

Cottonwood respectfully requests that the Court stay Defendants' Motions to Dismiss until discovery has been completed. This Court stated that discovery is permissible during the September 26, 2018 hearing on Defendants' Motions to Dismiss. The Ninth Circuit has stated that "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Defendants oppose this Motion.

Discovery is being sought because Governor Bullock and Federal Defendants recently moved to dismiss this case for lack of jurisdiction. Dkts. 47-50. Discovery seeks, inter alia, documents that demonstrate that the State of Montana and the Federal Government's management of bison, including quarantine and hunting, are "sufficiently intertwined to constitute a 'federal action' for NEPA purposes." *Laub*, 342 F.3d at 1092. Making this determination will "require a careful analysis of *all facts and circumstances* surrounding the relationship." *Id* (emphasis added).

Federal Defendants' Motion to Dismiss argues that "[i]n lieu of final agency action definitely adopting a new bison population goal, there is no potential injury directly traceable to agency action." Dkt. 48 at 14. "An action to compel an agency to prepare a [supplemental EIS] . . . is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to compel agency action

unlawfully withheld or unreasonably delayed.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (citation omitted).

Cottonwood’s complaint claims that Defendants violated NEPA by failing to determine whether former Superintendent Wenk’s statement that Yellowstone National Park can hold more bison is significant new information that requires supplemental NEPA analysis. Dkt. 46 at ¶¶75-76. MT Fish, Wildlife, and Parks stated that increasing the population objective would require additional NEPA analysis. *See* Dkt. 27 at 5. Wenk was replaced as Superintendent of Yellowstone National Park after making the statements. Dkt. 27 at 11 (“Yellowstone National Park's superintendent said Thursday that he's being forced out as a ‘punitive action’ following disagreements with the Trump administration over how many bison the park can sustain.”)

Cottonwood seeks discovery to reveal evidence to further support its claim that Defendants violated NEPA by failing to determine whether former Superintendent Wenk’s statement was significant new information that required NEPA analysis. At the pleading stage, Rule 8(a) “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence to support the allegations.” *Star v. Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011) (citation omitted).

CONCLUSION

Cottonwood respectfully requests that the Court grant its motion and stay Defendants' Motion to dismiss until after discovery is completed.¹

Respectfully submitted this 1st Day of November, 2018.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiff

¹ Cottonwood sent both the State of Montana and Federal Defendants electronic copies of discovery requests on November 1, 2018.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2018, the foregoing was electronically filed with the Clerk of the Court and served using the CM/ECF system upon all parties and counsel of record.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiff

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 445 words, excluding the Caption and Certificates. Dated this 1st Day of November, 2018.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiff