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

STATE OF MONTANA, BY AND
THROUGH ITS GOVERNOR, *et al.*,

Plaintiff,

v.

DOUG BURGUM, in his official
capacity as Secretary, U.S. Department
of the Interior, *et al.*,

Defendants.

Case No. CV-24-180-BLG-BMM

**BRIEF IN SUPPORT OF
MOTION TO COMPLETE
AND/OR SUPPLEMENT THE
ADMINISTRATIVE RECORD**

INTRODUCTION

Plaintiff State of Montana, by and through its Governor, Montana Department of Livestock (MDOL), and Montana Department of Fish, Wildlife and Parks (MFWP) (collectively, Montana) moves to complete and/or supplement the administrative record in this case with the following seven (7) items/exhibits:

1. May 6, 2023 text messages from Defendant Yellowstone National Park (YNP) Superintendent Cam Sholly to Montana Governor Greg Gianforte, attached hereto as **Exhibit 1**.
2. December 2011 Draft Joint Environmental Assessment for *Adaptive Management Adjustments to the Interagency Bison Management Plan* (IBMP) prepared by MDOL and MFWP, attached hereto as **Exhibit 2**.
3. February 2012 Joint Decision Notice for *Adaptive Management Adjustments to the Interagency Bison Management Plan* issued by MDOL and MFWP, attached hereto as **Exhibit 3**.
4. August 14, 2014 memorandum from Interagency Bison Management Plan (IBMP) facilitator Scott Bischke regarding the “2014 IBMP Adaptive Management Plan,” attached hereto as **Exhibit 4**.
5. April 8, 2016 memorandum from IBMP facilitator Scott Bischke regarding the “2016 IBMP Adaptive Management Plan,” attached hereto as **Exhibit 5**.
6. March 24, 2010 Draft Environmental Impact Statement for *Brucellosis Remote Vaccination Program for Bison in Yellowstone National Park* prepared by Defendant National Park Service (NPS), attached hereto as **Exhibit 6**.
7. September 2011 *Monitoring Plan for Yellowstone Bison: The Effects and Effectiveness of Management Actions* prepared by Defendant NPS, attached hereto as **Exhibit 7**.

BACKGROUND

In 2000, after litigation and mediation with the State of Montana, MFWP, and MDOL, federal defendant NPS and the United States Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS), as well as USDA Forest Service (USFS), issued a record of decision (ROD) concerning the management of bison within YNP. Montana also issued its own bison management plan ROD in 2000. The prevailing bison management provisions in the state and federal RODs mirrored each other. Since 2000, NPS, USFS, APHIS, and MDOL, and MFWP have met annually since 2000, at IBMP meetings. During these meetings, agencies review the previous year's management and discuss plans for the upcoming year. Adjustments to the 2000 RODs, when made, have been memorialized.

In January 2022, NPS published notice in the federal register of its intent to prepare an environmental impact statement (EIS) for a bison management plan (BMP). 87 Fed. Reg. 4653 (Jan. 28, 2022). The notice identified preliminary alternatives, including a purported "No Action Alternative" that stated

[t]he NPS would continue to manage bison pursuant to the 2000 IBMP as adaptively adjusted and implemented through consensus decisions and annual operations plans by the agencies involved with bison management.

Id. at 4654.

Montana provided comment on that notice on February 28, 2022, Admin. Rec. (AR) NPS_0001031-1042. Montana identified many concerns, including NPS': failure to coordinate and cooperate with Montana; incorrect assumption that Montana would tolerate increased bison populations outside YNP; assertions that there was sufficient forage in YNP to support increased bison populations; failure to accurately represent the "no action" alternative for National Environmental Policy Act (NEPA) analysis; and failure to examine and commit to disease suppression in bison. *Id.* These concerns were conveyed to leadership at YNP, NPS, and the United States Department of the Interior (DOI) several times throughout 2022 and 2023. *Id.*; *see also* AR NPS_0054803; AR NPS_0002586; AR NPS_0018099-18100 (denoting meetings on April 19, 2022, May 9, 2022, May 17, 2023, and June 29, 2023).

The draft EIS (DEIS) for the proposed BMP was released on August 10, 2023. AR NPS_0000018. Montana submitted extensive comment, reiterating many of the concerns from its 2022 comment. AR NPS_0054784-54800.

In June 2024, NPS issued a final EIS (FEIS). AR NPS_0000373. The no-action alternative in the FEIS stated that "NPS would continue current management pursuant to the IBMP, *as adjusted and implemented since 2000 through consensus decisions* and annual operations plans by the agencies involved in bison management." AR NPS_0000379 (emphasis added); *see also* ROD at AR

NPS_0000842. None of the alternatives in the FEIS included vaccination of YNP bison. AR NPS_0000424-426, AR NPS_0000418 (vaccination of bison was an alternative “considered but dismissed from detailed analysis”).

The bison population ranges examined in the FEIS were 3,500-5,000 (Alternative 1—“No Action”), 3,500–6,000 (Alternative 2—“Preferred Alternative”), and 3,500–7,000 (Alternative 3). AR NPS_0000379-380. The BMP ROD, signed in July 2024 by Superintendent Cam Sholly, adopted Alternative 2’s population of 3,500–6,000, recognizing that numbers “may exceed the upper end of the population range of 6,000....” AR NPS_0000835.

On December 31, 2024, Montana filed its complaint initiating the above-captioned case. Doc. 1. In that complaint, Montana set forth seven claims.

- Claim 1: The BMP FEIS is based on inaccurate and false assumptions in violation of NEPA and the [Administrative Procedures Act (APA)]. Doc. 1 at 38–39. The BMP FEIS alternatives were erroneously premised on an assumption that Montana’s 2011 and 2015 tolerance zone expansions would accommodate YNP bison populations beyond 3,000. *Id.*
- Claim 2: A reduction in Montana’s tolerance zone is a reasonably foreseeable [sic] circumstance defendants failed to analyze, in violation of NEPA and the APA. *Id.* at 39–42. Tolerance zone expansion was done, in part, to expand opportunity for bison vaccination and manage conflict. *Id.* at

41. FEIS alternatives eliminating vaccination and increasing the bison population undermine those pillars of Montana's tolerance. *Id.*

- Claim 3: The “no action” alternative represents an artificial baseline in violation of NEPA and the APA. *Id.* at 42–45. Elements of the “no action” alternative, including the population range of 3,500–5,000 and absence of vaccination, are in conflict with management directives in place prior to the BMP. *Id.*
- Claim 4: Defendants were pre-decisional, in violation of NEPA and the APA. *Id.* at 45. Defendants' behavior and statements during the NEPA process were pre-decisional, rendering the process meaningless. *Id.*
- Claim 5: Defendants failed to cooperate with Montana, in violation of NEPA and the APA. *Id.* at 45–47.
- Claim 6: The FEIS was not a “sufficiently detailed statement” in violation of NEPA and the APA. *Id.* at 47–49.
- Claim 7: The FEIS alternatives considered degrade YNP range and natural systems, in violation of the [National Park Service Organic Act], the [Yellowstone National Park Protection Act], and the APA. *Id.* at 49–50. Each alternative analyzed in the FEIS, including the preferred alternative adopted in the ROD, degrade YNP's range and natural systems by increasing bison population levels. *Id.*

LEGAL STANDARD

The APA requires a court to “review the whole record” when hearing a case on judicial review. 5 U.S.C. § 706.

“The whole record” is “everything that was before the agency pertaining to the merits of its decision,” *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993), which includes “all documents and materials directly or indirectly considered by agency decision-makers [including] evidence contrary to the agency’s position,” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citations omitted).

Helena Hunters & Angers Ass’n v. Marten, 470 F. Supp. 3d 1151, 1166 (D. Mont. 2020). When reviewing agency action, courts must engage in a “thorough, probing, in-depth review” based “on the full administrative record that was before the [decision-maker] at the time he made the decision.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971). To require less than a full record “denies effective judicial review, and leaves the agency unaccountable, contrary to congressional purpose.” *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 39 (N.D. Tex. 1981).

Incomplete records are viewed as “fictional” accounts of the decision-making process. *Portland Audubon Soc’y v. Or. Lands Coal.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (quoting *Home Box Office, Inc. v. Fed. Commc’ns Comm’n*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

Although an agency is entitled to a presumption that the record is complete, this presumption may be overcome by a strong showing to

the contrary. *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1129 (D. Mont. 2018). An agency may not hide behind the record rule and deliberately exclude documents adverse to its position. *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005); *see also Camp v. Pitts*, 411 U.S. 138, 142–43, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973) (holding that a district court may supplement the record when the record submitted by the agency is so incomplete as to frustrate judicial review).

Helena Hunters, 470 F. Supp. 3d at 1166.

ARGUMENT

Materials “considered by the agency yet omitted from the administrative record” can be used to **complete** the record, while “materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry” can be used to **supplement** the record. *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1274 (D. Colo. 2010); *Yellowstone v. Bolling*, No. 4:20-cv-00192-DCN, 2021 U.S. Dist. LEXIS 231235, *4 (D. Idaho Dec. 1, 2021); *Bruce v. Azar*, 389 F. Supp. 3d 716, 724 n.5 (N.D. Cal. 2019) (recognizing the difference in standards and construing Plaintiff’s motion as a motion to complete or, alternatively, a motion to supplement the AR). While the tests for completion and supplementation differ, the two standards overlap to some degree. *All. for the Wild Rockies v. Anderson*, No. CV 24-125-M-KLD, 2026 U.S. Dist. LEXIS 70328, *10–11 (D. Mont. Mar. 31, 2026) (“Documents which ‘complete the record’ because they ‘were actually considered by the agency’ might very well also ‘supplement the record’ because the agency ‘relied on’ those

documents under the second [*Lands Council v. Forester of Region One of the U.S.F.S.*, 395 F.3d 1019 (9th Cir. 2005)] exception.” (quoting *Bruce*, 389 F. Supp. 3d at 724 n.5)).

A. Exhibit 1 is Necessary for a Complete AR.

Exhibit 1¹, text messages sent by Superintendent Sholly to Governor Gianforte, were in response to comments submitted by Montana during the NEPA process, *see* AR NPS_0001031-1042, and in anticipation of a meeting on May 17, 2023, referenced at AR NPS_0018100. The messages are materials considered by the decision-maker² and were inappropriately excluded from the AR.

“A court may order the completion of the AR in narrow circumstances.” *Bold Alliance v. U.S. DOI*, 572 F. Supp. 3d 943, 947 (D. Mont. 2020). A plaintiff may rebut the presumption that an agency has provided a complete administrative record with clear evidence to the contrary. *Id.* (citing *Indigenous Env'tl. Network v. U.S. Dep't of State*, Nos. CV-17-29-GF-BMM & CV-17-31-GF-BMM, 2018 U.S. Dist. LEXIS 63765, *7 (D. Mont. Apr. 16, 2018)). Rebuttal can be accomplished through identifying “‘allegedly omitted material with sufficient specificity’ and ‘reasonable, non-speculative grounds for the belief that the alleged documents

¹ Plaintiff has redacted the last four digits of Superintendent Sholly’s phone number as a privacy courtesy in the Exhibit 1 filed herewith. However, Plaintiff distributed an unredacted copy to the parties when it sought objections/non-objections to the motion pursuant to L.R. 7.1(c)(1).

² Superintendent Sholly signed the ROD for the BMP. AR NPS_0000830.

were considered by the agency and not included in the record.” *Id.* (quoting *Indigenous*, *7–8). A plaintiff may also show that the agency “‘applied the wrong standard in compiling the record.’” *Id.* A demonstration of bad faith or improper motive is not required. *Id.*

In *California ex rel. Lockyer v. U.S.D.A.*, federal defendants were ordered to complete the record with the agency’s internal and external communications relating to the decision-making process, including drafts, dissents, e-mail exchanges or “‘other correspondence between and among the agencies and/or others involved in the process....” Nos. C05-03508 EDL & C05-04038 EDL, 2006 U.S. Dist. LEXIS 15761, *15–16 (N.D. Cal. Mar. 16, 2006); *see also Bimini Superfast Operations LLC v. Winkowski*, 994 F. Supp. 2d 103, 106 (D.C.C. 2014) (“‘Court finds that Defendants’ email correspondence with Plaintiffs is not irrelevant material. Prior to making the November 2013 final determination, Defendants would have reasonably reviewed and considered its correspondence with Plaintiffs in which Plaintiffs discussed their various cruise operations and CBP made representations regarding those operations. Accordingly, the Court finds that the emails are properly part of the administrative record.’”)

Superintendent Sholly’s texts are the type of communication contemplated by the foregoing authorities. By text, Superintendent Sholly takes issue with Montana’s comments offered in the context of NEPA regarding: its past working

relationship with federal defendants; the target bison population identified in agency management documents; brucellosis management in YNP bison; and YNP's capacity to sustain bison populations over 3,000. Superintendent Sholly's responses are relevant and have direct bearing on this case and Plaintiff's claims, especially Claims 1, 3, 4, 5, and 7.

Claims 1 and 3 involve the federal defendants' failure to acknowledge 3,000 as the baseline population for a "no action" alternative. Exhibit 1 is relevant to these claims because it evidences that, prior to even issuing a DEIS, the individual who signed the 2024 ROD (Superintendent Sholly) had disregarded Montana's concerns by characterizing 3,000 as "a political compromise" instead of the foundational basis for NEPA analysis.

Claim 4 alleges that the federal defendants had pre-decisionally identified a course of action prior to the conclusion of NEPA, rendering the process meaningless. Exhibit 1 is relevant to the claim because it evidences that, prior to the issuance of the DEIS, Superintendent Sholly was making representations as to what the decision would be. *See* Ex. 1.

Claim 5 alleges that the federal defendants failed to cooperate with Montana. *The Memorandum of Understanding Between the NPS and the State of Montana* for cooperative agency work, signed prior to the BMP effort, states that NPS will "[l]et the cooperating agency [Montana] know specifically how and where

cooperative agency data, information, or input was incorporated into, or considered in, the EIS, and how it may have influenced the decisions of the lead agency.” AR NPS_0000882. Exhibit 1 is direct evidence of how the federal defendants treated Montana’s information and input, and thus it is relevant to the claim at issue.

Claim 7 alleges that the FEIS alternatives considered degrade YNP range and natural systems, in violation of the National Park Service Organic Act, Yellowstone National Park Protection act, and the APA. Exhibit 1’s statements regarding carrying capacity, population, and a “major starvation situation” are specifically relevant to this claim.

For the foregoing reasons, an order requiring AR completion with Exhibit 1 is appropriate and respectfully requested.

B. Exhibits 1–7 are All Appropriately Supplemented to the AR.

As recognized by this Court in *Bold Alliance*, supplementation of the AR with extra-record evidence may occur:

- (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision,
- (2) if the agency has relied on documents not in the record,
- (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or
- (4) when plaintiffs make a showing of agency bad faith.

Bold Alliance, 572 F. Supp. 3d at 947 (quoting *Lands Council*, 395 F.3d at 1030).

The party seeking admission of extra-record evidence bears the initial burden of demonstrating that one of the foregoing exceptions applies. *San Luis & Delta-*

Mendota Water Auth. v. Locke, 776 F.3d 971, 992–93 (9th Cir. 2014) (citing *Fence Creek Cattle Co. v. U.S.F.S.*, 602 F.3d 1125, 1131 (9th Cir. 2010)).

As previously explained, Exhibit 1 should be incorporated to complete the AR. Alternatively, this Court should order its supplementation under *Lands Council* exceptions 1, 2, and 4. Exhibit 1 is correspondence from the decision-maker discussing key aspects of the NEPA alternatives months prior to their issuance in the 2023 DEIS, in response to comments submitted by Montana. Exhibit 1 is necessary to determine whether the agency “relied on documents not in the record” and “considered all relevant factors and has explained its decision.” *Lands Council*, 395 F.3d at 1030.

Exhibit 1 should also be supplemented pursuant to the “bad faith” factor of *Lands Council*. “Normally there must be a strong showing of bad faith or improper behavior” before a Court will supplement extra-record evidence. *Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982). Montana need not establish that federal defendants “formulated the record itself in bad faith or as the result of improper behavior.”³ *A.M.Q.A. v. Lugo*, No. 1:20-cv-1556-JLT-EPG, 2026 U.S. Dist. LEXIS 122898, *15 (E.D. Cal. June 3, 2026). Rather, Montana “must make a strong showing that bad faith or improper behavior infected the agency’s decision-

³ Montana need not argue bad faith in formulation of the record, nor would it here. The federal defendants have worked with Montana to resolve most of Montana’s AR concerns.

making process.” *Id.* at *15–16 (finding the “bad faith” exception in *Lands Council* warranted extra-record discovery where Plaintiffs “proffered significant evidence based on hard facts [that] the Government’s decision was pretextual” and reverse engineered to get to a pre-determined answer). The text messages from Superintendent Sholly constitute arbitrary and capricious pre-decisional behavior that infected and foreclosed the “hard look” required by NEPA. *See* Doc. 1 at 45. Supplementation is warranted under the fourth *Lands Council* exception.

Exhibits 2 and 3 are the draft joint environmental assessment (EA) and joint decision notice promulgated by MDOL and MFWP in 2011/2012 when Montana expanded its tolerance zone for the first time. The relevant environmental assessments and decision documents for Montana’s *second* expansion, which occurred in 2013/2015, are already part of the AR (at NPS_0040476, 0040867). Montana commented, repeatedly throughout the NEPA process, that the alternatives proposed by federal defendants failed to properly consider Montana’s tolerance zones, and undermined the principles upon which they were based. Supplementation of Exhibits 2 and 3 are appropriate to ensure that “the agency has considered all relevant factors,” particularly with regard to Montana’s tolerance zones, and pertain to Claims 1–3 of Montana’s complaint. *Lands Council*, 395 F.3d at 1030; Doc. 1 at 38–45.

Exhibits 4 and 5 are memoranda by the IBMP facilitator to IBMP partner agencies, including NPS and Montana, outlining management adjustments made to the IBMP by those agencies over periods spanning between 2000–2014 and 2000–2016. In the BMP ROD, NPS describes Alternative 1 (No Action) as reflecting “current management pursuant to the IBMP *as adjusted and implemented since 2000 through consensus decisions and annual operations plans* by the agencies involved with bison management.” AR NPS_0000842; *see also*, FEIS at AR NPS_0000381 (“Under all alternatives, the NPS would continue to meet the principal purpose of the 2000 IBMP, *as adjusted.*”) (emphasis added); AR NPS_0000389 (“The NPS would continue to meet with the other federal state and tribal agencies to coordinate bison management using the existing framework for the [IBMP] *as adjusted* which has been in place since 2001.”) (emphasis added); AR NPS_0000378, 379, 381, 389, 392, 393, 394, 399, 402, 406, 410, 412, 416, 445, 450, 506, 542, 557, and 566 (referring to the “IBMP, as adjusted”). Exhibits 4 and 5 outline adjustments made, over time. As such, they are necessary to determine “whether the agency has considered all relevant factors,” pursuant to *Lands Council*, 395 F.3d at 1030, and speak to Claims 1–3 of Montana’s complaint. Doc. 1 at 38–45.

Exhibit 6 is the 2010 DEIS issued by NPS regarding remote vaccination of YNP bison for brucellosis. The 2014 FEIS is presently part of the AR. *See* AR

NPS_0030373. The 2020 DEIS provides background and context regarding the issue of remote vaccination, particularly as that tool was viewed in 2010, and especially given NPS' continued reference to the IBMP "as adjusted" over time. *Supra*. Exhibit 6 is appropriately supplemented under the first *Lands Council* exception.

Finally Exhibit 7 is a monitoring plan created by NPS in 2008 and updated in 2011. It was intended to "evaluate the likely effects and effectiveness of a variety of management activities" that had been identified in the IBMP. Ex. 7 at 2. The plan identified "a suite of long-term monitoring and research activities for Yellowstone bison that meet the mission of the NPS and inform adaptive management." *Id.* The plan identifies "desired conditions" and "management and research objectives", including "[b]ison abundance average[ing] 3,000–3,500...", increased tolerance for bison outside YNP, and at least 50% reduction in brucellosis in bison. *Id.* Activities to achieve desired conditions include management culls/harvests, research into disease dynamics and transmission, and vaccination and brucellosis research. *Id.* at 2, 21–22. This document relates directly to Claims 1-3 of Montana's complaint and should be supplemented pursuant to the first *Lands Council* exception.

CONCLUSION

For all of the reasons stated herein, Plaintiff respectfully requests that the Court complete or supplement the AR with Exhibit 1. Plaintiff further requests that Exhibits 2–7 be supplemented into the AR.

RESPECTFULLY SUBMITTED this 2nd day of June, 2026.

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of L.R. 7.1(d)(2)(A), containing 3,451 words (excluding caption, certificate of compliance, table of contents and authorities, exhibit index, and any certificate of service), as verified by the word count feature of Microsoft Word, the word processor that created it.

/s/ Lindsey R. Simon

Lindsey R. Simon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties via CM/ECF electronic notice.

/s/ Lindsey R. Simon
Lindsey R. Simon