John Meyer, MT Bar # 11206
Cottonwood Environmental Law Center
P.O. Box 412 Bozeman, MT 59771
(406) 546-0149 | Phone
John@cottonwoodlaw.org

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

COTTONWOOD ENVIRONMENTAL LAW CENTER, Plaintiff, vs. RYAN ZINKE, *et. al.* Defendants.	2:18-cv-00012-SEH PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR LEAVE

INTRODUCTION

"Th[e] policy of favoring amendments to the pleadings should be applied with 'extreme liberality." *Myers v. BAC Home Loans Servicing*, 2013 WL 6231715 at *2 (D. Mont. Dec. 2, 2013) *quoting DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). A court should allow leave to amend a complaint when a responsive pleading has not been filed. *Kinsley by Kinsley v. Beaumont Unified School Dist.*, 21 F.3 1114 (9th Cir. 1994). A responsive pleading in this case has not been filed. [1]

A motion to amend "should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *United States v. Gila Valley Irrigation District*, 859 F.3d 789, 804 (9th Cir. 2017). "Of the Rule 15(a) factors, it is the consideration of prejudice to the opposing party that carries the greatest weight." *Kelly Supply, LLC v. Econ Polymers & Chemicals*, 2014 WL 2961083 at *3 (D. Mont. June 30, 2014). "Absent prejudice, or a strong showing of any of the remaining factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Id.* (emphasis in original). The party opposing amendment bears the burden. *Id.*

[1] Defendants' motions to dismiss are not considered responsive pleadings. *Nolen v. Fitzharris*, 450 F.2d 958, 958 (9th Cir. 1971).

ARGUMENT

I. The Amendment Does Not Prejudice the Defendants

"To support denial of a motion for leave to amend, prejudice must be substantial." *Lindsay v. World Factory, Inc*., 2015 WL 1246939 at *8 (D. Mont. March 18, 2015) (citation omitted). Cottonwood agrees with Federal Defendants (Fed. Defs.' Brf. at 7) that "[p]rejudice typically arises where the opposing party is surprised with new allegations which require more discovery or will otherwise delay resolution of the case." *quoting Sharper Image Corp. v. Target Corp.,* 425 F. Supp. 2d 1056, 1080 (N.D. Cal. 2006). None of the parties have sought discovery for any of the claims. There is no undue delay because the statements giving rise to the new claim in the proposed amended complaint were made after Cottonwood filed its first amended complaint. A case schedule has not been issued which could possibly be delayed. *See King v. LSF9 Master Participation Trust*, 2018 WL 3054689 at * 2 (D. Mont. June 20, 2018) (finding no delay when schedule had not been issued.) In short, leave to amend the complaint should be granted because Defendants have not shown that they will suffer "substantial" prejudice. See *Lindsay,* 2015 WL at *8.

II. The Amendment is Not Futile.

The Federal and State Defendants argue the proposed amended complaint is futile. Fed. Defs.' Brf. at 2; State Def.'s Brf. at 1. Defendants bear the burden of

making a "strong" showing amendment is futile. *Kelly Supply,* 2014 WL 2961083 at *3. "A proposed amendment is viewed as futile if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Kelly Supply* quoting *Miller v. Rykoff-Sexton, Inc.* 845 F.2d 209, 214 (9th Cir. 1983); *Barahona v. Union Pacific Railroad Company*, 881 F.3d 1122, 1134 (9th Cir. 2018).

Instead of focusing on making a strong showing that no set of facts can be proven to constitute a valid legal claim, Defendants attempt to recycle their previous Rule 12(b)(1) Motion to Dismiss arguments. *See, e.g.*, Fed. Defs.' Brf at 4 (raising previous Article III standing arguments related to tribal bison hunt claim).[2] Cottonwood maintains that it has already established Article III standing for its first amended complaint through extensive briefing and numerous declarations.

Perhaps more importantly, Defendants are confounding the standard for a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) with the standard for leave to amend, which "should not be denied based on futility

[2] Cottonwood has repeatedly stated that it is not opposed to bison hunting and actually seeks to increase hunting opportunities and the safety of its members and the public by enjoining enforcement of the Zone 2 Drop Dead Line until additional NEPA analysis is completed. *See, e.g.,* Dkt. 1-12 at 3 ¶ 14. Gutkoski Dec. (stating "I like the idea of tribal members hunting Yellowstone bison all across the State of Montana.") State Defendants manage the bison hunt on federal land while the Federal Defendants haze, harass, capture, and quarantine bison, which establishes injury-in-fact, traceability, and redressability to Cottonwood's injuries and request for relief.

unless the proposed amended complaint would fail to state a claim upon which relief can be granted." *Lindsay v. World Factory, Inc*., 2015 WL 1246939 at *8 (D. Mont. March 18, 2015) (citation omitted). As such, Defendants are required to demonstrate that Cottonwood can prove no set of facts under the amendment to the pleadings that would constitute a valid and sufficient claim. *Barahona v. Union Pacific Railroad Company*, 881 F.3d 1122, 1134 (9th Cir. 2018).

Cottonwood's proposed amended complaint contains a claim that alleges the Defendants failed to make a determination of whether Defendant Wenk's statements that Yellowstone can increase its population objective for bison is significant new information that requires supplemental NEPA analysis. Dkt. 33-1 at 10-11. "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require an SEIS." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (citation omitted). Whether the Defendants made the required significance determination goes directly to the merits of the case.

According to the proposed amended complaint:

> 75. Defendants have violated, and continue to violate, NEPA by failing to determine whether to supplement the NEPA analysis for the IBMP in light of the significant new information or circumstances that indicate the Park Service believes 4,200 can be a new population goal.
>
> 76. Defendants have violated, and continue to violate, NEPA by failing to

> supplement the NEPA analysis for the IBMP in light of the significant new information or circumstances that indicate the Park Service believes 4,200 can be a new population goal.

Dkt. 33-1 at 10-11.

Federal Defendants argue that Cottonwood has failed to allege that the Defendants have actually adopted the 4,200 number as the new standard or made a determination to adopt such a standard in the future. Fed. Defs.' Brf. at 5. Federal Defendants charge that "[i]n lieu of final agency action definitively adopting a new bison population goal, there is no final potential injury directly traceable to agency action." Fed Defs.' Brf. at 5.[3] Federal Defendants' arguments "reflect[] confusion between lawsuits that challenge the propriety of a final agency action, and suits that are brought to compel an agency to act in the first instance." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

Federal Defendants argue that Cottonwood's "new claim is futile because Plaintiff fails to establish that the alleged [information] is factually or legally significant or requires supplemental NEPA analysis." Defs.' Brf. at 6. Defendants were required to make the significance determination, not Cottonwood. *Friends of the Clearwater*, 222 F.3d at 560. The failure to do so is a violation of NEPA.

---

[3] To be sure, Cottonwood has submitted several declarations that demonstrate its members injuries are traceable to the Defendant's failure to prepare supplemental NEPA analysis. Gutkoski Decl. ¶ 16 (Dkt. 1-12 at 3), Griffin Decl. ¶ 15 (Dkt. 1-11 at 3), Nagel Decl. ¶ 8-10 (Dkt. 37), Thorton Decl. ¶ 8-9 (Dkt. 27), Knight Decl. ¶ 15-17 (Dkt. 14-5).

Ultimately, if Defendants determine the 4,200 number is significant, Cottonwood agrees with the State of Montana that new analysis will be required for the IBMP. Dkt. 27 at 5. But before that happens, Cottonwood is asking this Court to decide whether the Defendants have made the required significance determination. Defendants' opposition to Cottonwood amending its complaint indicates the Defendants have violated NEPA by not making the required significance determination.[4] Regardless, Defendants have not made a "strong" showing that an amendment is futile.

CONCLUSION

For the foregoing reasons, Cottonwood respectfully requests that the Court grant its motion for leave to file a second amended complaint.

Respectfully submitted this 18th day of August 2018.

/s/ John Meyer
JOHN MEYER
Cottonwood Environmental Law Center
P.O. Box 412 Bozeman, MT 59771
(406) 546-0149 | Phone
John@cottonwoodlaw.org

Counsel for Plaintiffs

[4] Counsel for Federal Defendants suggests Defendants Wenk's statement that 4,200 can be the new population objective is not significant because the Park has had more than 5,000 bison in the past. Fed. Defs.' Brf. at 6. That is a determination that the Defendants must make—not their counsel.

CERTIFICATE OF SERVICE

I certify that the foregoing document was served on Defendant's counsel via CM/ECF on August 18th, 2018:

Mark Steger Smith
Mark.smith3@usdoj.gov

Jennifer Najjar
Jennifer.najjar@usdoj.gov

Attorneys for Federal Defendants

Raphael Graybill
Raphael.graybill@mt.gov

Rebecca Dockter
Rdockter@mt.gov

Attorneys for State Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 1,428 words, excluding the Caption and Certificates.

Dated this 18th Day of August, 2018.