

No. 11-16088

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In the  
**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LAURA LEIGH  
Plaintiff - Appellant

vs.

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,  
Defendants - Appellees

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On Appeal from the U.S. District Court  
for the District of Nevada

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**REPLY BRIEF OF APPELLANT, LAURA LEIGH**

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Gordon M. Cowan  
Law Office of Gordon M. Cowan  
P.O. Box 17952, Reno, NV 89511 USA  
10775 Double R Blvd., Reno, NV 89521 USA  
Phone 775.786.6111

*Counsel for Plaintiff-Appellant LAURA LEIGH*

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## **I. FACTS: “AND NOW, THE REST OF THE STORY”**

### **A. The Change of Status Quo Following the BLM’s Marred Image**

Prior to the conclusion of the Calico Roundup the public was given access to trap sites, traps and temporary holding with an unobstructed view. ER 351-353 At Calico Ms. Leigh stood out in the open with ten other members of the public and without a zoom lens captured images clearly, even at the trap itself. (ER 201)

In November 2009 (at a BLM Advisory Board Meeting in Reno) the statement was made by Don Glenn (at the time BLM’s Director of the Wild Horse and Burro Program): “All of our gathers are open to the public, the public is invited to watch all the time.” ER 49.

The reasoning for changing the status quo is illustrated by a statement made in June 2010 in Denver, CO by Lili Thomas (another BLM meeting) (Ms. Thomas is a designated spokesperson for the topic). In response to Leigh’s question about the change in protocol after photos and videos went to the public, Ms. Thomas answers, “It’s caused us to have a real hard time to try to explain what’s happening.” ER 49-50, ER 351.

At the facility (Broken Arrow) status quo also changed. ER 51-53. The public was allowed in until the BLM received a favorable decision in another case. The BLM then closed the door due to bad press gleaned through videos, photos and reports coming out of the facility including reports made by Leigh. ER 56.

The other claims BLM makes for closing the facility (expense, staffing, etc.) have never been substantiated and no documentation exists to support those other claims as FOIA requests were made for such conversation and documentation. ER 50. Through FOIA request, the only documentation received for the reason of closure was the email from Dean Bolstad. ER 56. Claims that Bolstad did not have the authority are unsubstantiated as Bolstad's request is the only documentation given for closing the facility. ER 50.

### **B. Time Line of Absurdities and Discriminatory Access**

The BLM implies Ms. Leigh did not bring timely action. (Reply brief page 2 Paragraph 2). The BLM implies Ms. Leigh "did nothing" between the time BLM announced the roundup on June 16, 2011 and filing of her suit on September 24, 2011.

The conduct that brought the suit forward occurred from just prior to the announcement of the Silver King roundup through its commencement.

It was the repetitive nature of conduct, and the expectation that such conduct would continue, that brought this action.

Ms. Leigh was not an absent participant in the process. Ms. Leigh was on the road using considerable resources of time and money traveling extensively on public land attempting to fulfill her obligations to report on this issue.

From the time BLM announced the Silver King Roundup to it's

commencement Ms. Leigh was in the field suffering discriminatory or no access.

Prior to Silver King, discriminatory access existed to the extent that press deemed “worthy” by the BLM, was actually allowed within the trap itself during capture. ER 44-53, 283-287, 290-291, 293, 295-296, 298 After Silver King, discriminatory access existed. ER47-48, ER 50. At Silver King no access to the moment of capture existed. ER 247-248. Ms. Leigh was the only member of the press present. Others testified that when Leigh is not present the access became much less restrictive ER 48- 49.

*Time line:*

1. In July Leigh attempted to view horses rounded up from the Tuscarora area. At the Owyhee HMA no member of independent press was allowed to view a single horse captured. BLM made arrangements for selective members of the public to view while Ms. Leigh was held at a roadblock of armed men despite a Court order to make every "reasonable" attempt to allow Ms. Leigh to document. ER 49, 283, 285-287.
2. At Twin Peaks in August Ms. Leigh was restricted on public land in an area others had no restrictions attempting to photograph horses on a public road at the same moment two members of the press from the New York Times were given direct access to the trap and even were inside the actual jute area. ER 45, 50, 284-286, 290-291, 293, 296, 298.

3. A videographer, Clare Major, was given access to trap site during Twin Peaks as well and recorded the statement "Were not gonna give them that one shot they want." ER 46, 291, 293.
4. Leigh was also denied access to the same press box area the BLM videographer used. When Leigh asked for the same access they removed the other photographer instead of allowing Leigh to enter. ER 46, 286.
5. The Tonapah roundup had only two access days out of the entire operation. On Sept. 16 Leigh was told there would be no press access given at all by field manager Tom Seley. Ms. Leigh and others took photos of Tom Seley standing next to a photojournalist from the Las Vegas Sun where he was given access at the moment of capture at the actual trap while Leigh was held behind a hillside and had no line of visibility whatsoever. Seley refused to even take Ms. Leigh's press credentials. It took a call to the DC offices of BLM by her Editor to allow partial access to loading of animals and the actual trapping of horses was called of for the day. ER 46-47, 283-287, 295-296, 298.
6. Ms. Leigh's suit was filed the following week, September 22, 2011 (Doc sheet 1, ER 330).
7. Testimony also shows that Leigh is cooperative and stays within parameters yet meets a more restrictive attitude. ER 136-137, 140-141, 153,

155-156 Leigh even had difficulty at Silver King roundup finding a place to relieve herself without being observed. She was held on public land for four hours and told not to move even though the helicopter was not flying, she was not permitted to go to holding and watch horses unloaded and report on what she might have seen. ER 96 Leigh had noticed inaccuracies in numbers of horses shipped reported by the BLM on the website to what was being witnessed on the ground. She had concerns that horses were unaccounted for and was not permitted to travel freely to observe shipments. ER 96- 97, 187, 352.

8. As Ms. Leigh expected discriminatory, or no access to view, has continued since Silver King. This continues after Court record has stopped. ER47-48, 50.

### **C. The BLM's Health and Safety Fiction**

Discussions regarding the lack of a BLM national protocol occurred between Ms. Leigh and Tom Gorey (DC office, BLM). ER 352. Mr. Gorey admits there is no national observation protocol for wild horse roundups. Mr. Gorey discussed the prospect of initiating such a protocol beginning with the Twin Peaks roundup although it never materialized. In practice, the protocol is never consistent from roundup to roundup. (ER 352).

At page 6 of the BLM's brief, the health and safety risks appear reasonable

although in practice, they are fictional.

If the BLM's health and safety risks statements are the truth then no personnel other than those vital to the operation of roundups should be allowed near the wild horse traps during roundup operations. The BLM however, repeatedly defies these health and safety risks statements when allowing access for those (who are non-essential to the operation) of their choosing.

By example, the New York Times, Las Vegas Sun, BLM spouses, BLM photographers, members of "welfare" organizations of BLM's choosing and the contractor allows children on equipment, trap pens and playing near holding pens. ER 44-53, 283-287, 290-291, 293, 295-296, 298. If the assertion that glare from a camera lens could cause issue how is it that the lens of the New York Times photographer located directly in the jute area of the trap does not cause issue? How is it a toddler playing next to a holding pen causes no issue? See, ER 45, 50, 284-286, 290-291, 293, 296, 298.

Ms. Leigh caused no issue at the Calico roundup in January 2010 when she was allowed to put her head and shoulders into a stallion pen and take photographs. ER 201, 351-353. Where is the distinction?

It appears that Ms. Leigh's camera lens only caused issue after her video and photographs were published.

Perhaps the best response to the change in "safety" protocol is the statement

made in June 2010 in Denver, CO by Lili Thomas, a BLM designated spokesperson, who relays, “It’s caused us to have a real hard time to try to explain what’s happening.” ER 49-50.

**D. The BLM’s Reliance on Matters Outside the District Court Record**

The BLM includes several documents from their opposition to Ms. Leigh’s TRO but not to Ms. Leigh’s motion for preliminary injunction. The BLM did not file a true opposition to the amended preliminary injunction because they contended the matter was moot once the roundup ceased. SER 9- 28.

Nevertheless, Ms. Leigh responded to each document in the course of the TRO. ER 337- 353, including the following:

1. Declaration of Alan Shepard fails to address issues pertaining to Silver King. The majority of his declaration was irrelevant as he was not present. ER 339. The rest of his Declaration deals with authority to do the roundup. ER 338-339.
2. Declaration of Heather Emmons: Ms. Emmons was only present one day at Silver King. Ms. Emmons makes comments as to the statement in Leigh’s Declaration of a “misrepresentation” of a conversation Leigh had with Chris Hanefeld (lead PR, BLM for Silver King) that she was not present to hear. ER 351. Ms. Emmons makes statements about “safety” protocol as though it were always in force. However, Ms. Emmons is

clearly aware the protocol changed significantly after Ms. Leigh's photographs were published since Ms. Emmons was present with Leigh at Calico roundup. ER 351.

The BLM referenced new documents in a footnote on page 9 of its answering brief. These documents are not part of the court record, there is no citation to them being included in the district court record, and they are not relevant to the discussion at hand.

## **II. MOOTNESS: THE APPLICABLE EXCEPTIONS**

### **A. Capable of Repetition Yet Evading Review, and Misplaced Burden.**

A "mootness" exception is recognized where, "(1) the challenged conduct is too short in duration to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiff [] will again be subject to the same action." *American Civil Liberties Union v. Lomax*, 471 F. 3d 1010, 1017 (9<sup>th</sup> Cir. 2006).

The BLM skirts discussion of this exception, contending instead that, since the Silver King roundup is over, there is nothing left to enjoin.

The flavor of BLM's brief suggests the BLM anticipates continuing on with "business as usual," using the same "observation" and "safety" protocols that Ms. Leigh faced at several roundups, Silver King included. These protocols, arbitrary as applied, preclude Ms. Leigh's observations, time after time, roundup to

roundup, of the actual capture moments of wild horses.

The BLM does not deny their impediments to viewing the actual wild horse captures, “could be physical such as mountains, hillsides, fencing, panels, structures, or vehicles; or, dimensional such as distance or time. ER 82-83, 96, 108-115, 192-194.” Appellant’s Brief, p. 10. They don’t deny these obstructions would continue at future roundups.

The BLM admits they intentionally place obstructions in the public’s and Ms. Leigh’s view. (Ans. Brief p. 38). The BLM cites to no evidence, protocol, observance, hearsay, even conjecture, suggesting they would someday in the future, provide the public or press an unobstructed view.

The BLM does not dispute the timing of a roundup is short in duration when compared with the time it takes to get the district court to decide a preliminary injunction motion. The Silver King roundup started September 25, 2010 and ceased 13, 2010.<sup>1</sup> The roundup lasted 18 days. Conversely, the district court took more than 180 days to decide the preliminary injunction matter.<sup>2</sup> The roundup was so short, the BLM chose not to respond to Ms. Leigh’s Amended Motion for Preliminary Injunction except to provide a notice to the pending TRO at the time,

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<sup>1</sup> D’Aversa Declaration, C.R. Tab 23-1, p. 1, ¶ 4. SER 029.

<sup>2</sup> The Amended Preliminary Injunction was filed October 1, 2010. The district court’s decision from which this appeal arises was entered April 13, 2011.

that the case is moot because the roundup is over.<sup>3</sup>

The District Court neither allowed nor considered available evidence offered by Ms. Leigh, as to both prior and subsequent conduct which precluded her from viewing meaningful access to assess the conditions of captured horses at the time of their capture. The court record is replete with both prior and subsequent instances of Ms. Leigh's preclusion. See, e.g., ER 40-53, 283-287, 290-291, 293, 295-296, 298, and discussion above.

Ms. Leigh has not experienced meaningful observation to assess the condition of captured horses since the Calico roundup in January 2010. For more than a year now, time after time, Ms. Leigh sought such a glimpse, but to no avail. Much like showing up at the movie house, she buys the tickets but the films never play.

*Amici Curiae* reference *Greenpeace Action v. Franklin*, 14 F. 3d 1324 (9<sup>th</sup> Cir. 1992), which held, the "capable of repetition yet evading review" exception applied to fishing regulations in effect less than a year. The *Greenpeace* court noted, it was, "difficult to obtain effective judicial review" on such a time frame. *Id.*, at 1329-30.

The Hon. Morrison C. England for the Eastern District of California recently found *not* moot, the Plaintiff's challenge to a BLM wild horse roundup at

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<sup>3</sup> BLM's Notice, etc. C.R. Tab 23.

Twin Peaks (north of Susanville, California), even though the roundup was completed. The BLM there, claimed as they do here, that the plaintiffs were not experiencing ongoing harm since the actual roundup was completed; and, that the case was not justiciable. Addressing the nearly identical issues, Judge England defined the Plaintiff's injury as follows:

The asserted injury . . . is Plaintiffs diminished ability to enjoy wild horses and burros on the Twin Peaks HMA. Because the wild horses and burros removed from the range have not been returned, this Court finds that Plaintiffs do in fact continue to suffer the lost enjoyment of those animals. They have sufficiently claimed an ongoing injury.<sup>4</sup>

In applying the "capable of repetition yet evading review" exception to the BLM wild horse roundup, Judge England provided the following guidance:

Defendants argue that future roundups would vary in timing and circumstances, such as topography, types of horses gathered, and nature of any harms, which are all unknowable at this point. This Court does not find Defendants' argument persuasive. The "capable of repetition" exception to mootness was not intended to be applied so rigidly.<sup>5</sup>

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In response to a defendant's insistence that a future repeatable claim must share all characteristics with the current claim in order to be capable of repetition, the Court stated, "History repeats itself, but not at the level

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<sup>4</sup> *In Defense of Animals v. United States DOI*, 2011 U.S. Dist. Lexis 45887, p. 26 (E.D. Cal. Apr. 20, 2011).

<sup>5</sup> *Id.*, p. 31.

of specificity demanded by the [defendant]." (Cite omitted). The case or controversy to be repeated need not be factually identical to the last detail, but instead considered in terms of the legal questions it presents and the identifying factors that are essential to Plaintiffs' theory of their claims. *Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 323 (D.C. Cir. 2009). Plaintiffs' underlying concern . . . was Defendants' indiscriminate capture and roundup of non-excess horses only to release them back on the range. And though Defendants are right to say that the precise contours of any future gather are "unknowable" and "speculative," this is not the proper test for the "capable of repetition" exception. Rather, Plaintiffs need only show that there is a reasonable expectation that the same injury will befall them again. This Court finds that Plaintiffs have met that burden, and thus, Claim Three under the Wild Horse Act is not moot.<sup>6</sup>

As Judge England points out, The Supreme Court eschewed such rigidity in application of the mootness exception. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007).

In declining to consider evidence of "capable of repetition yet evading review," the district court in the instant matter, placed the burden of producing evidence on the issue squarely with Ms. Leigh. Then, the district court refused to allow into evidence at hearing, either prior or subsequent instances of identical conduct occurring at other roundups.<sup>7</sup> The court in essence, ignored all evidence

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<sup>6</sup> *Id.*, pp. 32-33.

<sup>7</sup> See as but one of many examples of sustained objections at hearing, at ER 77- 79.

pointing to the likelihood that the identical conduct was capable of repeating. It in fact, repeated although the judge refused to hear it.

The record confirms the BLM's national roundup schedule would continue this year. See, D'Aversa declaration.<sup>8</sup> SER 022, ¶¶ 19, 24. Ms. Leigh's job with Horseback Magazine and to others to whom she reports, is to travel to these roundups. ER 73-75, 353.

### **B. It's Not Moot Where Silver King Horses Remain in Facilities**

The BLM acknowledges the Broken Arrow / Indian Lakes wild horse holding facility, had been open to the public. Ans. Brief p. 25. They contend the closure was due to staffing problems. The BLM also contends the email of their BLM official, Mr. Bolstad, who stated the facility should be closed due to, "[the] damage that is being done to BLM's image as a result of the [public] tours" was not authorized. Yet, Mr. Bolstad's superiors accepted Mr. Bolstad's recommendation and closed the facility. This is not in dispute.

No document or evidence offered by Ms. Leigh ever suggested that the interests of this suit ended when the last stock trailer at Silver King, loaded with Silver King horses, left the range.

This portion of the suit does not address a "policy" change. Rather, this portion of the case likewise seeks to return the *status quo* to when the Broken

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<sup>8</sup> The BLM references its Supplemental Excerpts as "SER."

Arrow facility remained open to the public earlier this past year. The BLM's Preclusion of viewing horses at Broken Arrow began shortly after the Bolstad email and shortly after Ms. Leigh's photos were published. This too is not in dispute.

Ms. Leigh continues to suffer irreparable injury from being precluded from observing other aspects of the BLM's handling of Silver King horses, not just those involved in the roundup. Her preclusion does not start and stop with a roundup of wild horses. Her preclusion continues with her being removed, held back, denied access, to other portions of the defendants' process which remain ongoing well after the Silver King roundup.

These horses, (Silver King horses in this instance) are being handled, processed and/or disposed of, or moved, or "lost" or warehoused even as of this writing. The BLM's process doesn't come to a halt just because the BLM completed its roundup. The process is ongoing. The roundup is only the "front end" or beginning of the process. In this instance the BLM's process remains entirely secretive and hidden from the public's eye because the BLM succeeded thus far, to convince the court that re-opening the facility would amount to a "policy change."

In this instance, Silver King horses entered the process at the front end, beginning with the roundup. They (Silver King horses) remain within the BLM's

system, somewhere.

There is not one document or notice from the defendants indicating that *all handling* of Silver King horses are concluded. Only the roundup stopped. No document or record of the defendants states or even implies that they (the defendants) have concluded all handling, processing and warehousing of Silver King horses.

### III. WHY INJUNCTIVE RELIEF REMAINS APPROPRIATE

#### A. The BLM's Public vs. Private Forum Shell Game and the District Court's Avoidance of Forum Review

The BLM originally sought to convince the district court that the Silver King Herd Management Area was a nonpublic forum. ER 210-211. The absurdity of the notion was discussed at length by Ms. Leigh. ER 337-347, 350-353.<sup>9</sup> The

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<sup>9</sup> The words “non-public forum” were offered for the first time in the Defendants Opposition (Doc 20) to Plaintiff's TRO Motion. ER 210. It was also the BLM's first notice to the public. In this regard, 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 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.”

BLM now abandons the notion, opting for an “even if” argument as relating to a public forum analysis. Ans. Brief, p. 37.

The district court avoided the forum analysis, committing reversible error in the process. Had it done so, the court would likely have considered the extensive public forum analysis offered by Ms. Leigh. CR Tab 21 and 21-1; ER 337-353.

**B. The Right to News Gather and Right of Access**

The court reviews *de novo* the "district court's application of the law to the facts on free speech questions." *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 792 (9th Cir. 1986), *aff'd*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

The BLM’s resistance to allowing the public and press to view meaningful moments of capture and to view horses in captivity, raises both news gathering and access issues. The BLM never disputes that the management of wild horses on America’s public lands (BLM managed lands) are matters of significant public concern. They don’t dispute that the subject is newsworthy.

*Daily Herald Co. v. Munro*, 838 F. 2d 380 (9<sup>th</sup> Cir. 1988) confirms, “the First Amendment protects the media’s right to gather news.” *Id.*, at 384.

The BLM discards *Munro* over its confusion of its significance. Ans. Brief,

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*Int'l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696, 112 S.Ct. 2701 (1992) (Kennedy, J., concurring).

p. 28. The BLM contends *Munro* is not an “access” case. But, *Amici Curiae* cite *Munro* as a “news gathering” authority.

Nevertheless, *Munro* doesn’t help the BLM where the case confirms the right to gather news is highly protected, that restrictions are constitutional “only if it is narrowly tailored to accomplish a compelling government interest,” and the restriction involved in *Munro* did not meet the “narrowly tailored” criterium. *Id.*

On the issue of “access,” Ms. Leigh never seeks “unlimited” access. This is the BLM’s characterization. Rather, Ms. Leigh has always sought reasonable or meaningful access which requires an unrestricted view. Such a view can occur from a safe distance. The BLM however, chooses to place obstructions or unreasonable distances between her and the horses.

A discrepancy in “definition” remains between what the BLM says it does, and what it actually delivers. When the BLM says it “provided members of the public with multiple alternative times and places to view the gather,” (Ans. Brief p. 38), what it carefully omits is, this type “view” really means, the public and Ms. Leigh are not allowed to view moments of capture where the health and safety of the animals are of paramount issue and interest to the public.

### **CONCLUSION**

The district court did not base its decision on “facts” as the BLM suggests. The district court instead, applied mootness, without recognized exception, to

exact the case from the docket, committing error. More difficult is the passage of more than 180 days before a ruling took place on a matter that should have been considered more akin to an emergency.

Ms. Leigh seeks reversal of the district court's denial of her Amended Motion for Preliminary Injunction and a remand with instructions to enter promptly, Ms. Leigh's requested relief.

Respectfully, this 30<sup>th</sup> day of June 2011.

LAW OFFICE OF GORDON M. COWAN  
Reno, Nevada

s/

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Gordon M. Cowan, Esq.,  
for Plaintiff-Appellant LAURA LEIGH

**CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Circuit Rule 32(a)(7)(c) the Motion herein is proportionately spaced, has a typeface of 14 points in Roman style type and contains 3,818 words exclusive of tables and certificates.

LAW OFFICE OF GORDON M. COWAN  
Reno, Nevada

s/

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Gordon M. Cowan, Esq.,  
for Plaintiff-Appellant LAURA LEIGH

**PROOF OF SERVICE**

I certify I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Ninth Circuit by using the appellate CM/ECF system on June 30, 2011. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

LAW OFFICE OF GORDON M. COWAN  
Reno, Nevada

s/

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Gordon M. Cowan, Esq.,  
for Plaintiff-Appellant LAURA LEIGH