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

NEIGHBORS AGAINST BISON
SLAUGHTER, *et al.*,

Plaintiffs,

v.

The NATIONAL PARK SERVICE, *et
al.*,

Defendants.

Case No. 1:19-cv-128-SPW

Judge Susan P. Watters

PLAINTIFFS' BRIEF IN SUPPORT
OF THEIR PARTIAL MOTION FOR
SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

FS 004463

Background

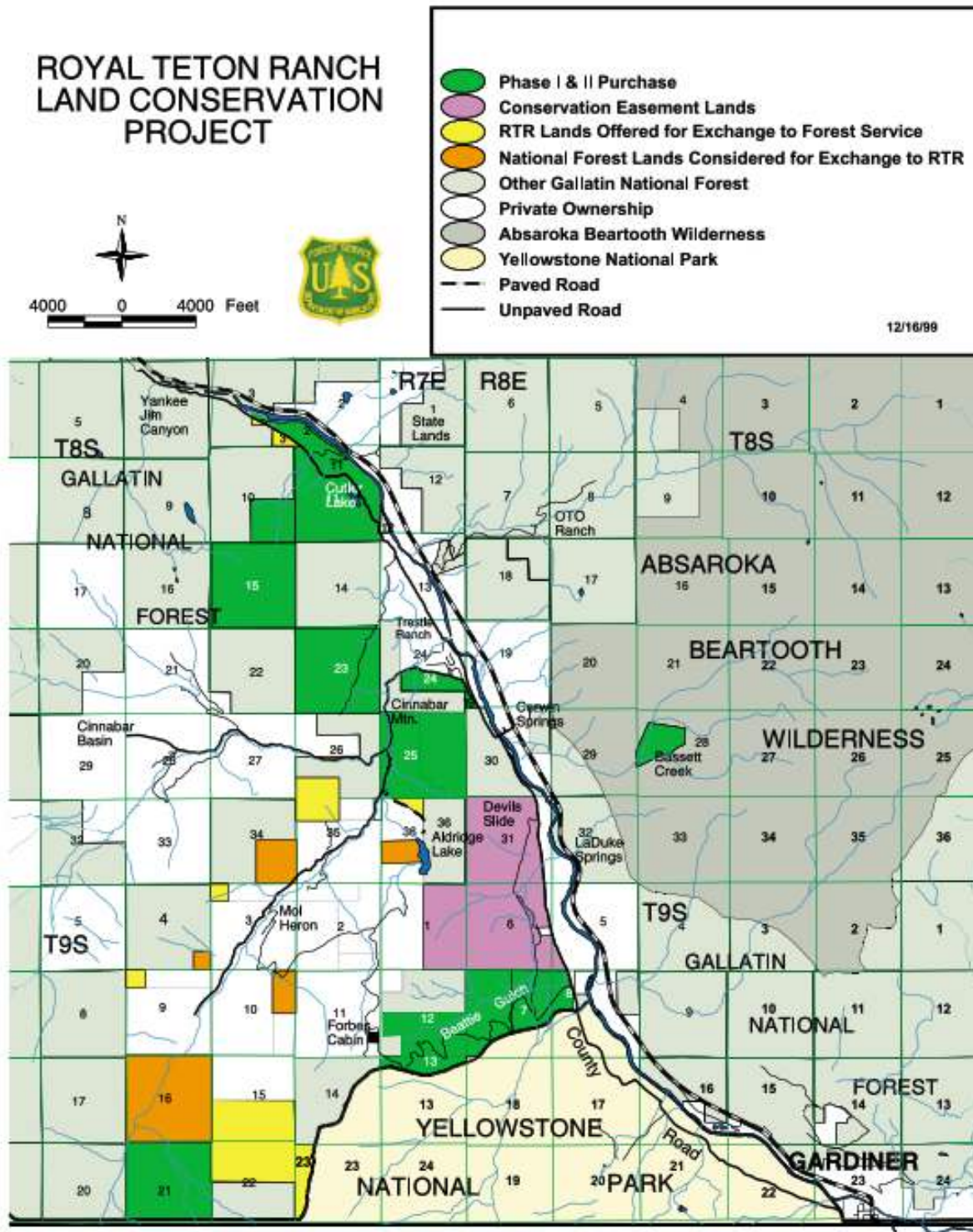


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Number	Title	Administrative Record number¹
1	Yell Bison Internal Draft [EIS] Cooperating Agency Review	NPS_0000017
2	Cooperating Agency and Tribes with Treaty Hunting Meeting (Jan. 10, 2022)	N/A
3	2024 IBMP Partner Protocols (Oct. 29, 2024)	NPS_0000938

¹ This brief is attaching, as exhibits, some documents from the administrative record for the Park Service's 2024 Record of Decision.

TABLE OF ACRONYMS AND ABBREVIATIONS

2019 Operation Plan	[2019] Operating Procedures for the IBMP (Dec. 31, 2018), FS11258
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
Environmental Impact Statement	EIS
IBMP	Interagency Bison Management Plan
Neighbors	Neighbors Against Bison Slaughter and Bonnie Lynn
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12
Park Service	National Park Service
Record of Decision	ROD

INTRODUCTION

No federal agency is taking responsibility for managing Yellowstone wild bison that migrate every year north from Yellowstone National Park to land managed by the U.S. Forest Service. Defendants the National Park Service, the United States Forest Service, the Secretary of the Interior, the Secretary of Agriculture, and the Superintendent of Yellowstone National Park (collectively, the Agencies) do not want responsibility for them. But with their minimal management steps, the Agencies are allowing Montana to stop Yellowstone wild bison from expanding on open and unclaimed lands, where they would thrive, increase their numbers, and provide more food and treaty hunting opportunities for members of the Confederated Salish and Kootenai Tribes, the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakama Nation, and the Confederated Tribes of the Umatilla Indian Reservation (the Tribes). The Agencies have never analyzed, under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347, 4332(2)(C)(iii), any alternative that would maximize Tribal hunting on open and unclaimed lands.

In a supplemental EIS, Neighbors Against Bison Slaughter and Bonnie Lynn (collectively, Neighbors) expect the Forest Service to reach a decision that

1. Expands Tribal hunting;
2. Treats our National Mammal, the bison, with the respect it deserves; and

3. Ensures that the people of Montana, Gardiner, and the United States will be able to see Yellowstone wild bison on more public lands.

Yet for over 11 years, the Forest Service has ignored its NEPA duties. According to the Park Service, since the Agencies' 2000 environmental impact statement (2000 EIS), 72 new circumstances and information developments have arisen—and more exist. The Forest Service did not dispute those findings, yet it refuses to analyze them in its own EIS. In addition, Montana recently revealed a secret “handshake agreement” with the Forest Service: the Forest Service agreed not to enforce its food safety order to store carcasses safely. The Forest Service never analyzed the environmental effects of that secret “handshake agreement.” The Forest Service’s delays and evasions show that only a court-ordered deadline can force the supplemental EIS that NEPA has required for over eleven years.

For over a century, the Tribes had nowhere to hunt wild bison. Tribal hunting near Yellowstone allowed them to start exercising their treaty rights. But the Agencies give the Tribes only a fraction of the treaty rights the United States owes. Out of 3 million acres on the Custer-Gallatin National Forest, the Agencies squeezed over eight Tribes—and state hunters—onto 40 acres in Beattie Gulch. *See Nat’l Park Serv. Final Env’tl. Impact Statement i (NPS FEIS).*² The Forest

² Available at <https://parkplanning.nps.gov/showFile.cfm?sfid=740681&projectID=94496>.

Service objects that it lacks authority to manage Yellowstone wild bison. But Congress gave the Forest Service jurisdiction over hunting. 43 U.S.C. § 1732(b).

The Agencies also violated the Constitution by delegating authority to a non-federal entity, the Interagency Bison Management Plan (IBMP). Now, the Agencies only vote on—instead of decide—Yellowstone wild bison management approaches. The IBMP can veto the Agencies’ decisions. The Agencies are violating Article II of the Constitution, which requires federal agencies to take responsibility for their actions to execute federal laws.

Only this Court can break the stalemate, provide legal clarity, and compel the Agencies to analyze an alternative for Yellowstone wild bison management that maximizes the United States’ satisfaction of its treaty obligations. The Tribes and our national mammal deserve better. Granting Neighbors’ motion for summary judgment will compel a new EIS by the Forest Service that NEPA has required for over eleven years.

STATEMENT OF FACTS

See Neighbors’ attached Statement of Undisputed Facts.

LEGAL BACKGROUND

I. The National Environmental Policy Act

NEPA “is our basic national charter for protection of the environment.”

Churchill Cnty. v. Norton, 276 F.3d 1060, 1072-73 (9th Cir. 2001) (quotations

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omitted). Congress aimed to use “all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a). Congress achieved that purpose “not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is almost certain to affect the agency’s substantive decision[s].” *Or. Nat. Desert v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2008) (quotations omitted).

NEPA serves as an “action-forcing device” that requires agencies to consider information at the “earliest possible time to [e]nsure that planning and decisions reflect environmental values” *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (quotations omitted). It requires federal agencies to consider the environmental effects of their actions before acting—instead of “act[ing] on incomplete information, only to regret [their] decision[s] after it is too late to correct.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

After completing an EIS, NEPA requires the agency to complete a supplemental EIS if new information shows the remaining activity will affect the environment in a significant manner or to a significant extent not already

considered. *See Marsh*, 490 U.S. at 371-74.³ Courts have a duty to “[e]nsure that the agency has taken a ‘hard look’ at environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

II. Tribal Treaty Rights

Many Tribes executed treaties with the United States that reserved their rights to hunt “upon open and unclaimed land,” or “on unclaimed lands,” which included the right to hunt wild bison. Treaty between the United States and the Flathead, etc. (commonly known as the Hellgate Treaty), Art. III, June 16, 1855, 12 Stat. 975; Treaty between the United States and the Nez Percé Indians, Art. 3, June 11, 1855, 12 Stat. 957; Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians, Art. 1, June 9, 1855, 12 Stat. 945; Treaty between the United States and the Yakama Nation of Indians, Art. 3, June 9, 1855, 12 Stat. 951. The Supreme Court recently interpreted a Crow Tribe treaty to recognize that references to “open and unclaimed lands” include national forests. *Herrera v. Wyoming*, 587 U.S. 329 (2019). The Ninth Circuit has recognized that treaties prevented the State of Washington from stopping fish from migrating

³ Although some agencies have issued new NEPA regulations, *see, e.g.*, [NEPA], 90 Fed. Reg. 29,632 (July 3, 2025), recent changes do not affect the Agencies’ NEPA obligations when Neighbors filed their 2019 Complaint. Congress gave no authority to make new regulations retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). But regardless of which regulations apply, the statutory text requires supplemental EISes. *See Marsh*, 490 U.S. at 371-74.

upstream, to where the Yakama Tribe could exercise their treaty rights to fish.

United States v. Washington, 853 F.3d 946, 958-59 (9th Cir. 2016).

III. Forest Service Management Statutes

In the Forest Service’s Organic Act, Congress gave the Forest Service “broad discretion” to “to regulate [the national forests’] occupancy and use,” which includes “conservation purposes.” 16 U.S.C. § 551; *Wyoming v. USDA*, 661 F.3d 1209, 1234 (10th Cir. 2011). Those powers include protecting “our forests and wildlife.” 16 U.S.C. § 528; *Koniag, Inc., Vill. of Uyak v. Andrus*, 580 F.2d 601, 605 (D.C. Cir. 1978) (quotations omitted). Congress gave the Forest Service jurisdiction to preempt state hunting laws. 43 U.S.C. § 1732(b); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 947-48 (9th Cir. 2023) (*CBD*).

IV. The Duty to Faithfully Execute the Laws

The United States Constitution assigns the President and the Executive Branch the duty to “take Care that the Laws be faithfully executed.” Art. II, secs. 1, 3. Agencies may not delegate federal decision-making authority to non-federal parties. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

STANDARDS OF REVIEW

Because neither the Constitution nor any of these statutes contain judicial review provisions, courts rely on the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, to determine whether agencies complied with each statute. *See*

Russell Cntry. Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1041 (9th Cir. 2011). Federal Rule of Civil Procedure 56(b) allows a party to “file a motion for summary judgment at any time until 30 days after the close of all discovery.” See *Jeffries v. Barr*, 965 F.3d 843, 848 (D.C. Cir. 2020) (remarking that the U.S. Department of Justice’s early-filed summary judgment motion “may well” surprise the plaintiff). Courts grant summary judgment if the evidence “shows that there is no genuine [issue] as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Courts decide APA claims via summary judgment based on the administrative records. 5 U.S.C. § 706; see *Nw. Motorcycle Ass’n v. USDA*, 18 F.3d 1468, 1472 (9th Cir. 1994).

On judicial review, the APA requires Courts to take a “thorough, probing, in-depth review” of agency actions. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 104, 107 (1977). Congress created a private cause of action and waived sovereign immunity for claims that agency decisions qualify as

- “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”
- “contrary to constitutional right, power, privilege, or immunity,” or
- “without observance of procedure required by law.”

5 U.S.C. § 706(2). The APA requires the agency not only to “examine the relevant data,” but also to “articulate a satisfactory explanation for its action” that includes

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a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations omitted).

ARGUMENT

The Forest Service continues to violate NEPA by failing to complete a supplemental EIS for Yellowstone wild bison management. It has failed to recognize its authority to expand wild bison to satisfy the United States’ weighty treaty obligations to the Tribes. The Park Service admitted, “[l]arger harvests are unlikely until bison and hunters are distributed across a larger landscape.”

NPS7251.⁴ Yet without congressional approval, the Forest Service and the Park Service violated Article II by delegating federal authority to a new agency with non-federal that they created (the IBMP).

⁴ This brief cites administrative record pages as FSXXX and NPSXXX where XXX denotes the page number. The Agencies lodged supplemental administrative records on July 7, 2020. Notice of Lodging of the Supp. Admin. R., ECF No. 86.

	Count 1	Count 2	Count 3	Count 4	Count 5
	Violated the Bison Clause, 16 U.S.C. § 36	Violated Forest Service Statutes by Approving the 2019 Operation Plan	Violated NEPA by issuing the 2019 Operation Plan without analyzing its environmental effects under NEPA	Violated NEPA by failing to issue a supplemental EIS	Violated the United States Constitution Article II by delegating authority to the IBMP
Park Service	New final agency action issued.	N/A	New final agency action issued.	Neighbors prevailed.	Unresolved
Forest Service	N/A	Unresolved	Unresolved	Unresolved	Unresolved

I. The Forest Service violated NEPA by failing to complete a supplemental EIS to analyze 75 new, significant circumstances and information developments.

The Forest Service did not dispute the Park Service’s conclusion that 72 new circumstances or information developments arose, yet the Forest Service refused to issue any supplemental EIS. *See* NPS FEIS 147-52. Just one change would have required a supplemental EIS. *See Greenpeace, Inc. v. Stewart*, 743 F. App’x 878, 879 (9th Cir. 2018) (overturning a district court that failed to require a supplemental EIS to analyze new deer habitat information). The Forest Service violated NEPA by failing to issue a supplemental EIS before approving operation plans.

The requirement to issue a supplemental EIS presents a “low standard.”

Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006).

NEPA requires agencies to remain “alert to new information.” *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000). NEPA assigns every agency a “continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS.” *Id.* at 559 (quotations omitted). It requires a supplemental EIS if the agency either (a) makes substantial changes to the action or (b) identifies significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2019).

Even when an agency is in the middle of acting, the duty to complete a supplemental EIS arises “[w]hen new information comes to light” *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980). NEPA requires the agency to complete a supplemental EIS before continuing with the action—“notwithstanding the fact that the project was initially approved and . . . commenced.” *Marsh*, 490 U.S. at 72, 372 n.15; *see Ross v. FHWA*, 162 F.3d 1046, 1048, 1054 (10th Cir. 1998) (upholding “a permanent injunction enjoining further action on a [highway segment] pending the completion of a supplemental [EIS].”).

Courts require supplemental EISes if “the commenting public would [not] regard the change as a minor variation,” but would “find the new alternative to be

qualitatively [outside] the spectrum of alternatives previously considered.” *Russell Cntry.*, 668 F.3d at 1045 n.12. But “regardless of [the agency’s] eventual assessment of the significance of this information, the [agency has] a duty to take a hard look at the proffered evidence.” *Marsh*, 490 U.S. at 385. A “plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.” *Klamath Siskiyou*, 468 F.3d at 562 (quotations omitted). The Park Service recognized the many changes in Yellowstone wild bison management over 25 years easily meet that “low standard.” *See id.*

A. The Park Service’s EIS recognized 72 new circumstances and information developments, and NEPA requires the Forest Service to analyze them in a supplemental EIS.

NEPA requires the Forest Service to complete a supplemental EIS to analyze the 72 changed circumstances and information developments the Park Service identified. Below are a few highlights:

- “2006: The IBMP members [including the Forest Service] adjusted the operation plan to increase tolerance for bull bison in Montana because there is negligible risk of them transmitting brucellosis to cattle.”
- “2006: American Indian Tribes asserted their treaty rights to harvest bison migrating from [Yellowstone] onto unoccupied national forest lands [controlled by the Forest Service] in Montana. These hunts have continued to present.”
- “2009: Evidence emerged that elk play a predominant role in the transmission of brucellosis to cattle, and the risk of transmission from bison to cattle [on Forest Service land] is minute in comparison”

- “2011: A technical committee for the IBMP [including the Forest Service] completed an assessment of suitable bison habitat in the Gardiner and Hebgen Basins and explored new areas where there could be increased tolerance for bison to accommodate additional hunting opportunities.”
- “2015: MFWP began requiring successful bison hunters to place unused parts of carcasses at least 200 yards (183 meters) from roads, trails, and homes, and spread stomach contents on the ground to reduce attraction to scavengers.”
- “2016: The Custer Gallatin National Forest [the Forest Service] issued an official shooting closure, renewed annually, for a 150-yard (137-meter) buffer extending west from Old Yellowstone Trail South Road in Beattie Gulch where there would be no shooting.”
- “2017 and 2020: The National Academies of Sciences, Engineering, and Medicine concluded infected elk had transmitted brucellosis to livestock in the [Greater Yellowstone Area] at least 27 times since 1998 with no transmissions attributed to bison.”
- “2020-2021: The Custer Gallatin National Forest implemented a one-year emergency closure followed by a permanent firearm discharge closures on about 23 acres (9 hectares) near Beattie Gulch and the McConnell area north of [Yellowstone National Park] for safety.”

NPS FEIS 147-52 (citations omitted). Under NEPA, each new, significant circumstance and information development compelled **the Forest Service** to issue a supplemental EIS. *See Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 WL 3267846, at *2 (9th Cir. May 5, 2023) (overturning a NEPA analysis for failing to analyze “potential effects of the agency’s action on

residents of the neighboring communities” and “same place-same time encounters with *residents and landowners*”).⁵

In 2020, the Agencies recognized their “NEPA obligation to consider any new information or changed circumstances since the IBMP’s adoption in 2000.” Defs.’ Br. in Supp. of Mot. for Voluntary Remand 14, ECF No. 84-1. Yet the Forest Service issued no EIS; on the Park Service’s EIS, it provided only 26 minor comments, which included 20 typos and terminology changes. Yell Bison Internal Draft [EIS] Cooperating Agency Review, Ex. 1; Yell Bison Internal Final [EIS] Cooperating Agency Review, ECF No. 145-7. It had no comments on the 72 new circumstances or information developments. But the Forest Service continues to sign operation plans every year. *See, e.g.*, FS11258. The Forest Service’s failure to complete its own EIS resulted in Yellowstone wild bison management actions on federal lands with no federal agency analysis. The Forest Service violated NEPA

⁵ The Forest Service will likely seek to escape liability by pointing to its Custer Gallatin National Forest, 2022 Final EIS for the Land Management Plan. The 2022 EIS does not satisfy the Forest Service’s obligations for at least two reasons. First, that EIS does not analyze the 72 new circumstances or information developments. Second, the EIS clarifies the Forest Service continues operating under the 2000 ROD as “a living document updated annually or as appropriate.” Final [EIS] for the Land Mgmt. Plan Custer Gallatin Nat’l Forest, Vol. 2, at 47 and 127, *available at* www.fs.usda.gov/media/51354.

by failing to issue a supplemental EIS that takes a hard look at the 72 new circumstances and information developments.

B. Because the Forest Service learned of other new facts and circumstances, NEPA required it to issue a supplemental EIS at least eleven years ago.

Beyond the Park Service's 72-item list, NEPA compels a supplemental EIS to analyze at least three other, new circumstances.

1. *Hunters killed 1,382 % as many Yellowstone wild bison as analyzed in 2000.*

Yellowstone wild bison impacts far exceed the range of alternatives analyzed in the 2000 EIS, and NEPA requires a supplemental EIS to analyze those impacts. In the 2000 EIS, the Agencies analyzed alternatives that would allow hunting "between 75 and 85 bison . . . per year." FS4379; FS4392; FS4558-59; FS4648.

By 2017, hunters killed 486 Yellowstone wild bison. NPS8172 (389 + 97). And during the 2023-2024 winter, hunters shot 1,175 wild bison on Forest-Service-managed land. Chris Geremia, *Status Report on the Yellowstone Bison Population* 11 (Oct. 2023) (1,133 + 42), ECF No. 145-2. That reaches 1,382 % of the 85 maximum. No reasonable "commenting public" member would consider 1,175 killed bison a "minor variation" of 85 or as fitting "qualitatively within the spectrum of alternatives" between 0 and 85. *See Russell Cntry.*, 668 F.3d at 1041 n.4, 1045-46 (recognizing that motorized travel mileage outside the analyzed range

would have required a supplemental EIS), 1045 n.12. NEPA required the Forest Service to issue a supplemental EIS. *See id.*

2. *The hunting configuration shrunk, from the assumption in 2000 that hunting would happen across zone 2, to just 40 acres in Beattie Gulch.*

The shooting configuration in Beattie Gulch also changed. Hunting does not spread north to Yankee Jim Canyon as the Agencies anticipated in Alternative 3, but concentrates on 40 acres in Beattie Gulch. NPS7817; FS4230 (map); FS4379; FS10701 (“quarter-mile-square area”). The “firing line effect [] occurs just as bison step out of [Yellowstone] and into Beattie Gulch.” FS9121; NPS7251 (“Bison essentially constrained to park”). In 2018, Montana concluded “the density of hunters has increased beyond what [it] considers safe,” FS10701, and “the safety issues continue to escalate and the fear for injury or death to hunters is real.” NPS7258. The Agencies never considered the “wholly new problems posed” by “squeez[ing]” the impacts into that smaller area. *See Dubois v. USDA*, 102 F.3d 1273, 1293 (1st Cir. 1996) (requiring a supplemental EIS), *cited approvingly by Russell Cntry.*, 668 F.3d at 1049 n.15. Therefore, NEPA required the Forest Service to complete a NEPA analysis. *See id.*

3. *The Forest Service made a secret “handshake agreement” with Montana not to enforce its food storage order.*

The Forest Service and Montana made a secret “handshake agreement” not to enforce the Forest Service’s food safety order. Yell Bison Internal Final [EIS]

Cooperating Agency Review. Yet the Forest Service never analyzed the environmental effects of that secret, unwritten “handshake” agreement.

Every winter, bison hunters leave behind hundreds of “gut piles,” each weighing hundreds of pounds. *See* FS4715 (estimating bison weigh 900-1,100 pounds, and hunters take only 60 % by weight); NPS7283. The 2000 ROD analyzed, “[m]itigation measures requiring removal of carcasses from areas near human habitation might minimize these potential conflicts.” FS4328.

But the Forest Service is not implementing that mitigation measure. Its food storage order prohibits leaving carcasses “within 200 yards of a Forest Road or Trail.” *See* FS1152 (or within “½ mile of a camping or sleeping area”). But the Forest Service is not “[e]nforc[ing] and adher[ing] to current USFS food storage restrictions” in Beattie Gulch. IBMP Subcommittee Assessment (July 29, 2020), ECF No. 145-8; FS9359. NEPA requires the Forest Service to complete a supplemental EIS that analyzes its secret “handshake agreement.” *See Neighbors of the Mogollon Rim*, 2023 WL 3267846, at *2.

C. The Forest Service will not act until this Court compels it under 5 U.S.C. § 706(1), and it needs a deadline.

The Forest Service did not and is not completing any NEPA analysis of Yellowstone wild bison management. Tr. 50:19-20, *Montana v. Haaland*, No. CV-24-180-BLG-BMM (D. Mont. Apr. 17, 2025) (“[T]he Forest Service is not undertaking any supplemental NEPA right now.”), ECF No. 145-1. The APA *Neighbors Against Bison Slaughter v. Nat’l Park Serv.*, No. 1:19-cv-128-SPW Pls.’ Br. in Supp. of Mot. for Summ. J.

compels it to act, and because of its decade-long delay, and refusal to act on the first remand, this situation calls for a deadline. *See* 5 U.S.C. § 706(1).

In 2014, the Park Service issued a press release that recognized “substantial new information and changed circumstances since the [2000 EIS].” FS11350. The next year, it filed a notice of intent in the Federal Register. [EIS] for Mgmt. Plan for Yellowstone-Area Bison, 80 Fed. Reg. 13603 (Mar. 16, 2015). The Park Service informed the public it would complete that analysis by 2017. NPS6559. About 3,000 people submitted 8,830 comments. NPS6789. But both Agencies ignored the public and never completed any supplemental EIS.

Again in 2018, the Park Service acknowledged “substantial new information and changed circumstances since the [2000 EIS].” NPS7892. Again, it completed no EIS. Even when the Park Service completed an EIS in 2024, the Forest Service did no analysis, signed no EIS, and made no final agency action.

The Ninth Circuit has recognized that, “[i]f an agency withholds a required action, it violates § 706(1) regardless of its reason for doing so.” *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102, 1121 (9th Cir. 2025).⁶ This

⁶ Withholdings thus require no determination of whether the delay qualifies as unreasonable. *Id.*; *see* 5 U.S.C. § 706(1) (directing courts to compel not only agency actions “unlawfully withheld,” but also actions “unreasonably delayed”). The distinction between “delay” and “withholding” depends on intent. “With

withholding of agency action compels an order directing the Forest Service to complete a supplemental EIS.

The Ninth Circuit has issued writs of mandamus in similar situations, and the same reasons compel a Section 706(1) order here. Six years' delay qualifies as "egregious." *In re NRDC*, 956 F.3d 1134, 1139 (9th Cir. 2020). In that case, ten years had passed without access to judicial review because an agency failed to act. *Id.* at 1139-43. The Ninth Circuit routinely sets deadlines when agencies are failing to act. *See id.* at 1143 (90-day deadline); *League of United Latin Am. Citizens v. Wheeler*, 922 F.3d 443, 445 (9th Cir. 2019) (*en banc*) (90-day deadline); *In re A Cmty. Voice*, 878 F.3d 779, 788 (9th Cir. 2017) (ordering a proposed rule within 90 days, and a final rule within one year); *In re Pesticide Action Network*, 798 F.3d 809, 815 (9th Cir. 2015) (80-day deadline). Here, after eleven years of knowing NEPA required a supplemental EIS, and after five years since moving for remand, the Forest Service has done nothing and intends to do nothing. This situation calls for a Section 706(1) order compelling the Forest Service to complete a new EIS within one year.

patience, one can wait out delay, but even with superhuman patience, one cannot wait out withholding." *Al Otro Lado*, 138 F.4th at 1122. Here, the Forest Service has decided not to act. It is withholding. *See id.*

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II. The Forest Service arbitrarily and capriciously issued the 2019 Operation Plan without analyzing a wild bison management alternative to maximize Tribal hunting opportunities.

The Forest Service arbitrarily and capriciously approved the 2019 Operation Plan. The Forest Service found it lacked jurisdiction over Yellowstone wild bison on National Forest System land, FS11258; FS4207, but 43 U.S.C. § 1732(b) gave it jurisdiction over hunting. The Forest Service can maximize Tribal hunting on open and unclaimed land. Because the Forest Service was wrong on the law, the APA requires this Court to set aside that decision for the Forest Service to reconsider it based on the full scope of its jurisdiction. *See* 5 U.S.C. § 706(2); *Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs Gen. Comm. of Adjustment*, 558 U.S. 67, 86 (2009) (compelling an agency to decide a matter over which the agency had jurisdiction, but over which the agency had wrongly concluded it lacked jurisdiction).

Reasoned decision-making requires two steps. First, determine correctly the rule of law. *See id.*; *NRLB v. Brown*, 380 U.S. 278, 292 (1965) (“Courts must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.” (quotations omitted)); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“an order may not stand if the agency has misconceived the law.”). Second, reason from that rule of law to a decision. The Forest Service incorrectly determined the rule of law, so it failed to make a reasonable decision. *See Regents of the Univ. v. U.S. Dep’t of*

Homeland Sec., 908 F.3d 476, 505-06 (9th Cir. 2018), *rev'd in part, vacated in part on other grounds sub nom. Dep't of Homeland Sec. v. Regents of the Univ.*, 591 U.S. 1 (2020).

The Forest Service denies it has jurisdiction over Yellowstone wild bison. FS4207. Congress gave the Forest Service “authority to preempt state laws related to hunting and fishing.” *CBD*, 80 F.4th at 947-48.⁷ The statute allows the Secretary of Agriculture to “designate areas . . . and establish periods when, no hunting or fishing will be permitted” 43 U.S.C. § 1732(b). When the Forest Service concluded it lacked jurisdiction, it misinterpreted the law. That erroneous legal foundation rendered its decision in the 2019 Operation Plan arbitrary and capricious. *See Regents*, 908 F.3d at 505-06.

The Constitution gives Congress “complete power . . . over public lands,” and that “includes the power to regulate and protect the wildlife living there.” *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976). The Supremacy Clause, in turn, makes federal control supreme even if a state considers the object important. *See Hodel v.*

⁷ In the past, a court may have deferred to an agency’s interpretation of an ambiguous statute under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), but courts may no longer defer. “*Chevron* is overruled.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). The APA requires “courts, not agencies, [to] decide *all* relevant questions of law’ arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it.” *Id.* at 392.

Va. Surface Mining Recl. Ass’n, 452 U.S. 264, 290 (1981). The “power of the United States to . . . protect its lands and property does not admit of doubt . . . the game laws or any other statute of the state to the contrary notwithstanding.” *Hunt v. United States*, 278 U.S. 96, 100 (1928); see Martin Nie *et al.*, *Fish and Wildlife Mgmt. on Fed. Lands: Debunking State Supremacy*, 47 *Envtl. L.* 797, 857-58 (2017) (*Debunking State Supremacy*).

To protect federal objectives, the Constitution recognizes a “fundamental” principle that “shield[s]” federal activities from state regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1976). Courts allow states to regulate federal agency actions “only when and to the extent there is a clear congressional mandate, [or a] specific congressional action that makes this authorization of state regulation clear and unambiguous.” *Id.* (citation modified). Although states “have broad trustee and police powers over wild animals within their jurisdictions,” those powers “exist only in so far as their exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.” *Kleppe*, 426 U.S. at 544, 545; *Kennedy v. Becker*, 241 U.S. 556, 562 (1916). Therefore, the Supremacy Clause ensures that the Forest Service has authority to manage Yellowstone wild bison on its land—and even to protect those wild bison from Montana while they migrate to other federal lands.

The *Kleppe* decision explains this principle. There, in the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, 1333(a), Congress gave the Secretary of the Interior jurisdiction over burros “as components of the public lands.” After a rancher complained and the Secretary declined to remove “several unbranded burros,” New Mexico rounded up nineteen and sold them. *Kleppe*, 426 U.S. at 533. New Mexico argued the act violated its “traditional trustee powers over wild animals.” *Id.* at 541. The Supreme Court rejected that argument. It concluded the property clause “power . . . is broad enough to reach beyond territorial limits.” *Id.* at 538; *see Debunking State Supremacy*, 47 *Envtl. L.* 797, 833.

Courts have extended *Kleppe* in a wide range of contexts. *See, e.g., United States v. Bd. of Cnty. Comm’rs*, 843 F.3d 1208, 1212 (10th Cir. 2016) (Forest Service trees); *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002) (elk management); *Minnesota v. Block*, 660 F.2d 1240, 1252 (8th Cir. 1981) (motorboats).

The Forest Service acted arbitrarily and capriciously by failing to consider an option of using its legal authority to produce a management option for Yellowstone wild bison that would maximize the Tribes’ ability to exercise their treaty rights. It knows the IBMP “need[s] to get more bison outside of the park, further dispersed, to aid in a safe, productive hunt.” FS9732; *see* FS9202 (seeking to “increas[e] the

number of bison available and expanding their distribution on open and unclaimed lands outside of YNP.”); NPS4496. The Park Service has described some practical steps toward that approach. NPS7288-89.

An agency’s sheer “failure to exercise its own discretion, contrary to existing valid regulations” qualifies as arbitrary and capricious decision-making. *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Although nothing required the Forest Service to choose a treaty-rights-maximizing option, it acted arbitrarily and capriciously by failing to consider that option. *See State Farm*, 463 U.S. at 50 n.15 (“[T]hat option had to be considered.”), 51. Again, “[i]f the record before the agency does not support the agency action [or] if the agency has not considered all relevant factors, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The Forest Service’s legal misinterpretation requires remand with a one-year deadline.

III. The Agencies violated Article II by delegating their authority and giving veto power to non-federal entities.

The Agencies have found another reason not to expand bison for more tribal hunting: they delegated their control to a non-federal body, the IBMP, where they vote instead of decide, and which can veto Agency actions. But the Constitution requires federal agencies to remain “in control.” *FCC v. Consumers’ Rsch.*, 145 S.

Ct. 2482, 2491 (2025). Congress has not allowed the Agencies to delegate their
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authority outside the federal government. Therefore, the United States Constitution Article II, section 3, prohibited the Agencies from delegating federal authorities to the IBMP.⁸ Consequently, the 2019 Operation Plan (and every other IBMP decision) violates the Constitution, and the APA compels setting it aside.⁹ *See* 5 U.S.C. § 706(2)(B).

Article II, Section 3, assigns the President and the Executive Branch to faithfully execute federal laws. *See Printz v. United States*, 521 U.S. 898, 922 (1997). It prohibits delegating final decision-making authority to non-federal actors. “[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010) (quotations omitted).

Without Congressional authorization, the Constitution prohibits “delegation to outside entities” because that “increases the risk that these parties will not share the

⁸ This Court expected the Park Service, on remand, would re-analyze the IBMP structure. Order re: Defs.’ Mot. for Voluntary Remand 3, ECF No. 107. The Park Service never intended to do that: “[T]he intent of the IBMP was being preserved under this revised plan.” Cooperating Agency and Tribes with Treaty Hunting Meeting (Jan. 10, 2022), Ex. 2.

⁹ Nothing moots Neighbors’ claim over the 2019 Operation Plan because the claim is capable of repetition yet evading review. The IBMP issues operation plans every year, and one year is too short for an entire legal case. *See NRDC v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003); [IBMP], Operations Plan (Oct. 29, 2024), ECF No. 145-6.

agency’s national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.” *U.S. Telecom*, 359 F.3d at 565-66. Article II prohibits delegating to sovereign entities, too. *Id.* Allowing non-federal actors to decide federal matters risks blurring “lines of accountability” and risks “undermining an important democratic check on government decision-making.” *Id.* “[P]ublic accountability for agency action can only be achieved if the electorate knows how to apportion the praise for good measures and the blame for bad ones.” *Regents*, 908 F.3d at 498-99.¹⁰ Agencies can elicit “recommendations” from outside parties, but only “[a]s long as an agency . . . retains decision-making power.” *Consumers’ Rsch.*, 145 S. Ct. at 2491.

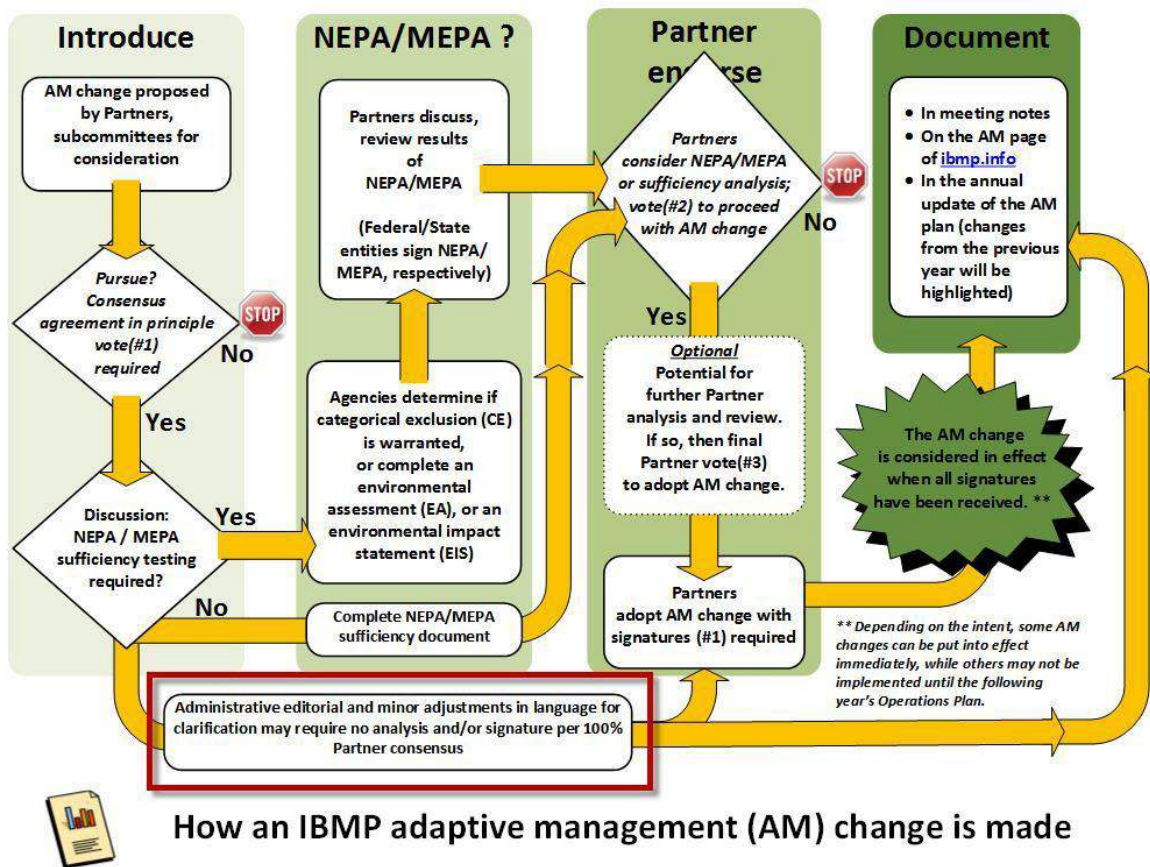
The Agencies are not making independent decisions under the Supremacy Clause that respond to the democratic will of the people of the United States. Instead, they created a new agency, the IBMP, where the nine members *vote* on how to manage Yellowstone wild bison. FS113329 (“Each of the nine Partner organizations has one vote in multi-agency decisions.”).¹¹ “Some Partners stated

¹⁰ See *Free Enter.*, 561 U.S. at 497-98; Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2251-52 (2000) (specifying “accountability and effectiveness” as “the principal values that all models of administration must attempt to further.”).

¹¹ 2024 IBMP Partner Protocols 5-6, 8 (Oct. 29, 2024) (“Each of the nine Partner organizations has one vote in IBMP Decisions.”), **Ex. 3**.

that they don't always agree 100% with all IBMP decisions but recognize the need to act in concert toward the goals of the IBMP." FS7828. (And still not every Tribe is a member. FS9732.)

The decision-making process for the IBMP wildly departs from any decision-making process that Congress created or authorized. FS8410. The IBMP holds a veto over the Agencies' decision-making. If the entire IBMP does not want the Agencies to make a change, as in column 3, the Agencies stop.



FS8418. The Agencies gave the IBMP power to veto federal agency decision-making, which violates the Constitution. *See FDA v. Brown & Williamson*

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Tobacco Corp., 529 U.S. 120, 125 (2000) (“[an agency] may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.” (quotations omitted)). Consequently, when any IBMP member proposes ideas, they go nowhere because they have “no consensus.” FS9877. This structure flips the Supremacy Clause on its head. *See Hancock*, 426 U.S. at 179 (“where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation.” (quotations omitted)).

This Court directly rejected a federal agency’s effort to delegate its authority outside the Executive Branch. It held the agency “fail[ed] to ensure that the [federal agency] fulfills *its* obligations under [the federal law] because it delegates the [agency’s] determination to non-federal [parties].” *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985, 993 (D. Mont.) (Morris, J.), *amended on other grounds*, 460 F. Supp. 3d 1030 (D. Mont. 2020), *stayed in part sub nom. U.S. Army Corps of Eng’rs v. N. Plains Res. Council*, 141 S. Ct. 190 (2020), *appeal dismissed, not vacated, but remanded on other grounds*, No. 20-35412, 2021 WL 7368336 (9th Cir. Aug. 11, 2021). The same principle compels the same result here.

Striking down the IBMP as an illegal committee would not stop collaboration with the Tribes or Montana. Even if this Court finds the IBMP a “practical

accommodation,” that does not justify violating the Constitution. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991). For situations like this, the Federal Advisory Committee Act allows agencies to create committees to advise them. *See* 5 U.S.C. § 1001-1014. The Agencies could include all Tribes in a committee under that authority.

The Supreme Court does not allow decisions to stand when a decision-maker lacked constitutional authority to make that decision. *Ryder v. United States*, 515 U.S. 177, 182-183 (1995); *Lucia v. SEC*, 585 U.S. 237, 251 (2018); *Free Enter.*, 561 U.S. at 513. “The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’” *United States v. Stevens*, 559 U.S. 460, 470 (2010) (quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).

Because the IBMP and not the Agencies make decisions on Yellowstone wild bison management and can veto Agency decisions, the IBMP decisions violate Article II, section 3, of the Constitution. The Agencies approve decisions contrary to the Constitution. They are void, and the APA requires setting them aside. *See* 5 U.S.C. § 706(2).

CONCLUSION

For the foregoing reasons, Neighbors established that NEPA and the APA compel summary judgment in their favor. This situation compels declaratory relief

that the 2019 Operation Plan and the IBMP structure are illegal, and an order compelling the Forest Service to complete a supplemental EIS within one year.

Dated November 14, 2025,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,497 words, excluding the caption, certificate of compliance, tables of contents authorities, and exhibit index, which complies with L.R. 7.1(d)(2)(A). I relied on the word count in MS Word.

Dated November 14, 2025,

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