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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

WESTERN WATERSHEDS PROJECT,	)	No. CV 09-159-M-CCL
BUFFALO FIELD CAMPAIGN,	)	
TATANKA OYATE, GALLATIN	)	
WILDLIFE ASSOCIATION,	)	<b>PLAINTIFFS' BRIEF IN</b>
NATIVE ECOSYSTEMS	)	<b>SUPPORT OF THEIR</b>
COUNCIL, YELLOWSTONE BUFFALO	)	<b>MOTION OBJECTING TO</b>
FOUNDATION, MEGHAN GILL, CHARLES	)	<b>ADMINISTRATIVE</b>
IRESTONE, and DANIEL BRISTER	)	<b>RECORD AS INCOMPLETE</b>
Plaintiffs,	)	<b>AND TO COMPEL</b>
	)	<b>DEFENDANTS TO</b>
vs.	)	<b>PRODUCE DOCUMENTS</b>
	)	<b>TO COMPLETE THE</b>
KEN SALAZAR, Secretary of the Interior;	)	<b>RECORD</b>
SUZANNE LEWIS, Park Superintendent,	)	
Yellowstone National Park; NATIONAL	)	
PARK SERVICE, an agency of the U.S.	)	
Department of Interior; LESLIE WELDON,	)	
Regional Forester, US Forest Service Northern	)	
Region; UNITED STATES FOREST	)	
SERVICE, an agency of the U.S. Department	)	
of Agriculture; MARY ERICKSON, Gallatin	)	
National Forest Supervisor,	)	
Defendants.	)	

## **INTRODUCTION**

Plaintiffs Watersheds Project, et al., respectfully move this Court to compel the federal Defendants to supplement the administrative record with documents and information that should have been included initially and which are necessary to complete the record.

## **RELEVANT FACTUAL BACKGROUND**

Plaintiffs filed the present lawsuit on November 9, 2009, challenging U.S. Forest Service and National Park Service actions and decisions regarding bison management and slaughter in and around Yellowstone National Park as violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the National Park Service and Yellowstone National Park Organic Acts (Organic Acts), and the Administrative Procedure Act (APA). On February 18, 2010, Defendants filed their answer to the complaint. On March 11, 2010, this Court filed the original Scheduling Order for this case.

On March 26, the parties filed a stipulated motion requesting the Court extend the deadlines contained in the original Scheduling Order, and including opportunities to move to amend the pleadings after receiving and having an opportunity to review the administrative record, and to include the opportunity to object to and move to have the agencies supplement the

administrative record. The Court then issued an Amended Scheduling Order including these new deadlines.

Pursuant to the amended order, on April 1 Defendants filed the administrative record in two parts, one compiled by Defendant U.S. Forest Service, and a second compiled by the National Park Service. Since April 1, Plaintiffs have been reviewing the record, identifying items missing from the record, and evaluating their claims and requests for relief in relation to information in the administrative record.

The amended Order provided May 17, 2010 as the deadline for Plaintiffs to file a motion objecting to and/or moving to compel the agencies to supplement the record to ensure its completeness. Pursuant to that timeline included in the Order, Plaintiffs file their motion and this brief in support objecting that the administrative record is not yet complete, and seeking to have the Court compel the Defendants to produce for the administrative record those documents and information that are necessary to complete the record for adequate review of the agencies' decisions.

## **ARGUMENT**

### **I. ADMINISTRATIVE RECORD REVIEW**

Violations of NEPA, NFMA, and the Park Organic Acts are reviewed under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (“APA”). In

its review of an agency decision, the court must determine whether the agency “failed to consider an important aspect of the problem,” or failed to “explain the evidence which is available,” which would render the decision arbitrary and capricious under the APA. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

Such review is generally limited to the administrative record, and the Court must consider “the whole record or those parts of it cited by a party.” Id. at § 706.<sup>1</sup> Judicial review under the arbitrary and capricious standard focuses on “the administrative record already in existence” when the agency made its decision, rather than “some new record made initially in the reviewing court.” Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The court must consider “all evidence that was before the decisionmaking body.” Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982).

To ensure adequate review based upon the administrative record, that record must be complete. To be whole, the administrative record must

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<sup>1</sup> The Ninth Circuit employs exceptions to the general rule that review be limited to the administrative record. These exceptions are sometimes referred to as “extra-record” review, and also sometimes as “supplementing the record.” See, e.g. Animal Defense Center v. Hodel, 840 F.2d 1432, 1436-37 (9<sup>th</sup> Cir. 1988). Although the language of “supplementing” is used in multiple contexts (for extra-record review exceptions and in seeking to have the agencies complete the record with items that should have been included in the first instance), Plaintiffs here understand “supplementing” to mean compelling the agencies to supplement – or to complete – the records provided, based on Plaintiffs’ objections to the records’ completeness.

include everything that was before the agency at the time the challenged decision was made, and must include “all documents and materials directly or indirectly considered by agency decision-makers and include() evidence contrary to the agency’s position.” Thompson v. Department of Labor, 885 F.2d 551, 555 (9<sup>th</sup> Cir. 1989)(emphasis added)(also cited at McCrary v. Gutierrez, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007).

An incomplete record must be viewed as a “fictional account of the actual decision-making process.” ... If the record is not complete, then the requirement that the agency decision be supported by “the record” becomes almost meaningless. Portland Audubon Society v. Endangered Species Commission, 984 F.2d 1534, 1548 (9th Cir. 1993)(citations omitted).

## **II. THE AGENCIES SHOULD HAVE INCLUDED ADDITIONAL DOCUMENTS AND INFORMATION THAT WERE “BEFORE” THEM DURING DECISION-MAKING, AND WHICH ARE NECESSARY FOR A COMPLETE RECORD**

Plaintiffs’ NEPA challenges involve the agencies’ failure to prepare new or supplemental environmental review in an SEIS due to significant new information and changed circumstances since the agencies adopted the Interagency Bison Management Plan (IBMP), and improper use of categorical exclusions, improper segmentation of decisions with improperly narrow scope, and improper tiering to the invalid FEIS for the IBMP. On multiple occasions, related to various site-specific bison management

decisions and ongoing implementation and amendment of the IBMP, plaintiffs and/or other organizations and individuals requested the agencies prepare new or supplemental NEPA analysis for such decisions based on significant new information and changed circumstances. Plaintiffs and others noted that IBMP management was having unforeseen and adverse impacts that had not and have not been analyzed and disclosed in any NEPA document with full public participation.

Both the NFMA and Park Organic Acts claims address issues concerning impacts to the bison populations from IBMP and connected management decisions. Some of the new information and changed circumstances which Plaintiffs assert warrant new or supplemental NEPA analysis for these decisions and ongoing management, indicate the management may be negatively affecting the genetic viability and variability of multiple genetically distinct bison populations in the Greater Yellowstone Ecosystem, and may be affecting the population structure and dynamics, and disease prevalence in unforeseen and adverse ways as well. Such evidence directly relates to the agencies duties under their respective directive statutes.

Various management decisions implicate the Forest Service's duties to protect diversity on the Gallatin National Forest and ensure viable

populations of native species such as bison occur on the forest. Similarly, such management decisions implicate the Park Service's duties to ensure it conserves bison and other park resources for future generations, and protects such resources from unacceptable impacts and impairment, and protects bison in Yellowstone National Park from wanton destruction.

Relevant to these duties and the management decisions of these agencies, numerous documents and much information providing evidence of genetic structure, genetic impacts, population dynamics, disease dynamics and other factors related to management actions and their impacts on bison viability and conservation should have been considered by the agencies.

In fact, Plaintiffs and other organizations and individuals have supplied the Defendants with numerous such documents and references to other information. Specifically, some of the Plaintiffs submitted quantities of documents and references when they requested the agencies prepare a new or supplemental EIS for the IBMP and Adaptive Management adjustments, and when commenting on other connected actions impacting bison and their habitat. The items supplied to the agencies but not included in the administrative record are identified in Exhibit 1 attached to this brief.

In addition to documents supplied to the agencies, and therefore known to be "before" the agencies for decision-making, the agencies refer in

the record to various documents, data, or other information without including some of that information. See Public Power Council, 674 F.2d 791. All referenced items not included in the record are identified in Exhibit 1 attached to this brief.

Lastly, other information or documents are known to exist and are relevant to the agencies' decision and thus should have been directly or indirectly considered. See Thompson v. Department of Labor, 885 F.2d 551. These relate to both bison management decisions and sagebrush obligates and sagebrush habitat. The Forest Service record does not contain documents that would have been directly or indirectly considered for managing and/or eradicating sagebrush or for sagebrush obligates. Such items or categories of items not included in the record are identified in Exhibit 1 attached to this brief.

Plaintiffs' counsel sent via email the lists of missing documents to Defendants' counsel for review. Defendants indicated they are reviewing the lists, and determining with the various appropriate people within the agencies whether they will object to adding the identified items to form a complete record. These documents are part of the complete record, and necessary for the court to fully review the challenged agency decisions. Defendants should supply, and this court should so order, all the documents



and information identified as missing such that the administrative record will be complete.<sup>2</sup>

### CONCLUSION

For the reasons state above, Western Watersheds Project, et al., respectfully asks this Court to grant its Motion Objecting to the Administrative Record as Incomplete, and to Compel the Defendants to Produce Documents to Complete the Record.

DATED this 17<sup>th</sup> day of May, 2010. Respectfully submitted,

/s/ Summer Nelson

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Summer Nelson  
Attorney for Plaintiffs

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<sup>2</sup> Plaintiffs note that while inclusion of the documents and information currently identified as necessary to complete the record will complete it so far as is known, when additional information is added to the record it is possible that further documents or information will be identified as necessary as well (e.g. if these documents reference additional documents or make clear that the agencies relied on additional information for their decisions that but did not include such information in the administrative record). Additionally, exceptions to the general record review rule may apply and require extra-record evidence such as declarations, but these items are not presently at issue.

## **CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(d), I certify that the attached brief is proportionately spaced, has typeface of 14 points or more, and contains 1442 words of text.

Dated this 17<sup>th</sup> Day of May, 2010.

Respectfully submitted,

/s/ Summer Nelson

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Summer Nelson  
Attorney for Plaintiffs