



1 BLM (1) to use helicopters to gather the horses while there are pregnant mares and young foals in  
2 the herds, and (2) to close 27,000 acres of public land thereby excluding the public and the press  
3 from observing the gather in violation of the First Amendment. Doc. #1. Along with her complaint,  
4 Leigh filed her initial motion for a temporary restraining order seeking to prevent the BLM from  
5 conducting Tuscarora Gather and having the closure lifted. Doc. #3.

6 On July 15, 2010, the court heard oral argument on Leigh's motion. During the hearing, the  
7 court expressed its concerns regarding both the Tuscarora Gather and the closure of public lands.  
8 Subsequently, on July 16, 2010, the court issued an order granting in-part and denying in-part  
9 Leigh's initial motion for a temporary restraining order. Doc. #18. The court granted the motion in  
10 so far as it related to the BLM's blanket closing of public lands during the Tuscarora Gather  
11 finding that Leigh had made a sufficient showing that she was likely to succeed on her First  
12 Amendment claim against the blanket closure. *Id.* The court denied the motion as to Leigh's  
13 challenge of using helicopters to effectuate the Tuscarora Gather in the Owyhee, Rock Creek and  
14 Little Humboldt<sup>2</sup> HMAs finding that Leigh had not made a showing of her probable likelihood of  
15 success on the merits. *Id.*

16 Thereafter, Leigh filed the renewed motion for a temporary restraining order of the  
17 Tuscarora Gather in the Rock Creek and Little Humboldt HMAs once again challenging the  
18 BLM's use of helicopters to effectuate the gather and also challenging the BLM's decision to  
19 gather on private lands thereby precluding her access to the gather. Doc. #24.

## 20 **II. Discussion**

21 A court may grant a temporary restraining order upon a showing of: (1) irreparable harm to  
22 the petitioning party; (2) the balance of equities weighs in petitioner's favor; (3) an injunction is in  
23 the public's interest; and (4) the likelihood of petitioner's success on the merits. *See Winter v.*  
24 *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008) (citations omitted). However, "[t]he

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26 <sup>2</sup> The denial of the motion was without prejudice as to the Rock Creek and Little Humboldt HMAs.

1 sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party  
2 cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters  
3 of idle curiosity.” *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir.  
4 2002).

5 Initially, the court notes that there has been no showing of a probable likelihood of success  
6 on the merits by Leigh as it relates to her challenge of the Tuscarora Gather in the Rock Creek and  
7 Little Humboldt HMAs. She has not made a sufficient showing of the legal deficiencies in the  
8 BLM’s decision to conduct the gather at this time and its decision to effectuate the gather via  
9 helicopter.

10 In support of her motion, Leigh argues that the use of a helicopter during the foaling period  
11 is a violation of the BLM’s own policies and procedures. However, the court finds that the BLM’s  
12 policies and procedures define the foaling period as “six weeks on either side of the peak of  
13 foaling” which is identified as the period generally from March 1 to June 30. Doc. #3, Exhibit B,  
14 §4.4.4, BLM’s June 2010 official management manual “The Wild Horses and Burros Management  
15 Handbook.” Here, the gather is taking place in July 2010, outside of the defined foaling period.  
16 Accordingly, the court finds that Leigh is not likely to succeed on the merits of her complaint and,  
17 as such, a temporary restraining order is not warranted.

18 As to Leigh’s First Amendment challenge that the gather is taking place on private lands  
19 upon which Leigh does not have permission to enter, the court will likewise deny her motion for a  
20 temporary restraining order. The court’s previous order lifted the BLM’s blanket closure of public  
21 lands to allow the public and press the opportunity to observe any gather operations that take place  
22 on public land. The court’s previous concerns regarding Leigh’s First Amendment rights, namely,  
23 the right of the public and press to have reasonable access to a matter of public interest being  
24 conducted on public lands, is not present when gather operations are taking place on private land  
25 over which the BLM has no rights. The court finds that Leigh has not shown a probable likelihood  
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1 of success on the merits that the BLM's decision to gather on private land is a prior restraint on her  
2 First Amendment rights. Accordingly, the court shall deny her renewed motion for a temporary  
3 restraining order.

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5 IT IS THEREFORE ORDERED that plaintiff's renewed motion for a temporary restraining  
6 order (Doc. #24) is DENIED.

7 IT IS SO ORDERED.

8 DATED this 27th day of July, 2010.

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12 LARRY R. HICKS  
13 UNITED STATES DISTRICT JUDGE  
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