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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

COTTONWOOD ENVIRONMENTAL)
LAW CENTER)

Plaintiff,)

vs.)

DAVID BERNHARDT, in his official)
capacity as Secretary of the Interior; CAM)
SHOLLY, in his official capacity as)
Superintendent, Yellowstone National Park;)
LEANNE MARTEN, in her official capacity)
as Regional Forester, U.S. Forest Service;)
NATIONAL PARK SERVICE; U.S.)
FOREST SERVICE; USDA-ANIMAL &)
PLANT HEALTH INSPECTION)
SERVICE,)

Defendants

Case No. CV-18-12-BU-SEH

**BRIEF IN SUPPORT OF MOTION
TO REOPEN AND ENFORCE
TERMS OF REMAND ORDER**

Plaintiff Cottonwood Environmental Law Center (“Cottonwood”) files this motion to reopen the above-referenced Yellowstone bison lawsuit and enforce this Court’s 2020 Remand Order. Doc. 253. The Court’s 2020 Remand Order requires:

Federal Defendants shall conduct an additional NEPA analysis of the

[Interagency Bison Management Plan] and issue an appropriate final agency decision, which could include any of the review options articulated above, including revision of the current IBMP.

Doc. 253 at 5-6. Defendants National Park Service and Yellowstone National Park Superintendent Cam Sholly complied with the Court's Order and prepared additional NEPA analysis, which included public comment, before releasing the 2024 Yellowstone Bison Management Plan. Ex. 1 (Record of Decision). The remaining Federal Defendants have still not complied with the 2020 Remand Order. Cottonwood respectfully requests that the Court grant this motion and compel the remaining Federal Defendants to complete the supplemental NEPA analysis this Court previously ordered. The outstanding NEPA analysis must include public comment and take into account the 2024 Yellowstone Bison Management Plan, Federal Defendants' new science, and other pertinent information in the possession of the agencies.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, the National Park Service, U.S. Forest Service, and State of Montana signed a Memorandum of Understanding stating they "will be jointly responsible for the preparation of the [Yellowstone bison] plan and EIS." Doc. 123-2 at 1. Defendant USDA-APHIS agreed to be a cooperating agency. Doc. 123-2 at 5. The federal government and State of Montana have managed bison under the Interagency Bison Management Plan ("IBMP") since the year 2000. Doc. 203.

“The three main goals of the [IBMP] are to increase tolerance for bison outside the Park to the north and west, to conserve a wild, free-ranging bison population, and to prevent the transmission of brucellosis from bison to cattle.” *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1105-06 (D. Mont. 2011) *aff’d by* 494 Fed. Appx. 740 (9th Cir. 2012). “[T]he IBMP is a science-based plan.” *W. Watersheds Project*, 2011 WL 882641 at *2. “The IBMP was not designed as a static document; it allows for changes through Adaptive Management.” *Park Cnty. Stock Growers Ass’n v. Mont. Dep’t. of Livestock*, 2014 MT 64, ¶ 2, 374 Mont. 199, 201, 320 P.3d 467, 468.

In 2018, Cottonwood filed a lawsuit against Montana Governor Steve Bullock and Federal Defendants alleging violations of the National Environmental Policy Act (“NEPA”). Doc. 1. Cottonwood alleged the Defendants violated NEPA by failing to prepare supplemental analysis for the 2000 IBMP in light of new information regarding brucellosis, Native American Tribes asserting Treaty rights to hunt Yellowstone bison, and the potential to increase the bison population in and around the Yellowstone National Park. Doc. 91.

The IBMP demarcates different “zones” where bison are tolerated. Doc. 124-3; Doc. 123-4 at 9. USDA-APHIS enforces what is known as the Zone 2 Drop Dead Line, which bison are not permitted to cross, because of brucellosis. Doc. 123-4 at 9; Doc. 91 at 2. The Zone 2 line is approximately ten miles north of Yellowstone National Park at Yankee Jim Canyon and demarcates the area north of which bison are not allowed to travel on federal or private lands. Doc. 114-3. The original rationale

for keeping Yellowstone bison confined within the small Zone 2 Drop Dead area around Yellowstone National Park was that the animals carry brucellosis, a disease brought to America in cattle and transmitted to bison. Doc. 236 at 3. Brucellosis causes cattle to abort fetuses. Doc. 236 at 3. Cottonwood’s 2018 lawsuit relied upon a 2017 National Academies of Sciences article, which concluded there is “clear evidence that brucellosis transmission to livestock has come from infected elk and, as a result, aggressive control measures in bison seem unwarranted until tools become available that would simultaneously allow for an eradication program in elk.” Doc. 196 at 5; Doc. 123-1 at 1.

Montana and Federal Defendants filed several motions to dismiss. (Docs. 12; 18; 48; 50; 74; 75). Ultimately, this Court dismissed Cottonwood’s lawsuit, and Cottonwood timely filed an appeal. On appeal, the Ninth Circuit Court reversed this Court’s order granting the Federal Defendants’ motion to dismiss and affirmed dismissal of Governor Bullock as a Defendant. *Cottonwood Emtl. L. Ctr. v. Bernhardt, et al.*, 796 Fed. Appx. 368 (9th Cir. 2019). Significantly, the State of Montana told the Ninth Circuit during oral argument that the Zone 2 Drop Dead Line is an “admittedly arbitrary political boundary” that Yellowstone bison are not allowed to cross.

Cottonwood Emtl. L. Ctr. v. Bernhardt, et al., 796 Fed. Appx. 368 (9th Cir. 2019).¹ Today,

¹ December 10, 2019 Oral Argument at 39 minutes; <https://www.ca9.uscourts.gov/media/video/?20191210/19-35150/> (last visited January 20, 2025).

elk are allowed to migrate freely on federal public land and have been found to transmit brucellosis to cattle all over Montana in areas where bison are not allowed to travel under the 2000 IBMP. Doc. 123-1 at 1; Ex. 3 at 7.

The National Park Service has stated its belief that allowing bison to roam past the arbitrary Zone 2 boundary would allow for safer hunting opportunities. *See, e.g.*, Doc. 192 at 4. According to the Superintendent of Yellowstone National Park:

Currently, too many hunters are concentrated in too small an area near the northern boundary of the park.

...

If bison are allowed to live seasonally or year-round in the northern and western management areas without being chased back into the park then, over time, they should learn to distribute across the landscape and find other refuges than the park; thereby enhancing hunting opportunities in the future.

Doc. 192 at 4. According to the Park Service, “[t]here are recurring ethical, public relations, and safety issues in communities in Montana adjacent to [Yellowstone National Park] due to the concentrations of hunters, gut piles near roads and residences, shooting across roads, shooting elk, shooting practices perceived to be unethical (e.g., firing lines of hunters along the Park boundary; ‘flock shoot’)” Doc. 114-11 at 2. As one high-ranking NPS employee stated, the bison hunt is already a “clusterf**ck” where wounded bison are going back into the Park and bison hunters have been charged with criminal endangerment because “they were shooting towards other people.” Doc. 187.



Doc. 164. Bison carcasses litter a tiny area of National Forest land on the border of Yellowstone National Park.

When bison have escaped the firing lines, USDA-APHIS has enforced the “arbitrary” Zone 2 Drop Dead line by hazing bison back into the Yellowstone National Park using ATVs, snowmobiles, horses, and rubber bullets via the IBMP.

Doc. 202 at 10. Cottonwood repeatedly moved the Court to enjoin the Federal Defendants from enforcing the Zone 2 Drop Dead Line to allow Yellowstone bison to roam on federal land anywhere elk are allowed to go. *E.g.* Doc. 123. “Federal Defendants move[d] for administrative remand to allow the National Park Service *and the cooperating agencies* to conduct additional National Environmental Policy Act (“NEPA”) analysis related to the Interagency Bison Management Plan[.]” Doc. 244-1

at 1 (emphasis added). The Court granted the Federal Defendants' motion for remand without vacatur. (Doc. 253).



Doc. 147-2. A USDA-APHIS employee (right) and a Montana Department of Livestock employee (left) haze a Yellowstone bison after Cottonwood filed this case.

The 2020 Remand Order directs the Federal Defendants to complete supplemental NEPA analysis for the IBMP and issue a new final agency action. Doc. 253 at 5-6. Defendants Cam Sholly and the National Park Service have acknowledged the 2024 Yellowstone Bison Management Plan and its supporting NEPA analysis came about because of Cottonwood's 2018 lawsuit and the remand order. *See* Ex. 1 at 5 (2024 Yellowstone Bison Management Plan ROD). The remaining Federal Defendants have still not complied with this Court's 2020 Remand Order.

LEGAL STANDARD

The decision of a trial court to reopen a case is discretionary. *Watson v. Montana*, 2006 U.S. Dist. LEXIS 75358 at *18-19 (D. Mont. 2006) (citations omitted). “The district court has inherent power to enforce its orders.” *NRDC v. Evans*, 2004 U.S. District LEXIS 20122 at * 10 (N.D. Cal. Mar. 29, 2004) (citing *Peacock v. Thomas*, 516 U.S. 349, 356, 133 L. Ed. 2d 817, 116 S. Ct. 862 (1996)). “This includes power to enforce an order following remand.” *Id.* at * 10 (citing *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 456 (9th Cir. 1990)). “A court retains jurisdiction to enforce the terms of its remand order when an agency fails to meet them.” *Defs. of Wildlife v. Kempthorne*, No. 04-1230 (GK), 2006 WL 2844232, at *12 (D.D.C. Sept. 29, 2006)), on reconsideration in part sub nom, *Defs. of Wildlife v. Salazar*, 842 F. Supp. 2d 181 (D.D.C. 2012); *see also Swedish Am. Hosp. v. Sebelius*, No. 08-cv-2046 (D.D.C. Oct. 17, 2014) (reopening case after remand to agency in minute order). “Without jurisdiction to enforce a judgment entered by a federal court, ‘the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.’” *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (quoting *Riggs v. Johnson County*, 73 U.S. 166, 184 (1868)).

ARGUMENT

I. The Court Should Reopen the Case to Enforce the 2020 Remand Order.

The Court should grant Cottonwood’s motion to reopen the case and compel the Federal Defendants to complete the additional NEPA analysis and final agency action

required under the 2020 Remand Order. Doc. 253 at 5-6. The additional NEPA analysis is important because the 2024 Yellowstone Bison Management Plan increases the population objective of Yellowstone bison from an average of 3,000 animals in 2000 to 6,500. *See* Ex. 1 at 4. This new management plan impacts how the remaining federal defendants manage bison and habitat on federal lands in Montana.

In the context of the increased bison population, the supplemental analysis is important for three reasons. First, USDA-APHIS continues to assist the Montana Department of Livestock in enforcing the Zone 2 Drop Dead Line. *E.g.*, Doc. 147-2. USDA-APHIS must prepare supplemental NEPA analysis, which includes taking public comment, and decide whether to continue assisting Montana in the enforcement of an “admittedly arbitrary political boundary” in light of the new science and information regarding transmission of brucellosis.

Second, the U.S. Forest Service must conduct additional NEPA analysis on what activities can and cannot occur on National Forest Lands. The agency has previously closed areas of National Forest Land to hunting to provide for public safety. Doc. 172. The agency must now conduct additional NEPA analysis, including public comment, and decide whether to continue supporting the IBMP policy of not allowing bison to use habitat past the Zone 2 Drop Dead line in light of the new information regarding the increased bison population, the new science regarding brucellosis, and the different agencies’ statements that too many bison are confined to too small an area and bison need to better distributed.

Third, the MOU for the IBMP states, “APHIS will bring special expertise to the development of this management plan and will develop information directly related to... Brucellosis[.]” Doc. 114-2 at 708. The EIS for the 2024 Yellowstone Bison Management Plan states USDA-APHIS is responsible for quarantine protocols. Ex. 3 at 195. The USDA and National Park Service have published new science since the 2020 Remand Order was filed that indicates bison do not need to be held in quarantine for more than 300 days before being transferred to the Tribes. Ex. 2 at 5. Yellowstone bison are currently being held for up to 900 days before being transferred to the Tribes. Ex. 2 at 1.

Alaina Buffalo Spirit, a member of the Northern Cheyenne Tribe of Indians and Cottonwood, filed a declaration in this case stating:

7. Preparing new environmental analysis might allow more bison to roam farther into Montana or transfer Yellowstone bison to Native American Tribes sooner rather than hold them indefinitely in quarantine. New analysis would begin to redress harms to my spiritual interests in Yellowstone bison.

Doc. 67. USDA-APHIS must now complete additional NEPA analysis, including public comment, and determine whether to amend the IBMP to allow transfer of Yellowstone bison to Tribes after 300 days of quarantine.

CONCLUSION

The EIS for the 2024 Yellowstone Bison Management Plan states “[a]ction is needed because new information obtained since the approval of the IBMP in 2000 indicates some of the premises regarding brucellosis transmission in the initial plan

were incorrect or have changed over time.” Ex. 3 at 6. The Court should grant this motion and order the remaining Federal Defendants to comply with the Court’s 2020 Remand Order by completing additional NEPA analysis, including public comment, and issuing a final agency action.

Respectfully submitted this 23rd day of January, 2025.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2025, this motion was served on the Federal Defendants via CM/ECF.

/s/ John Meyer

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