UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

COTTONWOOD ENVIRONMENTAL LAW CENTER Plaintiff, vs. RYAN ZINKE, *et. al.* Defendants,	Civ. No. 18-12-BU-SEH PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Defendants have moved to dismiss Cottonwood's complaint under Fed. R. Civ. P. 12(b)(1) and alternatively under Fed. R. Civ. P. 12(b)(6). Dkt 47-50. Cottonwood has moved to stay briefing on the motion until discovery is completed on the jurisdictional issues raised in Defendants' Motions to Dismiss. The Ninth Circuit permits a plaintiff to conduct discovery when jurisdictional defenses have been raised. *Laub v. Dept. of Interior*, 342 F.3d 1080 (9th Cir. 2003). If the Court denies the Motion to Stay until discovery has been completed, Cottonwood offers the following response to Defendants' Motions to Dismiss.

FACTUAL BACKGROUND

In 1992, the Governor of Montana and the Federal Defendants signed a joint Memorandum of Agreement to prepare a long-term Interagency Bison Management Plan ("IBMP"). Dkt. 14-1 at 6. "The federal defendants worked jointly with [Montana Department of Livestock] to develop the Management Plan, and ultimately authorized and approved the Management Plan after adopting a lengthy Record of Decision." *Alliance for the Wild Rockies v. U.S.D.A.*, 772 F.3d 592, 599 (9th Cir. 2014). "Currently, the park, State of Montana, and others manage bison under the Interagency Bison Management Plan (IBMP) that was adopted in 2000." Dkt. 43 at 8 (2015 National Park Service Brochure).

In 2014, the State of Montana and Federal Defendants began the process of completing a new joint management plan. *E.g.*, Dkt. 43 at 8 ("Because of new information and changed conditions since the 2000 IBMP, a new plan is being prepared"). The Defendants acknowledged there is new information and changed circumstances regarding (1) the risk of brucellosis transmission from bison and elk to cattle; (2) interest from the public and Native American Tribes to hunting bison in Montana; (3) the probability of identifying brucellosis free bison through quarantine; and (4) changes in the views of stakeholders, IBMP partners, and scientists regarding the management of the disease brucellosis. Dkt. 14-3 at 2. The State of Montana and Federal Defendants were supposed to have released a Record of Decision for the single joint management plan in 2017. Dkt. 43 at 9. A draft EIS for the new joint management plan has still not been released.

Cottonwood filed this case seeking to require Defendants to supplement the NEPA analysis on the 2000 IBMP with new information and changed circumstances that Defendants have acknowledged justify a new joint management plan. According to Defendants, the 2000 IBMP will be used and the NEPA analysis supplemented until a Record of Decision for the new joint management plan replaces the 2000 IBMP. Dkt. 43 at 7. [1]

[1] New information such as the 2017 National Academy of Sciences paper and additional Native Americans Tribes asserting treaty rights to hunt Yellowstone bison has come to light since the Defendants announced in 2014 that a new management plan is necessary.

ARGUMENT

I. Cottonwood Has Met Prudential Standing Requirements.

"The prudential standing analysis examines whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *Ashley Creek Phosphate Co. v. Norton,* 420 F.3d 934, 939 (9th Cir. 2005) (citation omitted). "The zone of interests test is not intended to impose an onerous burden on the plaintiff and is not meant to be especially demanding." *Id.* at 940 (citation omitted). "[T]he purpose of the zone of interests test is to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Ranchers Cattlemen Action Legal Fund v. U.S. Dept. of Ag.*, 415 F.3d 1078, 1102-03 (9th Cir. 2005) (citation omitted). The zone of interests "test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Ashley Creek Phosphate Co.,* 420 F.3d at 940. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Id.* (citation omitted).

Cottonwood has no economic interests at stake in this case. Cottonwood seeks to increase the population and range of Yellowstone bison and protect the humans that hunt them by forcing the Defendants to consider whether there is new information or changed circumstances that require the NEPA analysis for the

IBMP to be supplemented.[2] Two of the goals of the IBMP are to maintain a population of wild bison and provide for public safety. Dkt. 48 at 13. That is exactly what Cottonwood seeks to do by requiring Defendants to supplement their NEPA analysis. Cottonwood has prudential standing.

II. Cottonwood has Article III standing.

The Ninth Circuit Court of Appeals has already held that conservation groups can establish standing to challenge the IBMP under NEPA. *Alliance for the Wild Rockies v. U.S.D.A.*, 772 F.3d 592, 599-600 (9th Cir. 2014). To establish Article III standing in a procedural case:

> a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). An association or organization has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An organization can satisfy the concrete harm requirement by alleging "an injury to the recreational or even the mere esthetic interests" of its members. *Jayne v. Sherman*, 706 F.3d 994, 999 (9th Cir. 2013) (internal quotation marks omitted).

Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075,

[2] NEPA is an action-forcing statute that accomplishes its goal of protecting the environment by mandating particular procedures, not particular results. *E.g.*, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

1079 (9th Cir. 2015) (*cert. denied*, 137 S. Ct. 293 (2016)).

As the Federal Defendants point out, Montana Fish, Wildlife, and Parks "has the primary responsibility regarding the public bison hunt" on federal lands. Dkt. 48 at 2 n.1. Cottonwood submitted declarations from its members describing the recreational, conservation, and aesthetic interests that would be harmed by Governor Bullock and the Federal Defendants' failure to supplement the NEPA analysis for the outdated IBMP. Dkt. 1-11(Griffin Decl.); Dkt. 1-12 (Gutkoski Decl.); Dkt. 14-5 (Knight Decl.); Dkt. 27 (Thornton Decl.); Dkt. 37 (Nagel Decl.); Dkt. 42 (Catir Decl.).

The Ninth Circuit has previously found "a direct causal connection between these claims of procedural injury and the federal defendants' actions concerning the Management Plan. The federal defendants worked jointly with MDOL to develop the Management Plan, and ultimately authorized and approved the Management Plan after adopting a lengthy Record of Decision." *Alliance for Wild Rockies*, 772 F.3d at 599.

"The procedural injury implicit in agency failure to prepare an [supplemental] environmental impact statement—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to

suffer whatever environmental consequences the project may have." *Wong v. Bush,* 542 F.3d 732, 736 (9th Cir. 2008) (citation omitted). The Defendants' failure to consider whether to supplement the NEPA analysis in light of the new information and changed circumstances alleged in the complaint have caused injuries-in-fact to Cottonwood members' aesthetic, recreational, and conservation interests. Dkt. 1-11 at 1 ¶ 10 (Griffin Decl.); Dkt. 1-12 at 2 ¶ 10 (Gutkoski Decl.); Dkt. 14-5 at 3 ¶ 14, 17 (Knight Decl.); Dkt. 27 at ¶ 8 (Thornton Decl.); Dkt. 37 at ¶ 8-9(Nagel Decl.); Dkt. 43 at 5 ¶ 27 (Catir Decl.). These injuries are specifically tied to Yellowstone National Park and the area just to the north of the Park where the bison hunts, hazing, and quarantine occur. *Id*. The joint capture and quarantine of Yellowstone bison under the IBMP is causing ongoing injuries to Cottonwood members' aesthetic and conservation interests. *E.g*., Dkt 37 ¶ 8-10 (Nagel Decl.)

"Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed. The members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (Internal citations omitted). "[W]e have explained that 'a litigant need only demonstrate that he has a procedural right that, if exercised, *could* protect his concrete interests and that those interests fall within the zone of interests protected by the statute at issue.'" *Cottonwood*, 789 F.3d at 1082-83 (*quoting Natural*

Resources Defense Council v. Jewell, 749 F.3d at 776, 783 (9th Cir. 2014).

Governor Bullock claims that Cottonwood does not have standing to bring claims against the State of Montana because it cannot prove traceability or redressability. (Dkt. 50 at 10). Requiring Governor Bullock to prepare supplemental NEPA analysis *could* protect Cottonwood members' concrete interests in their own safety and that of tribal hunters in the area north of Yellowstone National Park. Previous bison hunts on federal lands managed by MT FWP have caused Defendants to make "adaptive management adjustments" to the IBMP in 2005 and 2008. Dkt. 48 at 20. The State of Montana and the Federal Defendants have both recognized that increased treaty hunting is significant new information that requires NEPA analysis for the new joint bison management plan. Dkt. 14-3 at 1. The State of Montana proposed closing the bison hunting season north of Yellowstone this year because of increased hunting.[3]

Supplemental NEPA *could* lead to bison being allowed to roam north of Yankee Jim Canyon to provide more hunting opportunities. According to Governor Bullock:

> Montanans clearly recognize bison as wildlife and want us to do what we can to manage them as such, including providing more hunting opportunities.

[3] http://www.mtpr.org/post/montana-fwp-proposes-bison-hunting-closure-north-yellowstone (last visited October 31, 2018).

Exhibit 1 at 2.

Supplemental NEPA *could* lead to Governor Bullock and the Federal Defendants deciding to immediately transfer quarantined bison to Ft. Peck in light of the new National Academy of Sciences paper that states elk are carrying brucellosis far beyond the area where bison are allowed to roam. Supplemental NEPA could lead to Governor Bullock advocating for a higher population goal for bison like former Superintendent Wenk.

"Plaintiffs alleging procedural injury can often establish redressibility with little difficulty, because they need to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision of whether to take or refrain from taking a certain action. This is not a high bar to meet." *Center for Biological Diversity v. U.S. Fish and Wildlife Serv.,* 807 F.3d 1031, 1044 (9th Cir. 2015) (citation omitted).[4] "Because it is enough that a revised EIS *may* redress plaintiffs' alleged injuries, [Cottonwood] has satisfied

[4] Elsewhere, Federal Defendants argue 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).

the causation and redressability requirements. *Kraayenbrink*, 632 F.3d at 485 (internal quotations omitted and emphasis added).

III. Cottonwood has stated claims for relief.

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "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.* The Supreme Court does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a Rule 12(b)(6) motion to dismiss, all facts alleged in a complaint are presumed true and construed in the light most favorable to the non-moving party. *Schlegel v. Wells Fargo Bank, NA.*, 720 F.3d 1204, 1207 (9th Cir. 2013).

"The factual allegations of the complaint need only 'plausibly suggest an entitlement to relief.'" *Star v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011) (citation omitted). At bottom, the complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Baca*, 652 F.3d at 1216. 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." *Baca*, 652 F.3d at 1217 (quoting *Twombly*, 550 U.S. at 556).

In this case, the complaint must have given fair notice of the allegations because Federal Defendants' motion to dismiss argues the merits of the case. For example, the third claim for relief in Cottonwood's second amended complaint alleges that a new National Academy of Sciences paper regarding brucellosis is significant new information that requires supplemental NEPA. Dkt. 46 at ¶¶ 67-71. Federal Defendants correctly state that "where an agency reviews the relevant factors and determines that supplementation is not necessary, a court 'must defer to that informed discretion.'" Dkt. 48 at 5 (citing *Price Rd Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1509-12 (9th Cir. 1997).

Federal Defendants did not meet the standard they correctly articulated. Instead, the Federal Government's *attorney* spent one page trying to explain why the National Academy of Sciences publication is not significant. Dkt. 48 at 12-13. Federal Defendants themselves have not made a significance determination that supplemental NEPA for the IBMP is not necessary. To the contrary, the State of Montana and Federal Defendants have stated new NEPA analysis and a new bison management plan is necessary because of significant new information regarding

brucellosis transmission and other issues. *E.g.*, Dkt. 43 at 8.[5]

The Federal Government's attorney similarly claims that "Native American bison hunts are not 'new information.'" Dkt. 48 at 20. The State of Montana and the Federal Defendants have both recognized that increased treaty hunting is new information that requires updated NEPA analysis. Dkt. 14-3 at 1. Previous bison hunts caused "adaptive management adjustments" to the IBMP in 2005 and 2008. Dkt. 48 at 20. The Federal Defendants claim that Cottonwood "does not plausibly demonstrate how the hunt will be more dangerous." Dkt. 48 at 20. The State of Montana has proposed stopping the 2018/2019 non-native bison hunt this year because of safety concerns.[6] The Superintendent of Yellowstone National Park told the State of Montana and the other Defendants that "too many hunters are concentrated in too small an area near the northern boundary of the Park." Dkt. 1-3 at 1. Cottonwood has adequately stated claims for relief.

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[5] Further highlighting Defendants attempts to avoid supplementing the NEPA analysis with the new information contained within the complaint is the fact that Defendant Wenk was terminated from his position as Superintendent of Yellowstone National Park after he suggested an increased population goal for Yellowstone bison. 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.")

[6] The Defendants' claim that Cottonwood does not have Article III standing because the 2017/2018 hunting season has ended is undercut by the fact that Defendants have proposed closing the upcoming bison hunting season for non-native hunters because of safety concerns. http://www.mtpr.org/post/montana-fwp-proposes-bison-hunting-closure-north-yellowstone (last visited October 31, 2018).

IV. Governor Bullock is a Proper Defendant.

"A suit against a state official in his or her official capacity…is no different than a suit against the state itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Generally, "[t]he Eleventh Amendment…bars an action alleging a violation of federal law if brought directly against a state." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992). There is an exception when a state official has a fairly direct connection with the enforcement of the act. *See Ex Parte Young*, 209 U.S. 123 (1908).[7] "The supremacy clause mandates that federal courts have the power to enjoin state officials for violations of federal statutes." *Lujan*, 962 F.2d at 1397.

"Usually, the federal government is the only proper defendant in an action to compel compliance with NEPA. However, nonfederal defendants may be enjoined if federal and state projects are sufficiently interrelated to constitute a single federal action for NEPA purposes." *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1091-92 (9th Cir. 2003) (internal quotations and citations omitted). "The determination of whether federal and state projects are sufficiently intertwined to constitute a 'federal action' for NEPA purposes will generally require a careful

[7] Cottonwood's second amended complaint cites the Ex Parte Young doctrine (42 U.S.C. § 1983) as a basis for jurisdiction over Governor Bullock. Dkt. 46 at 5 ¶ 38.

analysis of all facts and circumstances surrounding the relationship." *Laub*, 342 F.3d at 1092 (internal quotations and citations omitted).[8]

"Currently, the park, State of Montana, and others manage bison under the Interagency Bison Management Plan (IBMP) that was adopted in 2000." Dkt. 43 at 8. In *Fund for Animals v. Lujan*, the Ninth Circuit determined that the State of Montana was not a proper defendant in a NEPA case because the State had "not received federal financial support to hunt and kill northern herd bison. Montana has not entered into a partnership or joint venture that involves the receipt of goods or services from a federal agency." 962 F.3d at 1398. After *Lujan* was decided, the "federal defendants worked jointly with [Montana Department of Livestock] to develop the Management Plan, and ultimately authorized and approved the Management Plan after adopting a lengthy Record of Decision." *Alliance for Wild Rockies*, 772 F.3d at 599. Since the 2000 IBMP was adopted, the State of Montana and the Federal Defendants have begun creating a new joint bison management because of new information such as brucellosis transmission and changed attitudes towards bison. Dkt 43 at 7.

The State of Montana argues that "the Second Amended Complaint makes no factual allegations that, if true, would subject the Governor of Montana to

[8] The State of Montana has expressed its opposition to discovery to determine whether the State and Federal management of bison is sufficiently intertwined to confer jurisdiction over it in this case.

NEPA obligations through association with the IBMP." Dkt. 50 at 15. Under the IBMP, "[t]he National Park Service, the State of Montana, and the U.S. Forest Service will be responsible as joint-lead agencies for the preparation of a bison management plan and EIS." Dkt. 14-1 at 2. A lead agency supervises the preparation of an environmental impact statement and is chosen due to their magnitude of involvement and approval authority. 40 C.F.R. § 1501.5 (2018). The IBMP specifically states that the State of Montana was chosen as a joint-lead agency because the State has "significant involvement with the management of bison in the Yellowstone area." Dkt. 14-1 at 2. "The joint preparation of the bison management plan and EIS reflects the agencies' belief that each must agree to the final plan if the plan is to be effective. Joint preparation is expected to reduce the duplication of regulatory requirements." Dkt. 14-1 at 3.

Cottonwood has moved to stay this motion to conduct discovery to ascertain whether the State of Montana's joint management of bison with Federal Defendants under the Interagency Plan is sufficiently intertwined to constitute a "federal action" for NEPA purposes. According to Federal Defendants, previous bison hunts on federal lands managed by MT FWP caused "adaptive management adjustments" to the IBMP in 2005 and 2008. Dkt. 48 at 20. Governor Bullock is directly responsible for safety issues associated with the dangerous hunting at issue in this case:

> I believe that with this decision, hunting outside the Park by state licensed and tribal hunters will become a more vigorous tool for population management.

Exhibit 1 at 2.

Montana's involvement in the adaptive management of the IBMP as it relates to hunting on federal land and its lead role in managing the hunt on federal land supports jurisdiction over Governor Bullock.

Montana's involvement in the hazing and quarantine of bison also lends itself to staying this motion and permitting discovery to determine the extent to which hazing and quarantine by the State and Federal Defendants are interrelated. *See* Dkt. 14-2 at 4 ("The IBMP members expect to cooperatively support bison management activities such as hazing, capture, monitoring, and research.").

CONCLUSION

For the foregoing reasons, Cottonwood respectfully requests that Defendants' Motions to Dismiss be denied.

Respectfully submitted this 1st day of November, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(A), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3,535 words, excluding the caption, tables, and certificates of service and compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2018 I filed the Response to Defendants' Motions to dismiss attached via CM/ECF.

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