GORDON M. COWAN, Esq.
SBN# 1781
Law Office of Gordon M. Cowan
10775 Double R Blvd
Reno, Nevada 89521
Telephone (775) 786-6111

Attorney for Plaintiff LAURA LEIGH

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAURA LEIGH,

Plaintiff,

vs.

SALLY JEWELL, *et al.*,

Defendants.
_____/

Case No. 3:13-cv-0006-MMD-VPC

RESPONSE OF PLAINTIFF TO FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS (Dkt.68)

Plaintiff, Laura Leigh, through counsel, responds and opposes Federal Defendants' Partial Motion to Dismiss (Dkt.68) as follows:

STANDARD OF REVIEW

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a court assesses whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Chavez v. United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012), quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)).

> "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'"

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct., 2130, 2137 (1992)(quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 889, 110 S.Ct. 3177, 3189 (1990)).

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679, 129 S.Ct. 1937.

Chavez, 683 F. 3d at 1108-09.

In determining whether the court has subject matter jurisdiction, the court may consider evidence outside of the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

DISCUSSION

Without including several unnecessary pages into this opposition that points to the BLM's characterizations and opinions of the Second Amended Complaint, Ms. Leigh can only agree to disagree with such unnecessary discussions. The arguments' substance are discussed below.

First Claim for Relief

The BLM objects to the first claim for relief because, in essence, "Plaintiff attempts to challenge the legality of BLM's conduct during the Owyhee gather...."[1] The BLM suggests the complaint challenges conduct that merely implements or consummates the EA.

The BLM glosses over the very first paragraph of the First Claim for Relief embodied

[1] See BLM's motion, Dkt.68, p.9 of 17.

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in paragraph 97, which incorporates into this claim, the several paragraphs preceding it, including numerous paragraphs directly challenging the BLM's decisionmaking process *before finalizing* the environmental assessment ("EA").[2] Compare generally, paragraphs 11-13, 15-16, 18-22, 24-25, 29, 33 and 34, all incorporated into the First Claim for Relief by paragraph 97.[3]

Although it is true that the First Claim for Relief challenges the methodology of the roundup that results in inhumane action, the First Claim makes it clear that the resulting implementation of the EA is flawed because the decisionmaking process in formalizing and finalizing the EA is likewise, flawed. Where the decisionmaking process fails to consider relevant facts or material, even after those matters are brought to the agency's attention, and then thereafter, the agency blindly continues on without taking such matters into consideration before finalizing the EA, the "final agency action" is flawed as is the following implementation of the EA.

In this regard, the second amended complaint, particularly the First Claim for Relief (through paragraph 99) challenges the decisionmaking process (i.e. the formulation of the EA), not just the action flowing therefrom. The following allegations are examples and are apropos:

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[2] See, *e.g.*, Second Amended Complaint ("Plaintiff incorporates by reference the averments contained in Paragraphs 1 through 96 of the Complaint as though the same were fully set forth herein."). Dkt.52-1, p.42 of 53, ¶97.

The defendants complain that the Second Amended Complaint was not independently filed. But there was no authority granted to file the same. Only the motion to amend was granted. It appears customary in the District that the court would order the filing of an amended complaint after granting the motion within a certain date or acknowledge that the amended pleading is filed as is. Neither action occurred in this circumstance.

[3] Dkt.52-1, p.42 of 53, ¶97 ("Plaintiff incorporates by reference the averments contained in Paragraphs 1 through 96 of the Complaint as though the same were fully set forth herein."). *Cf.*, Dkt.52-1, pp.5-8 of 53, ¶¶11-13, pp.8-12 of 53, ¶¶15-16, pp.12-15 of 53, ¶¶18-22, pp.15-17 of 53, ¶¶24-25, p.18 of 53, ¶29, pp.21-22, ¶33, p.22 of 53, ¶34.

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> Plaintiff is informed and believes the defendants should have considered but failed to consider before finalizing the EA, that leaving the handling and humane care of wild horses during roundup operations to the very entity / individuals whose monitoring for humane handling is required, potentially places wild horses slated for capture and removal, in jeopardy and to potential inhumane treatment; and the process prevents the BLM from accurately monitoring the capture and removal of wild horses by 80 percent of the time; and the process prevents the BLM from independently verifying and reporting to the public with any accuracy, except by, perhaps 20 percent, the number of horses removed, the number of horses injured, the number of horses destroyed and whether wild horses were captured, handled and shipped "humanely."
>
> Dkt.52-1, p.17 of 53, ¶27 (referencing Snowstorm).

* * *

In regard to the humane handling of wild horses that are targeted for removal from the Owyhee Complex, and as but a few examples, the defendants should have considered but failed to consider before finalizing the EA,

a. adopting a uniform standard of care or specific, enforceable rules that ensure and promote the humane handling of wild horses during the roundup, capture, holding, storing, transportation and disposition ("roundup activities") of wild horses in the Owyhee Complex;

b. adopting specific methods to avoiding the harassment

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> and death of wild horses in the Owyhee Complex, occurring during roundup activities; and
>
> in failing the foregoing, the defendants action is "not in accordance with law," or is arbitrary and capricious, or implemented without observance of procedure required by law.

Dkt.52-1, p.22 of 53, ¶34

The BLM's motion does not address these paragraphs nor others in the complaint discussing similar relief, nor does the BLM explain how the First Claim for Relief does not state a claim for relief when these paragraphs are incorporated into that same claim. The BLM's argument that the complaint merely seeks to stop the implementation process resulting from the EA does not correlate with these specific allegations. The BLM simply dismisses these paragraphs.

The BLM's finitely-focused assertion that, "Plaintiff identifies no other agency action in her first claim for relief,"[4] together with their inference that Ms. Leigh seeks principally or only, a section 706(1) claim,[5] is unsupported by the very allegations[6] found and incorporated into the First Claim for Relief that the BLM refuses to recognize.

Judicial review of this claim is governed by the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*. Under the APA, the court must hold unlawful and set aside agency "action, findings and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law," *id*. § 706(2)(A),(D). The court must also "compel agency action unlawfully withheld or unreasonably delayed," *id*. § 706(1). Agency action that is subject to review under the APA includes "[a]gency action made reviewable by statute

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[4] Dkt.68, p.9 of 17.

[5] 5 U.S.C. § 706(1).

[6] *Id.*

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and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

The First Claim for Relief identifies and incorporates the EA that is being challenged.[7] The same claim identifies several items that the BLM should have considered but failed to consider before finalizing the EA. *Id.* The complaint correlates these activities to "action, findings and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] The statute on which the APA claim is reliant is alleged as the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 *et seq.*.[9] That Act requires BLM to roundup and remove from the range *only* "excess" wild horses, as defined by the statute, and requires that all such roundup activities be conducted "humanely." 16 U.S.C. § 1333(b)(2)(B) (requiring that horses be "humanely captured and removed" and provided "humane treatment and care (including proper transportation, feeding, and handling)"). Finally, the BLM does not challenge Ms. Leigh's standing, clearly laid out in the complaint.

The defendants rely on *Leigh v. Jewell*, 11-cv-608, 2014 WL 31675 (D. Nev. Jan. 3, 2014 ("Triple B"). The Triple B court based its ruling on allegations inapposite to those contained in the Second Amended Complaint filed in the instant matter. The Triple B court did not find allegations in the Triple B complaint that included a challenge to the decisionmaking process of finalizing the EA, as are found in the challenged complaint in this case. Unlike Triple B, the Second Amended Complaint including the First Claim for Relief challenges "final agency action" under §706(2)(A) or (D). The *Leigh* decision was also a Rule 12(c) challenge, not a 12(b)(6) challenge as what is to be considered in this case.

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[7] Exhibit 1 to Second Amended Complaint, Dkt. 52-2. See Dkt. 52-1, p.2 of 53, ¶¶11, 34.

[8] Dkt.52-1, p.6 of 53, ¶11.

[9] Dkt.52-1, p.6 of 53, ¶11, p.35 of 53, ¶76.

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The First Claim for Relief clearly states a claim under § 706(2)(A) and (D) when challenging the agency's failure to consider certain matters before finalizing the EA, not merely activity that consummates or implements the EA as the BLM would have the court believe.

Second Claim for Relief

The BLM contends the Second Claim for Relief for declaratory relief, is duplicative and that such claims had been dismissed in a similar case. To the extent the relief sought is duplicative of that sought in the prayer in the Second Claim for Relief, and that the prayer itself is not being challenged by this motion, plaintiff would take no position on this part of the motion.

However, to the extent the claim is not duplicative of the prayer, or where it may assert an independent basis for relief in accordance with the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, plaintiff respectfully asks that it remain as a separate claim for relief.

Third Claim for Relief

To be clear, the defendants do *not* seek dismissal of the Third Claim for Relief.

Fourth Claim for Relief

The Fourth Claim asserts a First Amendment, press access claim.

The defendants contend Ms. Leigh alleged *no facts whatsoever* describing the type process at issue, the extent to which this process was open in the past, how the public plays a positive role, or how the plaintiff's access was curtailed. And thus, the allegations are, purportedly, conclusory.

But just as the defendants skipped over the First Claim's "incorporation" paragraph, they did it again with the Fourth Claim which likewise incorporates the many paragraphs previously stated therein. See, Dkt. 52-1, p.45 of 53, ¶111. Relevant incorporated

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allegations to this claim include the following:

> Plaintiff seeks to halt an intended preclusion of her constitutional, First Amendment right of access to observe and report to the public the activities of the roundups in Owyhee Complex. Plaintiff challenges two methods of her preclusion from observing, as follows:
>
> a. historical limitations occurring previously and which are likely to repeat in the future at helicopter roundups and their related activities at Owyhee Complex; and
>
> b. the newly announced bait / water trap operation at Owyhee Complex which precludes and forbids all public or press observation of the defendants' bait / water trap operations, and which causes these particular government operations to be conducted entirely in secrecy, afar from public scrutiny contrary to First Amendment press access notions.
>
> Dkt. 52-1, p.3 of 53, ¶3.
>
> The defendants intend to conduct the Snowstorm HMA roundup in a cloak of secrecy, afar from public and press and Ms. Leigh's observation by denying all public observation of roundup activity occurring as bait / water trap operations in the Owyhee Complex beginning with the Snowstorm HMA roundups. The defendants should have considered but failed to consider before finalizing the EA,
>
> a. that continuing to prohibit public observation in the manner that had taken place previously in both Owyhee Complex and elsewhere before finalizing the EA, and in intending to completely eliminate public observation and the plaintiff's observation of bait / water trap roundup operations

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> in the Owyhee Complex, including the Snowstorm HMA, that doing so violates Ms. Leigh's and the public's and other credentialed press's constitutional First Amendment right of access to observe government activity. See, e.g., Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).
>
> b. that public observation is successfully employed and permitted in other bait / water trap operations elsewhere, conducted on BLM lands;
>
> c. that Ms. Leigh and other members of the public and/or press have personally observed ongoing bait / water trap operations of wild horses on BLM lands;

Dkt. 52-1, p.23 of 53, ¶35.

> This action also seeks to enforce Ms. Leigh's constitutional right of access to view, observe, document, assess horses, against unreasonable restrictions meant to preclude her from reporting and photographing government activity.

Dkt. 52-1, p.4 of 53, ¶9.

> The defendants' intended preclusion and ongoing preclusion of the plaintiff from having access to observe roundup activities, to observe the handling of horses during roundups, corralling, shipment, temporary holding, and the defendants' preclusion of the plaintiff and the public from observing horses close enough so as to independently assess the condition of horses when they are captured and handled by the defendants or their chosen contractor(s), has violated and continues to violate the plaintiff's and others constitutional First Amendment right of access. The defendants' conduct also violates the plaintiffs' right to

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> observe and report to the public what transpires with respect to the government activities the plaintiff seeks to observe as a credentialed member of the press, in derogation of the First Amendment freedom of the press. Plaintiff is informed and believes the defendants' interference with the Plaintiff's constitutional First Amendment freedoms, is unlawful.
>
> Dkt. 52-1, pp.23-24 of 53, ¶36.

Additional allegations are found at pp.47-50 of 53, ¶¶126-133 (Dkt. 52-1). The specific relief sought is also found in the prayer at pp.50-51.

The defendants appear to require particularized pleading as if the plaintiffs were asserting a fraud claim. The defendants glossed over, once again, early allegations in the complaint that were included in the Fourth Claim for Relief. See, Dkt. 52-1, p.47 of 53, ¶125.

A claimant need only provide, "(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed.R.Civ.P. 8(a)(2),(3).

The question with a motion to dismiss, is not whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974). A dismissal under Rule 12(b)(6) is generally proper only where there "is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1988).

The defendants fail to bring forward any case indicating that facts must be specifically plead when a claimant brings a First Amendment claim, similar to particular pleading required of a fraud claim. No authority suggests that the allegations such as those contained in *this* Second Amended Complaint, are, somehow, "conclusory," other than the defendants own conclusory statements to the same. The defendants' recitation to

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the *Press Enterprise II* case is unavailing as requiring specific or certain allegations in a complaint that validly challenges restrictions to observe government activity or to enforce constitutional "press access" to such activity. *Press Enterprise II* has *never* stood as authority for the sufficiency of pleading a "press access" case.

The defendants also apparently contend that, because, as the example, the "Snowstorm" roundup was canceled, there is no viability to this claim. This issue is meritless for two reason:

1. *Mootness Challenge*

The contention raises a "mootness" challenge. When this suit was brought, the defendants dropped the Snowstorm roundup from their "gather" schedule. Nothing precludes the defendants from putting roundups at Snowstorm back on to the horses they didn't remove after they canceled this roundup? Other questions are rhetorical. Logic dictates that the defendants would likely return before the conclusion of the 10 year EA to remove wild horses they claimed were "excess" at Snowstorm in the first instance, that they did not remove when canceling this event.

"[a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " *Id.*, at 289, n. 10, 102 S.Ct. 1070 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)). "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid*. "In accordance with this principle, the standard we have announced for

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determining whether a case has been mooted by the defendant's voluntary conduct is stringent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000).

2. Does not exclusively attach to Snowstorm

The plaintiff's First Amendment claim does not attach solely to the canceled Snowstorm roundup but to the other roundups in the Owyhee Complex anticipated during the course of the 10 year EA, where access to observe is denied or unreasonably restricted, however accomplished.

Section 706(1) and Norton v. SUWA

The motion challenges the sufficiency of the pleading. It is not a request for summary judgment nor one for judgment on the pleadings.

The defendants desperately seek to have this case viewed as one solely seeking relief under 5 U.S.C. § 706(1). With incomplete logic and a "gloss-over" of important allegations, the defendants"pigeon-hole" the second amended complaint into a 706(1) matter, to conveniently contend the pleading does not pass muster under *Norton v. SUWA*.[10]

The second amended complaint asserts claims under 706(2)(A) and (D) of the APA, through the Wild Horse Act. The second amended complaint also raises First Amendment, press access concerns and seeks relief to avoid irreparable harm.

SUWA, then, would not appear to be instructive on this 706(2)(A) and (D) claim.

The defendants' implication that *SUWA* confirms that challenges under the Wild

[10] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2374-85, 159 L. Ed. 2d 137 (2004).

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Horse Act (like the general management of the New Orleans Jazz Park) would be uniformly considered inappropriate for court intervention because it would amount to a broad or general mandate that interferes with day-to-day decisions by the agency, is patently unfair. The *SUWA* court gave the following example of relief that would be too sweeping:

> To take just a few examples from federal resources management, a plaintiff might allege that the Secretary had failed to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance," or to "manage the [New Orleans Jazz National] [H]istorical [P]ark in such a manner as will preserve and perpetuate knowledge and understanding of the history of jazz," or to "manage the [Steens Mountain] Cooperative Management and Protection Area for the benefit of present and future generations." [Cites omitted]. The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.
>
> *SUWA*, 542 U.S. at 67.

The claims asserted in the instant case are specifically referenced in the second amended complaint and are clearly afar from the general propositions as espoused by example in *SUWA.*

CONCLUSION

For the stated reasons, plaintiff respectfully asks that the court deny the government defendants' partial motion to dismiss.

Should the court find the relevant complaint deficient under "notice" requirements, that where the plaintiff is able to state a viable claim based on the discussions offered above, that she be given leave to amend.

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10775 Double R Blvd
Reno, NV 89521

Respectfully, February 7, 2014

LAW OFFICE OF GORDON M. COWAN

s/ G.M. Cowan

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

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 February 7, 2014

s/ G.M. Cowan

G.M. Cowan

Cowan Law Office
10775 Double R Blvd
Reno, NV 89521