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NEVADA ASSOCIATION OF COUNTIES, *et al.*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

NEVADA ASSOCIATION OF COUNTIES, *et al*, Plaintiffs vs. UNITED STATES DEPARTMENT OF THE INTERIOR; *et al*., Defendants.	Civil No. 3:13-cv-00712-MMD-WGC PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS FILED BY DEFENDANT-INTERVENOR AMERICAN HORSE PRESERVATION COUNCIL AND BY FEDERAL DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SUPREME COURT DECISIONS

FEDERAL APPELLATE DECISIONS

DISTRICT COURT DECISIONS

STATUTES

COME NOW Plaintiffs in the above-entitled action, Nevada Association of Counties, *et al*., and file their memorandum of points and authorities in opposition to the motions to dismiss the first amended complaint in the above-entitled action filed by the federal defendants herein and defendant-intervenors American Wild Horse Preservation Campaign, *et al*. ("AWHPC"). Defendant-intervenor Laura Leigh has also filed a motion to dismiss as of August 7, 2014, which is consistent with the motions to dismiss of the other moving parties. While this motion was filed only 10 days before the date of this memorandum in opposition, Defendant-intervenor Leigh's Motion to Dismiss is virtually identical in its broad arguments to those of the federal defendants and the AWHPC to the extent that they could have been written by the same party. Although plaintiffs are entitled to respond to each motion individually, including Ms. Leighs', in the interests of judicial economy and to conserve the resources of the parties, plaintiffs will address these arguments in the same response. Accordingly, plaintiffs will not necessarily address in detail every sub-argument made by the moving parties in their briefs in support of their motions; however, by this plaintiffs are not waiving any arguments they have and are not intending thereby to indicate an agreement with any argument made by them.

I.

STANDARD OF REVIEW

A motion to dismiss cannot be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Revis v. Slocomb Industries, Inc*., 765 F. Supp. 1212, 1213 (D. Del. 1991). Emphasis added. A motion to dismiss is considered solely on the basis of the allegations in the complaint and extraneous material is disregarded. In considering whether to dismiss an action, the Court must treat all of the nonmoving parties' well-pleaded allegations as true. *Abbott Laboratories v. Nutrimax Products, Inc.*, 844 F.Supp. 443, 445.D. Ill. 1994); *Mullins v. M.G.D. Graphics Systems Group*, 867 F.Supp 1578, 1579 (ND Ga. 1994). The allegations of the non-moving parties must be viewed in the light most favorable to those parties. *Schroll v. Plunket*, 760 F.Supp. 1385, 1387 (D. Or. 1991), aff'd 932 F.2d 973; see, e.g., *Gould,*

Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir.1995). Because granting such a motion terminates the case on its merits, the complaint is construed broadly. *Ponder v. United States*, 117 F.3d 549, 552-53 (Fed. Cir. 1997).

Both the federal defendants and defendant-intervenors (jointly "moving parties") fail to meet the standards set forth above. At most, they complain that the remedies sought by plaintiffs are too broad and they seek dismissal of the first amended complaint by mischaracterizing not only the overall nature of the complaint, but also the specificity of the allegations with respect both to the defendants' actions and failures to act. They likewise ignore the truly focused areas of concern alleged in the complaint, and the specific injuries which have accrued to the plaintiffs. All of these entitle plaintiffs to seek relief from this court. Even were one to accept for the sake of argument the claims of the moving parties that at least some of the relief sought by plaintiffs is too broad, which plaintiffs in fact dispute, what remains is that that this court is not obliged to look only to the relief requested, but is both free – and required – to look to whether the plaintiffs may be entitled to *any* relief before it may dismiss the complaint (*Revis*, *supra*, 765 F.Supp. At 1213). It can tailor the relief granted to whatever scope the court deems proper. In short, the moving parties argue that the court's jurisdiction is dictated solely by the content of an injunction that the complaint suggests rather that whether the plaintiffs are entitled to some remedy they ignore the language of the complaint referring to such relief as the court deems proper. The moving parties views are inconsistent with the standard of review. The court is free to proceed and tailor the relief to what is believes is indicated and proper.

II.

SUMMARY OF THE ARGUMENT

This case concerns the Wild Free-Roaming Wild Horse and Burro Act of 1971 as Amended (16 U.S.C. § § 1331, et seq.) (hereinafter the "WFWHBA" or "the Act"). The moving parties seek dismissal of the complaint utilizing several arguments which may be summarized as follows. Using categorizations

and arguments that are virtually identical, the moving parties argue to the court that the complaint must be dismissed because this court lacks subject matter jurisdiction. The thrust of their argument is that the plaintiffs are not complaining of specific "final actions" by defendants which may be challenged pursuant to the Administrative Procedure Act ("APA") (5 U.S.C. §§ *551,et seq*.) but are instead bringing a general, "programmatic" challenge to BLM policy and interfering with defendants' discretion. The moving parties reliance on arguments pertaining to BLM's discretion are almost talismanic in tone. In both instances, however, their reliance on this argument is wrong. So too are their arguments that plaintiffs have not pled a sufficient property or other interest entitling them to relief under the APA. Plaintiffs will discuss the reasons in more detail below, but in sum, the reasons are these.

1. THE APA APPLIES BOTH TO ACTIONS AND INACTIONS/UNREASONABLE DELAYS IN ACTION; The APA pertains not merely to permit challenges to final actions/affirmative decisions of the agencies, but also to unreasonable delays in acting and failures to act. *See*, e.g., 5 U.S.C. §§ 701-706. The complaint alleges many of these including defendants' refusal to follow the disposal provisions of the Act (*see*, e.g., ¶¶ 49-52), repeated decisions to not conduct horse gathers at times and places of acknowledged excess populations, and repeated decisions to not remove animals from private lands and water rights after repeated demands to do so (¶¶ 10-12), *inter alia*. A decision not to remove horses from places where the statute requires their removal is as final a decision as can be asked, regardless of whether it was a published rule, regulations, order, or other action, or a tacit refusal to act. *See* also ¶¶ 53-55.

2. THE COMPLAINT ADDRESSES ITSELF TO DISCRETE MANDATORY ACTIONS AND NOT BROAD POLICY/PROGRAMMATIC MANDATES. To the extent that the complaint in the above-captioned matter seeks to compel action which is mandated by the Act, the order the plaintiffs have requested from this court is not a broad, general order aimed at forcing compliance with the goals of the Act. The actions the plaintiffs seek to compel are discrete, specific actions mandated by the Act and not

"disagreements over broad policy matters." There is no question but that the allegations of the complaint are of failure to comply with specific, discrete actions undeniably required by the Act that have deliberately and intentionally not being taken by defendants, failures to act which are acknowledged by the BLM as not being taken because BLM is siding with wild horse advocates in knowing defiance of explicit statutory language. This has been explicitly admitted to by BLM on its own website (see Complaint at ¶¶ 49-52 and Exhibit 2 thereto).[1] The moving parties seek to deflect from this by entering into lengthy discussions of how appropriate management levels (AMLs) are determined and by whom, ignoring the fact that the principle complaint is not about how AMLs are set or by whom, but the facts remain, as alleged, that the number of animals in the area addressed by the first amended complaint far exceed the already existing AMLs in the areas complained of, and that defendants are not taking the specific and defined mandatory steps for bringing the animals within these already determined AMLs. How the AMLs are set and the like, as well as the creation and maintenance of the mandatory animal inventory, are issues because, as the complaint alleges, they are arbitrary and capricious as the Department's own Office of the Inspector General (OIG), the Government Accountability Office, and the American Academy of Sciences have found, findings largely ignored by defendants. *See*, Complaint ¶¶ 34-47.

While such concepts as "appropriate management levels" and "thriving ecological balance are mentioned in these allegations, the paragraphs containing these phrases do not focus these concepts and do not simply allege that the defendants are failing to designate AMLs or maintain a thriving ecological balance. Instead, they focus on the discrete duties defendants have, such as maintaining a current inventory in the affected areas, and the failures to do that as well as the failures to do what the Act requires to bring animals within even the AMLs that are currently set, and the like. For example, the

[1] The moving parties have in fact argued that plaintiffs point to no final agency actions which may be properly the subject of an APA claim. This is not true for many reasons, but the BLM website is itself a refutation of the argument. The website language demonstrates an explicit decision by BLM to knowingly violate the statute because they want to side with a party opposing the statutory mandate.

complaint identifies the horse population in certain allotments in an area of Nevada known as the Diamond Complex as being more than 1,200 percent higher than the existing AML while the population in the Diamond Complex area of Nevada exceeds existing AML by 393 percent. In short, the population is already an excess population by BLM's own findings and yet none of the mandatory steps to reduce these numbers to the existing AML have been taken though such steps are discrete duties, legally required actions that defendants "shall" take. That the existing AMLs and inventories are not scientific, but are arbitrary and capricious is a separate issue. In short, while the complaint contains allegations concerning the general obligations of the agency under the Act (to maintain a thriving ecological balance, to protect the lands of Nevada, and to maintain multiple uses of the land) in order to provide a contextual framework,[2] the allegations and prayer for relief focus upon the specific, discrete *action* obligations of the defendants, such as maintaining a current inventory, removing excess animals, removing animals from non-federal property on request of property owners, and the like.

3. THE COMPLAINT ADDRESSES ITSELF TO DISCRETE MANDATORY ACTIONS AND NOT BROAD POLICY/PROGRAMMATIC MANDATES: The complaint seeks not only to compel actions unreasonably delayed or withheld, but challenges their affirmative actions as being arbitrary and capricious and not in accordance with law or regulations. *See*, e.g., ¶¶ 22-30, 32-38, 41-42, 43-45, 47, and others, discussed *infra*, which are final actions.

4. PLAINTIFFS MORE THAN ADEQUATELY ALLEGE THAT THEY ARE AGGRIEVED PARTIES AND HAVE ALLEGED DUE PROCESS VIOLATIONS. Defendant-intervenor Laura Leigh in particular alleges that no due process rights are involved because the plaintiffs' allegedly fail to identify any property interest affected by defendant's failure to follow their own statutes,

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[2] Some of these allegations illustrate how the failure to follow the explicit, discrete mandates of the Act (such as maintaining accurate, current inventories, removing horses from non-federal lands on demand, removing established excess known by the agency to above AMLs animals, and the like) have resulted in harm not only to the plaintiffs' interests, but also to the overall goals of the Act, but – again – the focus is on the failure to take mandatory *actions*, not failure to meet the Act's goals.

regulations, and procedures. She completely ignores the specific pleadings and entirely misconstrues the obligation of government to follow its own procedures. "'The touchstone of due process is the protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This safeguard is specifically built into the APA which explicitly permits suits against the government alleging that the government's conduct was arbitrary and capricious. Numerous allegations in the complaint assert and demonstrate the arbitrary and capricious nature of the defendants' actions and failures and delays in action. *See* e.g., Complaint ¶¶ 22-30, 34-47, 79, 59, 94.

Further, of course, the APA itself requires that to be an aggrieved party within the APA's meaning, one need only show that the party has been adversely affected by the agency's actions, failures to act, or unreasonable delay in acting and permits them to challenge the agencies' actions, inactions, and delays in acting. In this case, even a cursory reading of the complaint, especially of the amended complaint, shows that it is replete with allegations of individual property interests and interests of other parties which have been adversely affected by the conduct of the defendants. Plaintiff Crawford Cattle, for example, alleges in great detail that it owns patented lands in the Winnemucca District of BLM, that it has water rights it owns both on and off of its BLM and Forest Service allotments, that it owns rights-of-way to access and utilize its water rights (both of which constitute property for both takings clause and due process purposes), and that it holds BLM and Forest Service grazing permits (which are entitled to due process protections). Complaint ¶ 12. The complaint alleges in great detail the fact that both Crawford and its predecessor-in-interest, Nevada First Corporation, brought to the attention of defendants the fact that horses under the management of defendants had entered Crawford/Nevada First private lands and caused damage to those lands and improvements on those lands, consumed forage and waters the rights to which were and are owned by Crawford/Nevada First, interfered with their access to water rights and forage, and that they repeatedly requested defendants to remove the horses from the private properties

just as did the Fallinis in *Fallini v. Hodel,* 783 F.3d 1343 (1986), and those requests were ignored. Likewise, plaintiffs NACO and NFBF alleged in detail that their members have land and/or other interests which were directly and adversely affected by the actions, failures to act, and delays in acting alleged in the complaint. Complaint ¶¶ 9-10. The same holds true with respect to plaintiff NBHU. Complaint ¶ 11. *See also*, e.g. Complaint ¶ 64-73.

III.

ARGUMENT

A. FACTUAL BACKGROUND

Plaintiffs will not discuss the factual background in great detail. The complaint speaks for itself. As previously noted, the standard of review requires the reviewing court to look solely to the allegations in the complaint and must treat all of the nonmoving parties' well-pleaded allegations as true. *Abbott Laboratories, supra,* 844 F.Supp. at 445; *Mullins, supra,* 867 F.Supp at 1579. (ND Ga. 1994). It must view those allegations in the light most favorable to the plaintiffs. *Schroll, supra*, 760 F.Supp. at 1387, aff'd 932 F.2d 973; *Gould, supra, States,* 67 F.3d at 929. Notwithstanding this, the moving parties make a number of factual claims, apparently attempting to engage the court and the parties in a factual dispute which has no place in a motion to dismiss. Many of those factual assertions, if not most of them, plaintiffs would dispute, but in the interests of space and relevance, plaintiffs will not do so. By not doing so, however, plaintiffs are not indicating agreement with the moving parties's assertions.

1. Plaintiffs.

As the first amended complaint indicates, the plaintiffs herein are a mixture of organizational and individual parties. Each one of them (and their members, in the case of the organizational plaintiffs) has a different though overlapping range of interests affected by defendants' conduct, whether affirmative acts or omitted or delayed actions. One plaintiff, the Nevada Association of Counties, is an organization made up of officials representing every county within Nevada. Each county in which wild horses can be found,

are affected in generally the same manner. Complaint, ¶ 9. One plaintiff, the Nevada Farm Bureau Federation's membership comprises individuals directly involved in agriculture in the State of Nevada and others who directly or indirectly support the agricultural industry. Many of their members are affected in generally the same manner as Crawford Cattle. Horse enter their lands, utilize the waters to which the members have rights, damage or threaten damage to improvements on the lands, and the like. Complaint ¶ 10. A third plaintiff, Nevada Big Horns Unlimited ("NBHU"), is an organization consisting of individuals and organizations, which has as its purpose the protection of horses and other species as well as the environment in which they exist and has been an active participant in wild horse and burro protection efforts. They have worked with BLM and other to try to help in the protection of these horse for purposes explained in the complaint. Complaint ¶ 11. The last plaintiff, Crawford Cattle, is a private party and a successor-in-interest to Nevada First Corporation. It owns property in the Winnemucca District of Defendant BLM. It owns private land and is the holder of grazing permits on both BLM and Forest Service grazing allotments in that area. It also owns private property interests on the federal lands in the affected area including water rights and rights-of-way to and from and around the water sources in which they have water rights, *inter alia*. Complaint ¶ 12.

As is discussed further below, notwithstanding the claims of the federal defendants and the defendant-intervenors, each of these plaintiffs made specific and clear allegations both as to: (1) the actions, and failures to act and delays in action by the defendants; and (2) the injuries that have resulted to their interests and rights both to this point and that will continue to accrue to each and all of them as a result of specific improper actions of the defendants as alleged in the complaint (the term improper actions here includes both acts of commission and acts of omission and/or delay as well as actions which are arbitrary and capricious as alleged in the complaint).

B PLAINTIFFS PROPERLY ALLEGE VIOLATIONS REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

This action is brought primarily pursuant to the Administrative Procedure Act (5 U.S.C. §§ 551,

et seq., and 5 U.S.C. §§ 701-706), and the Declaratory Judgment Act (28 U.S.C. §§ 2201-2202). Three general classes of defects may be addressed by court under the provisions of the APA: (1) failures to act and/or unreasonable delays in action; (2) actions which are arbitrary or capricious, in excess of jurisdiction, or otherwise not in accordance with law; and (3) actions taken without compliance with procedures. The latter two categories may be lumped together under the rubric of defects in actions.

The moving parties make two general arguments against this Court's jurisdiction to hear the complaint. First, they argue that plaintiffs have identified no "final action" which can be addressed by this Court. Second, they argue that plaintiffs' challenges to the failures of the defendants to act and/or unreasonable delays in action are "programmatic" in nature and that the actions not performed or delayed are therefore wholly discretionary and are therefore beyond the ability of this court to consider. Neither argument can be sustained. Thirdly, defendant-intervenor Laura Leigh also makes the above arguments and argues that a due process claim cannot be sustained because the plaintiffs fail to point to property interests or some other interest protectable under the APA. This argument too is unsustainable.

1. Plaintiffs Properly Allege Failures to Act and Unreasonable Delays in Action Which May Be Addressed by This Court.

The APA requires that an agency act "[w]ith due regard for the convenience and necessity of the parties ... and within a reasonable time" and shall "conclude a matter presented to it." 5 U .S.C. § 555(b). The APA authorizes suit by "[a] person suffering legal wrong because of agency action" or one who is otherwise aggrieved by agency actions. 5 U.S.C. § 702. "Agency action" is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added). The APA permits a "reviewing court [to] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). When the court finds that agency actions were unlawfully withheld or unreasonably delayed, it "shall [ ] compel agency [the] action[s] unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). When asserting a claim that agency action was –

> unlawfully withheld or unreasonably delayed under section 706(1), a plaintiff must identify a statutory provision mandating agency action. *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 854 (9th Cir.2003). Judicial review is appropriate if a plaintiff makes a showing "of agency recalcitrance ... in the face of a clear statutory duty or ... of such magnitude that it amounts to an abdication of statutory responsibility." *Montana Wilderness*, 314 F.3d at 1150.

Oregon Natural Desert Ass'n v. U.S. Forest Service, 312 F.Supp.2d 1337, 1343 (2004). In short, APA review is warranted under 5 USC § 706(2) when the language asserted to be the violation of a mandatory duty to act "is neither a statement of policy, nor a generalized instruction to federal agencies that may be overlooked" as described herein below. *Id*. at 1345.

The moving parties assert that plaintiffs are alleging only violations of statutory policy and making only programmatic complaints. They appear to argue that any judicial inquiry must end where the agency has discretion. In fact, it does not. If the action is a discrete duty mandated by law or regulation and it is not done, the Court had the jurisdiction to compel its doing. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004).

Ironically, the moving parties, particularly the United States, seek comfort in *Norton,* relying on the *Norton* Court's discussion of the barring of "broad, programmatic" challenges under the APA. In *Norton*, SUWA was seeking an order to enforce a broad statutory mandate, *i.e.*, the so-called non-impairment goal of the statute at issue (which is not the Act under consideration in the above-captioned matter). The Court in *Norton* set forth in *dicta*, as an example of its thinking, a hypothetical in which:

> 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."

Id. at 66. The United States, in fact, tries to use this *dicta* to argue that the Supreme Court explicitly determined that the above-captioned matter cannot be sustained, but of course the example is not only *dicta*, it is distinctly different from the case before this court and was clearly not intended to suggest that

no APA remedy would ever lie for failure to comply with provisions of the WFWHBA. The *Norton* Court explicitly noted that its decision concerned itself with –

> preventing *abstract policy disagreements* which courts lack both expertise and information to resolve. If courts were empowered to enter *general orders* compelling compliance with *broad statutory mandates*, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate.

Id., 66-67 (emphasis added).

The case before this court, however, has nothing to do with "abstract policy disagreements" or "general orders compelling compliance with broad statutory mandates". Neither does it seek a goal anywhere near as vague as compelling the defendants to maintain a thriving ecological balance in the abstract. The complaint in this case alleges specific, discrete mandates to do particular things in particular places, in a particular way, considering specific types of information including, *inter alia*, (1) keeping a meaningful current inventory as the statute requires; (2) making explicit determinations of excess populations that the statute demands; (3) taking the immediate actions to reduce excess populations in the proper order and using the proper methods which the statute expressly states must be used; (4) promptly removing horses from private property on request; (5) consulting with the parties the statute demands be consulted with; and (6) actively and properly considering all relevant factors in making determinations. The complaint herein does not seek a generalized order of the court to achieve the general statutory goal of the Act, but to ensure that the defendants do the specific things the statute requires and to do so without being arbitrary and capricious, among other things.

(a) Mandatory Duties Imposed and Ignored.

Much of the Wild Horse and Burro Act, indeed the vast majority of it, imposes *mandatory* duties on the Secretary and, through him, his subordinates and it is clear that where a mandatory duty is imposed, the APA is the remedy to be employed to ensure that those mandatory duties are carried out. *See,* e.g., *Fallini, supra,* 783 F.3d 1343 (1986). Among the many specific and discrete mandatory duties

imposed on defendants by the Act are those identified by the following paragraphs in the first amended complaint. *See, e.g.,* ¶¶ 2(b), 23(a), 23(b), 24(a)-(c), 25-29, 33-34, 37, 46 and discussion *infra*.

As is discussed below and can be seen in the allegations of the complaint, the specific relief sought is what it is because the actions and failures to act and unreasonable delays in acting by defendants are so consistent, persistent, significant (and intentional as admitted BLM in its own website published by the Nevada BLM (see Complaint at ¶¶ 49-52 and Exhibit 2 thereto)), that injunctive relief is necessary to remedy the harms done by defendants' and to prevent a continuation of the current state of affairs. This is needed because defendants' conduct in the affected areas is not simply the cumulation of past conduct, but conduct indicative of a pattern and practice that defendants will continue to do in the future. The complaint shows a pattern and practice not of policies – as the moving parties would have it – but of conduct. If there was not a persistent pattern of conduct, an injunction would not be needed. It is with no small irony that the defendants and the intervenors argue that the very massiveness of the defendants' actions and failures to act should shield them from this litigation. The damage resulting to plaintiffs from this non-compliance is equally massive, notwithstanding defendant-intervenor Leigh's argument of a lack of protectable interests.[3] *See* ¶¶ 1(c)-(e), 9(b)-(e), 10(a)-(d), 11(c), 12(b)-(d), 42-47, 59-61, 64-70.

To be sure, the complaint does take note of certain statutory mandates under the WFWHBA which can be characterized as going to the general policy of the Act. *See*, e.g., ¶ 2(a). (The defendants are obliged to "manage wild, free-roaming horses and burros in a manner that is deigned to achieve and maintain a thriving natural ecological balance on the public lands.") It is apparently because of this particular sentence and similar statements in the first amended complaint that the moving parties invoke and erroneously rely on the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Such allegations of general duties in the first amended complaint, however,

[3] In light of these and other allegations in the first amended complaint, there can be no argument that plaintiffs lack standing.

are simply to provide context by which the specific failures to act and delays in action, and their harmful impacts, including those on the goal of the statute, can be understood.

Plaintiffs acknowledge that defendants have some degree of discretion in how they carry out some of their mandatory duties, but the areas in which they have discretion are few in number and circumscribed. For example, the Secretary of Interior[4] may have some discretion in how he or she goes about keeping a current inventory of horses, but has no discretion about *whether* to keep such an inventory (16 U.S.C. § 1333(b)(1)) nor may the inventory be kept in a manner that is arbitrary and capricious or unscientific. *See* discussion *infra*. Likewise, he or she may have some discretion as to whether an excess population exists,[5] but he or she cannot refuse to make such a determination nor can he or she make a determination without consulting with specified individuals and organizations (*id*.) and *must* make the determination based on *all* information currently available to him or her (including that including that provided to him or her by plaintiffs). 16 U.S.C. § 1333(b)(2). A mandatory duty to "consider" *is* enforcible under the APA. *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 856 (9th Cir. 2003). ("We thus conclude that the duty to consider, like the duty to maintain, constitutes a mandatory duty to act.")[6] Further, the same prohibition on making such determinations in an arbitrary

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[4] Plaintiffs use the term "the Secretary" throughout, but recognize that the decisions and actions are often actually made by designated lower officials within the Departments of the Interior and Agriculture.

[5] Having said this, however, it should be noted that determining whether an excess population exists once appropriate management levels have been set should be a relatively simply matter of comparing existing numbers with the established AMLs. If the AML is "X" and the current population is "X+Y", then there is an excess number of horses to the amount "Y". The ability to make this determination is dependent on the keeping of an accurate, defensible and current inventory of horses. As the allegations of the first amended complaint show as set forth below, defendants are not even maintaining the current horse populations in the area covered by the first amended complaint within current AMLs and that the current inventory is fatally flawed.

[6] In the first amended complaint, plaintiffs early on allege that they had provided the Secretary with specific information demonstrating a need for the Secretary tto take action within the meaning of the Act and asking that he do so, which correspondence elicited, only after a considerable delay, a suggestion that the parties meet. Plaintiff NACO agreed and followed up, but no further response ever came back, even to this date. *See* ¶¶ 7, 53-56. Likewise, plaintiff Crawford Cattle and, before it, its precedessor-in-

and capricious, non-scientific manner applies. Whether discretion exists does not end the inquiry, but merely begins it.

Further, once the Secretary makes a determination that there are excess horses he or she "*shall immediately* remove excess animals from the range . . . [and] *shall"* take steps to do so in the manner and order set forth in the statute. *Id*. Emphasis added. *See* Complaint ¶¶ 22-26. The complaint specifically alleges that such information was repeatedly provided and that the Secretary did not even go so far as to consider it or make a determination yea or nay as either to new standards or to comply with existing standards or obligations. *See*, e.g., ¶¶ 7, 12(a)(i)-(iv), 12(b). Further, the first amended complaint explicitly alleges that even the Office of Inspector General of the Department of the Interior ("OIG"), the Government Accountability Office ("GAO") and the American Academy of Sciences ("AAS"), and others available to the defendants have for years (at least as far back as 1982) provided information to defendants showing that their existing decisions are scientifically invalid, arbitrary and capricious and showed that the existing populations of horses in the affected areas well exceed the current AMLs without defendants having taken required actions, often claiming lack of funds (although, as the first amended complaint alleged, out, this financial wound is self-inflected). *See*, e.g., ¶¶ 35-38, 42-45, 59, 61-64, 73. Other allegations in the first amended complaint demonstrate that the failures to act and delays in action, as well as the decisions made were and are not only arbitrary, capricious and unscientific, they demonstrate both recalcitrance in the face of clear statutory mandates and an abdication of statutory responsibility which – at least in some instances – is both knowing and intentional. *See* e.g., ¶¶ 12, 33, 36-38, 43, 49-52, 55, 60, 62-63, 74. In sum, the first amended complaint alleges specific, defined and mandatory obligations under the Act such as, *inter alia*, the duty to maintain an accurate and *current* inventory, the duty to remove excess animals immediately, the duty to follow the prescribed manner and order of steps to be taken to reduce excess populations, the duty to consult with specified classes of

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interest, Nevada First Corporation, sent numerous letters requesting mandatory action under the Act, which actions never came. *Id*, ¶ 12.

parties and to consider their input (which, plaintiffs content, may not be a merely *pro forma* consultation and consideration), the duty to remove animals from private property on request of the owners of the private property,[7] and the duty to make a new determination based upon all current information available to the Secretary and the duty to do so expeditiously with prompt action to bring populations down to determined AMLs. *See, e.g.*, ¶¶ 2(b), 23(a), 23(b), 24(a)-(c), 25-29, 33-34, 37, 46.

These allegations and the allegations of failure to meet these defined duties which require specific actions, are not, and cannot reasonably be described, as "abstract policy disagreements [as to] which courts lack both expertise and information to resolve", nor can plaintiffs' requests for relief be reasonably characterized as requesting "general orders compelling compliance with broad statutory mandates". The determination of whether these kinds of duties have been met and what is necessary to achieve statutory compliance with them is something done by federal courts routinely. Either one keeps a current and accurate inventory or one does not. Either one makes a determination, consults, considers relevant information in a meaningful way, takes immediate action where required by statute or regulation, removes animals from private property on request, follows statutorily mandated methodology, or one does not. None of these things involves a general policy description such as a goal of maintaining a thriving, ecological balance. These are Congress's explicit prescriptions for how to achieve that general goal and are not left to the unfettered whim or discretion of the agencies. Discretion plays its part, such as, for example, in determining how to carry out a gather (e.g., by helicopter, by personnel on horseback, by other mechanical means, or a combination of means), but not in the obligation to do so and to do so promptly and to do so in a way that is not arbitrary and capricious..

2. Defects in Agency Actions:

The district court may also hold unlawful and set aside agency action that is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. §

[7] Private property includes not only patented or deeded land, but also waters to which the requesting party owns the water rights as was the case in *Fallini*, *supra*, 783 F.3d 1343, *passim* (1986).

706(2)(A); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C); or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D).

The first amended complaint clearly alleges that such actions as have been taken by defendants, including without limitation, the setting of AML's, the warehousing of horses instead of following the statutory mandates discussed previously, the manner in which horse and burro inventories are conducted and kept, the decisions *not* to comply with requests from, for example, plaintiff Crawford Cattle, to remove horses and burros from private property, and their refusal to conduct gathers requested by various parties, including members of the plaintiff entities, among others. Such decisions and actions are arbitrary, capricious, unscientific, and otherwise improper. Plaintiffs will not here give an exhaustive description of such allegations. The complaint speaks for itself. *See*, e.g., ¶¶ 7, 12(a)(i)-(iv), 12(b), 12(c), 27-30, 33-38, 40-47, 50-56, 62, 75-82. These paragraphs outline numerous actions taken by the defendants and decisions not to act in the face or repeated requests for action consistent with the statute which actions and decisions are arbitrary and capricious as well as without a scientific basis. In fact, they are so much so as to attract the pointed, repeated and consistent criticism of the Interior Department's own Office of Inspector General, the Government Accountability Office and the American Academy of Sciences, all of which is known to the defendants and all of which point out in detail as outlined above, information regarding the defects in the defendants' actions, and the consequences of the defendants' refusal to correct their conduct in such a way as to change their arbitrary and capricious decisions and conduct in the areas which are the subject of the first amended complaint.

IV.

CONCLUSION

For the reasons discussed herein-above, plaintiffs therefore respectfully request that this Court deny the motions of the federal defendants and all intervenors to dismiss the complaint in the above-captioned matter. Plaintiffs further request, should the court be inclined to grant said motions, to grant

leave to plaintiffs to amend their complaint to address any deficiencies found by the court.

Respectfully submitted this 15TH of August 11, 2014.

Mark L. Pollot

/s/ Mark L. Pollot

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CERTIFICATE OF SERVICE [Pursuant to Fed. R. Civ. P. 5(b) & Local Rules for Electronic Filing]

I certify, 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: August 15, 2014

/s/ Mark L. Pollot
Mark L. Pollot