or demise.

VII.
UNREASONABLE RESTRICTIONS AND CENSORSHIP ON THE PLAINTIFF IS ONGOING AT SILVER KING, AND IS CONSISTENT WITH HOW SHE HAS BEEN TREATED AT OTHER, PRIOR BLM ROUNDUPS ELSEWHERE

Attached hereto and incorporated herein are **EXHIBITS 14** and **15**. These exhibits demonstrate the true "access" Plaintiff received during her time at Silver King. It compares "access" at BLM's Calico roundup earlier this year. These exhibits as a whole, contradict the Defendants' Opposition when suggesting the Plaintiff's access was somehow ample, or sufficient, or reasonable at Silver King. It was not reasonable or sufficient, clearly demonstrated by these exhibits.

Ms. Leigh's Declaration (Exhibit 14) also addresses and contradicts Ms. Emmons Declaration relative to the disparity in her "access" to the Defendants' roundup activities in Silver King versus what occurred in Calico.

Ms. Leigh's Declaration confirms the disparity in her treatment as a journalist for Horseback Magazine versus how the press would be handled should the New York Times appear on scene. The Defendants admit the press and perhaps Plaintiff as well, would be treated differently if the New York Times appeared on scene versus if they were not on scene. This admission confirms the Defendants continue to treat Plaintiff's

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Reno, NV 89519
Ph 775 786 6111

press credentials and the Plaintiff differently from how the Defendants treat other members of the press, particularly those press organizations having more of a national prominence in circulation than that of Horseback Magazine, or who may be more friendly to the Defendants in their reporting of the Defendants' activities than might the Plaintiff's reporting.

VIII.
ARGUABLY SOME MATTERS HAVE BEEN DECIDED AND "COLLATERAL ESTOPPEL" COMES INTO PLAY

Defendants fail to address the concept of collateral estoppel. This very court stated the following:

> As to Leigh's First Amendment challenge to the closure of public lands during the gather, the court shall grant Leigh's temporary restraining order. Leigh argues that a blanket closure of 27,000 acres of public land on which the Tuscarora Gather is going to take place is a prior restraint on her First Amendment rights because she will be unable to observe and report on the health of the horses and the BLM's management of the gather. The court agrees and finds that she has made a sufficient showing of probable success on the merits to warrant granting the motion. As such, the court enjoins the blanket closure of public land access during the gather and shall lift the closure as written with regard to land access.
>
> The court is cognizant of the public interest in this matter and of the right of the public and press to have reasonable access to the gather under the First Amendment. . . . .

Leigh v. Salazar, 2010 WL 2834889 (D. Nev. Jul. 16, 2010) (Published Slip Opinion)

This decision involves the identical parties and identical conduct, only at a different location. That prior Order, although addressing a blanket closure of public lands, decided other issues as well that are identical in this case.

For instance, for the court to have ruled in favor of the Plaintiff in the prior companion case, it had to have determined (1) that she would be irreparably harmed

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without the granting of the TRO; (2) that she had standing to raise the constitutional challenge; (3) that she would likely prevail on the merits of the ultimate matter.

The court in open session discussed the Plaintiff's worthiness as a journalist and as a wild horse advocate. There are no less character or professional elements here as there were when the court ruled July 16, 2010 in the companion matter. The court would not have ruled in her favor in the prior case if there were notions that she did not have standing.

The court in the companion matter concluded also that this same Plaintiff would be irreparably harmed, ***"because she will be unable to observe and report on the health of the horses and the BLM's management of the gather."*** *Leigh v. Salazar*, 2010 WL 2834889 (D. Nev. Jul. 16, 2010)(Emphasis). This is the very issue occurring in the instant matter. It all amounts to access. The Defendants deprived access to Plaintiff in the prior case. The Defendants are depriving Plaintiff access in this case, albeit in a different manner. The Defendants in this case are effectively depriving the Plaintiff of her ability to "observe and report on the health of the horses and the BLM's management of the gather." *Id.*

In the prior case, when Plaintiff was denied access, the court found the Plaintiff was irreparably harmed. In the instant matter, when the Plaintiff is denied access, doesn't she suffer the same harm?

In the prior case when Plaintiff was denied access, the court found, such conduct a prior restraint on her First Amendment rights," and that she, "made a sufficient showing of probable success on the merits to warrant granting the motion." *Id.* In the instant case, when the Plaintiff is denied access, doesn't she demonstrate the same, sufficient showing that she is likely to succeed on the merits?

Plaintiff believes these particular issues "issue preclude" the government Defendants from raising these very same issues again. The Defendants should be collaterally estopped on the subject where these very specific issues had already been briefed and litigated through a hearing, as between the same parties which involved

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another roundup site in Nevada, which involved the same issue – ***access*** – to, "observe and report on the health of the horses and the BLM's management of the gather." *Leigh v. Salazar*, 2010 WL 2834889 (D. Nev. Jul. 16, 2010).

IX.
DEFENDANTS COMPLETELY IGNORE AND FAIL TO ADDRESS SIGNIFICANT ISSUES RAISED IN PLAINTIFF'S MOTION RELATIVE TO CAPTURED SILVER KING HORSES

The Defendants chose not to address and oppose Ms. Leigh's requested relief to allow her access to BLM temporary holding facilities, long-term holding facilities, or any other facilities whether public or private, to which Silver King horses are transported. The Defendants do not oppose Ms. Leigh's requested relief to require the Defendants to identify and record, whether by photographs or other methods, each Silver King wild horse removed from the HMA, in a manner which effectively allows the Defendants, the Plaintiff and the public to track their whereabouts to their respective, ultimate destinations. The Defendants do not oppose Ms. Leigh's requested relief to require the Defendants to keep accurate and copious records of: (a) persons to whom Silver King horses are given or sold outside of formal horse adoption programs; (b) the identification of each Silver King horse given or sold to each such person receiving them outside of formal adoption programs. The Defendants do not oppose many other items of requested relief to which "mootness," if applicable at all, would not attach.

Since the Defendants concede these points by failing to oppose the requested relief, Plaintiff respectfully submits injunctive relief as to these conceded matters should be immediately granted.

X.
CONCLUSION

The attached Declaration and those previously provided together with all exhibits clearly demonstrate the Plaintiff has in fact suffered and would continue to suffer immediate, continuing, irreparable injury when being censored and deprived of her First Amendment rights by these federal Defendants.

"[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a

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preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); see also S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1148(9th Cir.1998) See also, *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959 (2002)(The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction). Ms. Leigh accordingly, demonstrates a high likelihood of success on the merits, as this court so aptly found in her previous case.

Dated this 21st day of October 2010

RESPECTFULLY SUBMITTED,
LAW OFFICE OF GORDON M. COWAN

/S/

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

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.peterson@usdoj.gov

DATED this 21st day of October 2010

/S/

G.M. Cowan

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