

No. 11-35135

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN WATERSHEDS PROJECT; BUFFALO FIELD CAMPAIGN;
TATANKA OYATE; GALLATIN WILDLIFE ASSOCIATION; NATIVE
ECOSYSTEMS COUNCIL; YELLOWSTONE BUFFALO FOUNDATION;
MEGHAN GILL; CHARLES IRESTONE; and DANIEL BRISTER,
Plaintiffs – Appellants,

v.

KENNETH SALAZAR, Secretary of the Interior; DAN WENK, Park
Superintendent, * Yellowstone National Park; NATIONAL PARK SERVICE;
LESLIE WELDON, Regional Forester, U.S. Forest Service Northern Region;
UNITED STATES FOREST SERVICE; MARY ERICKSON, Gallatin National
Forest Supervisor,
Defendants – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA (Hon. Charles C. Lovell)

FEDERAL DEFENDANTS-APPELLEES' RESPONSE BRIEF

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Counsel for Appellees-Federal Defendants is not aware of any prior or related appeals.

JURISDICTIONAL STATEMENT

Plaintiffs (collectively “Western Watersheds Project” or “WWP”) invoked the district court’s jurisdiction under 28 U.S.C. § 1331 over its complaint challenging the Federal Defendants’¹ management direction for the bison population in Yellowstone National Park.

WWP appeals from a February 14, 2011 order of the United States District Court of the District of Montana granting summary judgment on all claims in favor of the Federal Defendants. WWP filed a timely notice of appeal that same day. *See* Fed. R. App. P. 4(a)(1)(B). This Court’s jurisdiction rests on 28 U.S.C. § 1291.

¹ Defendants in this action are Kenneth Salazar, Secretary of the United States Department of the Interior; Dan Wenk, Park Superintendent, Yellowstone National Park; the National Park Service, an agency of the U.S. Department of the Interior; Leslie Weldon, Regional Forester, U.S.D.A. Forest Service Northern Region; the United States Forest Service, an agency of the U.S. Department of Agriculture; and Mary Erickson, Gallatin National Forest Supervisor.

STATEMENT OF THE ISSUES

WWP challenges the Federal Defendants' bison management in and around Yellowstone National Park ("Yellowstone") under the Interagency Bison Management Plan ("IBMP"), adopted in 2000, which established a plan to adaptively manage Yellowstone bison as wild and free-ranging while at the same time reducing the risk of transmission of brucellosis to Montana cattle. The issues on appeal are:

1. Whether the Federal Defendants must prepare a supplemental environmental impact statement to address new information under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.
2. Whether the Forest Service's adoption and implementation of the IBMP on the Gallatin National Forest violates the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604.
3. Whether the Park Service's adoption and implementation of the IBMP violates the National Park Service Organic Act ("Park Organic Act"), 16 U.S.C. § 1, and the Yellowstone Enabling Act ("Yellowstone Act"), 16 U.S.C. § 22.

STATEMENT OF THE CASE

This case concerns WWP's objection to the management of Yellowstone bison under the Interagency Bison Management Plan. The IBMP was approved in

2000 by the Federal Defendants and the State of Montana to “maintain a wild, free-ranging population of bison and address the risk of brucellosis transmission to protect the economic interest and viability of the livestock industry in the state of Montana.” SER49. Bison are an “essential component” of the park, but Yellowstone “is not a self-contained ecosystem.” *Id.* Bison periodically migrate out of the park where they interact with both humans and cattle. *Id.* Some bison have brucellosis, a contagious bacterial disease that can be transmitted to cattle. *Id.*; SER51, 301. Because bison roam through different jurisdictions, the cooperation of federal and state agencies is necessary to conserve the population and lessen the risk of transmission of brucellosis to cattle. SER49.

In 2000, the National Park Service (“Park Service”), the United States Forest Service (“Forest Service”), the Animal and Plant Health Inspection Service (“APHIS”), and the state of Montana adopted the IBMP, which consists of a three-step plan to guide management of bison and brucellosis in the greater Yellowstone area, which includes Yellowstone National Park and adjacent federal, state, and private lands outside the park. ER604. Management under the IBMP has been adjusted several times since then according to principles of adaptive management.

WWP filed suit against the Federal Defendants under NEPA, arguing that the agencies should have supplemented the environmental analysis prepared in 2000 to address new information that has developed since then. WWP also argues

that the Forest Service violated NFMA and that the Park Service violated the Park Organic Act and the Yellowstone Act. Both WWP and the Federal Defendants filed motions for summary judgment, and the district court granted judgment for the Federal Defendants. WWP now appeals.

BACKGROUND

A. The Yellowstone National Park Bison Population

The greater Yellowstone area covers approximately 20 million acres throughout Idaho, Montana, and Wyoming, SER298, including Yellowstone National Park, which provides a sanctuary for a wild and free ranging population of bison. SER433. The Interagency Bison Management Plan establishes a conservation area for bison that included all of Yellowstone National Park, two adaptive management zones outside the northern and western boundaries of the park, and three areas of the Gallatin National Forest (i.e., Eagle Creek/Bear Creek, Lee Metcalf Wilderness, Cabin Creek Recreation and Wildlife Management Area), where there are no significant wildlife/livestock conflicts and bison are allowed year round. ER712; SER515.

The greater Yellowstone area is also “the nation’s last known reservoir of the *Brucella abortus* bacterium,” SER298, 446, which has existed in the area’s bison and elk populations since it was first discovered in 1917, ER606. Brucellosis is contagious to humans and domestic animals. SER58-63, 107-08. Brucellosis can

cause pregnant cattle, elk, and bison to abort their calves and is transmitted primarily when uninfected animals come into direct contact with infected birth material. SER60-61. In humans, the disease is called undulant fever and, although incidents are rare, it can cause “debilitating” symptoms. SER302.

The most common method for brucellosis to be detected is through “serologic” tests, which identify the presence of brucellosis antibodies in milk or blood. SER61. These tests are not completely reliable for identifying brucellosis infection because some animals lack antibodies but may be infected, while others may have antibodies without an active brucellosis infection. *Id.* The IBMP identifies a need to minimize the risk of brucellosis transmission from Yellowstone bison to nearby livestock. SER66.

When Yellowstone was established in 1872, wildlife had little protection in the park, and hunting was permitted until 1887. SER41. Hunting and illegal poaching left less than 25 plains bison in central Yellowstone by 1902. SER42, 508. That same year, park officials brought an additional 21 plains bison to northern Yellowstone and started managing these bison intensively. SER41, 300; ER605.

For decades, park officials managed bison in northern Yellowstone to ensure that their “numbers [were] sufficient to guarantee perpetuation.” *Id.*; SER43. To keep the bison population at “desired levels” that were consistent with the range-

condition and carrying-capacity, bison that were infected with brucellosis or otherwise considered undesirable were removed. SER43-45, 300. The Interior Department also donated some surplus bison to preserves, municipal parks, and other institutions. *See Interior Dep't Appropriations Bill, Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 67th Cong. 45-46 (1923) (statement of Arno B. Cammerer, Acting Director of the National Park Service); SER300. In 1923, Interior requested Congressional permission to sell surplus bison to private citizens because the Yellowstone population needed to be kept to a size that “can be accommodated on the range that is available.” *Id.*; ER605. There were approximately 700 bison at that time. Congress passed a law enabling Interior to “sell or otherwise dispose of the surplus buffalo of the Yellowstone National Park herd.” 16 U.S.C. § 36. The population was maintained at less than 1,000 for several decades. SER46; ER605.

In the late 1960s, management shifted to allow the population size to “respond to environmental conditions like climate or food supply without human interference.” SER300. By the early 1980s, the population had grown to more than 2,300, and bison were “increasingly reported moving beyond the park’s boundaries into Montana.” *Id.* The migration of bison outside of Yellowstone created a variety of issues, including safety and property damage concerns for people living around

the park. SER104-06. Migrating bison can also spread brucellosis to domestic cattle in Montana, which has “direct effects on local livestock operations.” ER599.

B. Bison Management.

Within Yellowstone, the Park Service has management authority over bison, whereas outside the park, the state of Montana takes the lead. ER712. On the Gallatin National Forest (“Gallatin”), the Forest Service has concurrent authority with the state of Montana, and more broadly, APHIS regulates to reduce the spread of communicable diseases of livestock. *Id.* Because bison migrate out of the park onto public and private lands and can spread brucellosis to cattle, cooperation between these federal and state agencies to manage bison is crucial.

Before the IBMP was adopted in 2000, migrating bison were frequently killed by hunters, ranchers, and state game wardens in Montana. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398-99 (9th Cir. 1992). During the mid-1980s through 1999, more than three thousand bison that crossed out of the park’s northern or western boundaries were killed. ER300. In 1990, recognizing a need for cooperative management, the federal agencies and the State of Montana prepared an interim bison management plan. *Fund for Animals, Inc.*, 962 F.2d at 1395, 1399; ER710; SER268. This interim plan was challenged by an animal advocacy group seeking to enjoin the federal government and Montana from removing bison leaving the park. 962 F.2d at 1391. The district court denied the

injunction, and this Court upheld the district court's finding that the Park Service's actions had not decreased the number of free roaming bison and that the plan, which would help prevent the spread of brucellosis, was in the interests of the health of Montana's citizens and its livestock. *Id.* at 1400, 1402.

In 1992, the Park Service, Forest Service, APHIS, and the State of Montana executed a Memorandum of Understanding embodying their agreement concerning their roles and responsibilities in the preparation of a long-term bison management plan. ER599. In 1995, Montana sued the Park Service and APHIS, claiming that their actions were unreasonably delaying the completion of an EIS and long-term bison management plan. ER600, 710. The parties settled the case by establishing a schedule for the completion of the bison management plan. ER600. From 1990 to 1996, the Park Service and the State of Montana developed four interim plans, the last being upheld by the Ninth Circuit in two separate lawsuits. ER710; *Intertribal Bison Co-Op v. Babbitt*, 25 F. Supp. 2d 1135 (D. Mont. 1998), *aff'd*, *Greater Yellowstone Coal. v. Babbitt*, 175 F.3d 1149 (9th Cir. 1999); *Greater Yellowstone Coal. v. Babbitt*, 952 F. Supp. 1435 (D. Mont. 1996), *aff'd*, 108 F.3d 1385 (9th Cir. 1997).

After several years of negotiations and environmental analysis, the agencies adopted the IBMP, the Modified Preferred Alternative, in a Record of Decision ("ROD") issued on December 20, 2000. The IBMP consists of a three-step federal-

state plan for spatial and temporal separation of bison from cattle as a means of controlling the risk of brucellosis transmission. ER716-19. In the first step, IBMP partners attempt to keep bison within the park, capture and test of bison attempting to exit the park's northern boundaries, and permit some sero-negative bison to exit the park's western boundaries until May 15 of each year, when they are hazed back into the park. ER716-17. The second step, which would occur after grazing on an adjacent cattle allotment at Royal Teton Ranch ceases, permits some seronegative bison to graze outside the northern boundaries of the park. ER717-18. Vaccination of bison at capture facilities and the development of a remote vaccine delivery system also occur during the first and second steps. *Id.* Step three of the plan allows untested bison out of the park, and would occur only after a comprehensive vaccination program is initiated. ER719.

Because the plan progresses from step to step only when certain milestones were met, the plan employs an "adaptive management approach," which allows the "agencies to gain experience and knowledge before proceeding to the next management step." ER716; SER277-78 (explaining adaptive management and NEPA); SER268-74 (same). The ROD authorizes the agencies to "agree to modify elements of [the plan] based on research and/or adaptive management findings." ER738. This provided the agencies with "flexibility to achieve the objectives of the actions set forth in th[e] plan." *Id.* Due to the necessity of cooperation among

federal and state agencies, the plan also reconciled differing agency policies. *See* ER712; SER55.

The IBMP's impacts were thoroughly analyzed in the 1998 DEIS and 2000 FEIS. ER600-01, 711. The FEIS analyzed the consequences of adaptive management adjustments, eight alternatives in detail, including impacts on the bison population, recreation, livestock operations, socioeconomics, threatened and endangered species, other wildlife species, human health, cultural resources, and visual resources, as well as cumulative impacts. SER78-95, 111-21, 157-61.

Since it was adopted, the IBMP has been adjusted several times pursuant to adaptive management principles. In 2005, the IBMP was adjusted to allow bison hunting in Montana by licensed hunters, SER193-203, 204, 206-07, 504, and, later, by American Indians with treaty rights. SER264-65, 465. In 2007, the General Accounting Office ("GAO") conducted an audit of the IBMP ("GAO Report") and noted a failure to progress to the second step by the anticipated deadline. GAO criticized the IBMP partners generally for failing to establish metrics by which the IBMP's success could be measured. SER287-338. The agencies held numerous public meetings from August through December 2008 to develop management adjustments to address GAO's recommendations. SER451.

In December 2008, the agencies created a new adaptive management document referred to as the 2008 Adaptive Management Plan that incorporated

previously-made adaptive adjustments to the IBMP and adopted new adjustments responding to issues identified by the GAO Report. ER401-10. The new adjustments included increased monitoring of the number of bison slaughtered, as well as establishing alternatives to lethal removals, such as increased hazing, state and treaty hunting, quarantine, and sending bison to alternate areas. ER407.

Under the IBMP, the bison population has grown larger than it ever was. There were 4,700 bison in late summer 2007, SER300, and, even after culling in 2008 and 2009, there were 3,900 animals during July 2010. *See* 72 Fed. Reg. 45717, 45721-22 (Aug. 15, 2007) (describing growth in bison population); ER850²; SER389-90 (culling in 2008); SER465 (culling in 2009). Across North America, there are more than 500,000 bison, ER986, although only Yellowstone bison are managed in a way to ensure that the population is wild, free-ranging, and subject to natural evolutionary processes. ER986, 1005; SER530-36, 537, 541-43.

C. Current Litigation.

The six year statute of limitations applicable to the 2000 IBMP has passed. 28 U.S.C. § 2401(a). Hence, WWP cannot challenge the 2000 IBMP in this action.

² The district court admitted this extra-record declaration by Richard Wallen, a Wildlife Biologist at Yellowstone National Park, and its attachment, a 2010 report on a bison genetics study. Op. at 17-19. On appeal, WWP does not challenge the district court's decision to admit and consider this declaration and the attached study.

In the district court, WWP instead challenged several of the adaptive management adjustments that the federal agencies have implemented since 2000. WWP alleged that the federal agencies should have prepared a supplemental EIS to address new information. WWP also argued that the Forest Service's participation in the IBMP violates NFMA and that the Park Service's capture and slaughter of bison violates the Park Organic Act and the Yellowstone Enabling Act. Both parties moved for summary judgment and included extra-record declarations with their submissions. Both parties also moved to strike the other's submissions. Before the court issued its decision, WWP moved to enjoin implementation of the IBMP.

The district court granted the Federal Defendants' motion for summary judgment and motion to strike the extra-record evidence.³ In a thorough opinion, the district court held that none of the information pointed to by WWP constituted significant new information requiring the supplementation of the FEIS. The district court also held that the Forest Service had not violated NFMA and that the Park Service had not violated the Park Organic Act or the Yellowstone Enabling Act. WWP now appeals.

³ WWP subsequently moved for an injunction pending appeal in the district court, which the court denied on March 10, 2011.

STANDARD OF REVIEW

The Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, governs this Court’s review of the Federal Defendants’ final action. Under 5 U.S.C. § 706(2)(A), this Court must determine de novo whether the Federal Defendants’ decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998). “The relevant inquiry is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (citation omitted). A court must not “substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). A court should be particularly deferential to an agency’s decision when “the challenged decision implicates substantial agency expertise.” *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (abrogated on other grounds).

SUMMARY OF ARGUMENT

On appeal, WWP offers three arguments. None of them has merit. First, WWP argues that there is significant new information relating to bison management, and that NEPA requires the Federal Defendants to prepare a

supplemental EIS. Contrary to WWP's assertions, the record reflects that the new information does not demonstrate that the IBMP will have impacts on the environment that differ significantly from those previously considered in the FEIS. The IBMP established an adaptive management framework, under which the agencies have considered new information and made appropriate adjustments to their management strategies (including adjustments consolidated in the 2008 Adaptive Management Plan). Those adjustments were anticipated by and analyzed in the 2000 FEIS and ROD, which studied a sufficiently broad range of alternatives to ensure that the impacts of future management adjustments were adequately considered. The agencies have also prepared additional environmental analysis, such as a Draft EIS in 2010 on the remote vaccination program for bison. Throughout the implementation of the IBMP, the Federal Defendants have held numerous public meetings and have kept the public informed of bison management actions. Because none of the information pointed to by WWP demonstrates that the project will impact the environment in a significant manner not previously considered, the Federal Defendants need not prepare a supplemental EIS.

Second, WWP asserts that the Gallatin National Forest Plan ("Forest Plan"), pursuant to which the Forest Service managed the Gallatin National Forest, violates NFMA because, under the IBMP, the Forest Service is not ensuring that bison are viable on the Gallatin. This general challenge to the Forest Plan is not

justiciable because, on appeal, WWP has not challenged any of the Forest Service's site-specific actions other than the IBMP. A challenge to the IBMP is barred by the statute of limitations. 28 U.S.C. § 2401(a). This argument also fails on the merits because the record reflects that bison are being conserved throughout the greater Yellowstone area. Moreover, neither NFMA nor the Forest Plan require the Forest Service to ensure a viable population of bison on the Gallatin. The Gallatin Forest Plan requires the Forest Service to manage "big game winter range" to "meet the forage and cover needs of deer, elk, moose, and other big game species in coordination with other uses." ER768. The Forest Plan also requires the Forest Service to cooperate with other federal and state agencies concerning wildlife management on the Gallatin National Forest. Cooperation over bison management is crucial because the state of Montana has the authority to and does manage animals within its boundaries, including animals on the Gallatin. The IBMP complies with the Forest Plan because it is a cooperative federal-state plan and because it ensures sufficient winter range for big game. There is no NFMA violation here.

Finally, WWP argues that the Park Service's bison management actions violate the Park Organic Act and the Yellowstone Enabling Act. This claim is also without merit. The Park Service has express authority under the Park Organic Act and the Yellowstone Enabling Act to sell or slaughter bison. 16 U.S.C. §§ 3, 36;

see Greater Yellowstone Coal., 175 F.3d at 1150 (affirming the district court's decision in *Intertribal Bison Co-op. v. Babbitt*, 25 F. Supp. 2d 1135). The Park Service has not acted outside of its authority by adopting and implementing the IBMP. The record shows that the Park Service's determination that the IBMP will not impair park resources is not arbitrary. Since 2000 up through the present, the Park Service has continued to monitor and evaluate the effects of the IBMP on bison. The Park Service has ensured that the bison population is wild and free-ranging, avoided impairment of park resources, and has not wantonly destroyed bison. The record demonstrates that the Yellowstone bison population is being conserved. The Park Service has not violated either statute.

ARGUMENT

I. THERE IS NO NEW INFORMATION REQUIRING A SUPPLEMENTAL EIS.

WWP argues that new information requires the Federal Defendants to supplement the EIS, specifically, information relating to (1) bison genetic diversity and minimum population levels; (2) cessation of some cattle grazing outside the park; (3) less severe regulatory consequences of brucellosis outbreaks due to Montana's and APHIS's changed regulations; (4) a study concerning the risks of brucellosis transmission and the continuing need for bison management; (5) the seroprevalence rate in bison; (6) the risk of brucellosis transmission from elk to

cattle; and (7) uncertainty surrounding a test for brucellosis known as the polymerase chain reaction (“PCR”) test. Br. at 32-40, 42.

None of this information requires the agencies to prepare a supplemental EIS. The FEIS for the IBMP analyzed a sufficiently broad range of management options to ensure a comprehensive environmental analysis of bison management, future management adjustments, and associated uncertainties. WWP has not shown that any of the new information is so different from the information available during the preparation of the FEIS that it demonstrates the IBMP will significantly impact the environment in a manner not previously considered.⁴

A. NEPA requires supplemental environmental analysis based upon new information only when the new information shows the project will significantly impact the environment in a manner not already considered.

NEPA requires a federal agency to prepare an environmental impact statement (“EIS”) evaluating and informing the public about the environmental effects of a proposed major federal action that “significantly affects the quality of

⁴ On appeal, WWP has abandoned its arguments that the agencies’ recent management adjustments constitute significant changes in the IBMP that require supplemental analysis. Therefore, its reliance on *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 701-702, 704-705 (9th Cir. 1993), *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705, 707-08 (9th Cir. 1993), and *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846 (9th Cir. 2005) is misplaced, because those cases involved challenges to new or revised agency actions that triggered new NEPA processes, rather than a claim that newly available information requires supplementation.

the human environment.” 42 U.S.C. § 4332(2)(C); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The purpose of NEPA is to “insure a fully informed and well-considered decision, not necessarily a decision the [reviewing court] would have reached had they been members of the decision making unit of the agency.” *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

Supplemental environmental analysis is sometimes required when new information comes to light. “[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989). Supplementation is necessary when “new information is sufficient to show that the remaining [federal] action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.” *Id.* at 374 (citations omitted); *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) (new information must demonstrate that the project “will have a significant impact on the environment in a manner not previously evaluated and considered.”); 40 C.F.R. § 1502.9(c)(1)(i)-(ii).

A court reviews an agency’s decision not to prepare a supplemental EIS under the arbitrary and capricious standard of review. *Marsh*, 490 U.S. at 373-75. Both NEPA and relevant regulations “are silent on the issue of how agencies are to

determine the significance of new information.”⁵ *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000); *see also Price Road Neighborhood Ass’n v. Dep’t of Transp.*, 113 F.3d 1505, 1509-12 (9th Cir. 1997) (citations omitted). Courts will defer to an agencies’ expertise, 490 U.S. at 377, and decision so long as “the agency’s path may reasonably be discerned.” *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

B. Information relating to bison genetics and minimum population levels does not demonstrate that the IBMP will have any new impacts.

WWP alleges that studies conducted after the FEIS was prepared indicate that a minimum viable population must be maintained in each of the two “breeding group[s]” of Yellowstone bison in order to conserve their genetic diversity. Br. at

⁵ WWP cites to *Ocean Advocates*, 402 F.3d at 867, to argue that NEPA requires an agency to expressly consider factors outlined in 40 C.F.R. § 1508.27 when it evaluates new information. Br. at 40-42. WWP misinterprets the relevant law. In *Ocean Advocates*, the court held, even without considering the factors set forth in the regulations, that the plaintiffs had demonstrated that the Corps needed to prepare an EIS in the first place. 402 F.3d at 867. The case does not stand for the proposition that if an agency fails to evaluate every single factor set forth in 40 C.F.R. § 1508.27, the court must automatically require the agency to supplement an existing EIS. WWP also mistakenly relies on *Klamath-Siskiyou Wildlands v. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004) to argue that an agency must prepare a detailed explanation of why it declines to supplement its analysis. Br. at 31. *Klamath-Siskiyou*, a case in which the Ninth Circuit held that an Environmental Assessment’s evaluation of cumulative impacts was insufficient because there was not enough information in the document, does not apply here.

35, 43. WWP contends that the FEIS's analysis is defective because it did not assume a minimum population within each breeding group, instead assuming a minimum viable population of 580 for the whole Yellowstone population. Br. at 35. WWP misreads both the significance of the studies upon which it relies, and the record.

The record shows that the FEIS thoroughly evaluated the impacts of the IBMP on the bison population and bison genetics and adequately considered what population size is necessary to ensure the population remains genetically diverse. ER634-36, 46-48; 714; SER96. Genetic diversity is important because it allows populations to evolve and survive changing environmental conditions. ER646. The Yellowstone bison population "display[s] average levels of genetic variation when compared with other bison populations." ER646-47.

Studies available at the time the FEIS was prepared indicated that a population of at least 580 animals was necessary to preserve minimum genetic integrity. SER73. The FEIS noted, however, that selective pressures on the population, genetics, demographics, environmental randomness, and catastrophes make minimum population numbers difficult to estimate, ER648, and that non-random culling could also negatively impact genetic diversity. ER648. "[N]one of the alternatives" studied in the FEIS "[wa]s expected to reduce the bison population to 580 animals." SER73. Each of the alternatives, including the IBMP,

would maintain the population at or above 1,700 bison. ER634-36. The FEIS predicted that each alternative would maintain genetic diversity. ER670-71.

The IBMP set a target of 3,000 bison for the entire population, ER738, and set in place protections if numbers fell below 2,300 animals in a single winter. SER178. Subsequent management adjustments (2008) clarified that when the population falls to 2,300, the agencies *will increase* non-lethal management measures, and if the population decreases to 2,100, the agencies *will cease* lethal brucellosis risk management and hunting, and shift only to non-lethal management measures, thereby increasing its ability to ensure the target population. ER407 (2008 Adaptive Management Plan); ER839 (adjustments consistent with FEIS and ROD).

Under the IBMP, the Park Service continued to study bison genetics and make appropriate management adjustments. SER177. After the FEIS was prepared, several studies (the Halbert 2003, Gates 2005, and Gross 2006) suggested that the Yellowstone population consists of two genetically distinct breeding groups or subpopulations (the northern and central herds). SER190; ER1033. The Gates 2005 and Gross 2006 studies found that a population of 400 to 1,000 animals would meet the objective of achieving a 90 percent probability of retaining 90 percent of the population's heterozygosity and allelic diversity (measures of genetic diversity, SER190) for 200 years. SER266. The Gross 2006 study posited that if the two

Yellowstone herds had no interchange of bison, each herd would need a minimum of 1,000 bison, SER391, but cautioned application of its analysis because “[p]recision of [the study’s] predictions is [] not great.” *Id.*

These studies do not constitute new information requiring supplementation of the EIS. The Federal Defendants concluded, after holding public meetings on the issue, that the studies do not directly apply to the Yellowstone management scenario because there is gene flow from bison moving from the central herd into the northern herd. SER397-98, 399-425, 391. A recent study (2010 Luikart) on the issue reveals that the Yellowstone population is a single population with two breeding herds. ER850, 852-88. The herds show some genetic differences, but are not two distinct genetic subpopulations. ER850, 852-88. DNA analysis indicates that male bison disperse and contribute to gene flow between the two breeding herds. ER850, 852-88. The study predicts that conservation of 95% of current genetic (allelic) diversity over the next 100-200 years is likely when there are more than 2,000-3,000 bison in the population, regardless of the Park Service’s culling strategy. ER850; SER433. “[C]ulling to maintain population census size goals will seldom accelerate loss of genetic variation when population size remains larger than 2,000 to 3,000 individuals.” ER867.

The analysis in the FEIS and the IBMP's target population size are consistent with the recommendations of the 2010 Luikart study.⁶ ER738, 740. The FEIS evaluated the impacts of the IBMP assuming it would maintain a population of 3,000 bison. The agencies have determined that there is genetic interchange between the two herds, and therefore, maintaining a single population target will ensure genetic diversity. The target population of 3,000 falls within the population size that the 2010 Luikart study recommends is sufficient to maintain genetic diversity. SER471. Unlike in *Seattle Audubon*, 998 F.2d at 701-702, 704-705 and *Portland Audubon*, 998 F.2d at 707-08, upon which WWP relies, Br. at 33-34, the most current scientific information demonstrates that the bison population is being conserved under the IBMP. The studies relied upon by WWP do not demonstrate that the IBMP will have impacts that were not previously considered.

C. The IBMP anticipated that changes in cattle grazing in the Greater Yellowstone Area would occur.

WWP asserts that the fact that there is no longer cattle grazing in some areas of the Gallatin National Forest where cattle grazing was present when the FEIS

⁶ Actual management practices have also been consistent with the 2010 Luikart study. SER242 (2005 population size), 438, 463, 509-510 (2009 population size). The Park Service has carefully monitored the size of the population throughout the IBMP period, with regular reporting on animals that were removed and annual head counts for each of the northern and central herds.

was prepared means that the impacts of the IBMP must be reevaluated. Br. at 38. WWP's brief has not identified the areas to which it refers, although it cites to documents from the administrative record explaining that cattle grazing on the Horse Butte allotment has been eliminated and that the permit for the Wapiti allotment was approved for nonuse for 2009. Br. at 38 (citing ER378, 531, 787). This information does not demonstrate that the FEIS must be supplemented.

The record reflects that the FEIS anticipated that cattle grazing would cease in some parts of the greater Yellowstone area. The FEIS analyzed the impacts of removing cattle from grazing allotments, including the Horse Butte and Wapiti allotments, in Alternatives 2, 3, and 7. SER122, 128, 130. At the time the FEIS was prepared, about 364 cow-calf pairs were grazed in Horse Butte and Wapiti areas. ER616, 842. The Federal Defendants determined that closure of those and other allotments would provide for the "largest and broadest distribution of bison," create "[t]he greatest potential for bison movements beyond the boundaries of the" special management areas where bison would be allowed, and could result in increased scrutiny of Montana's livestock industry as a result of the increased perceived threat of brucellosis transmission. SER130-33.

As contemplated by the FEIS, cattle grazing on the Horse Butte allotment ceased. The Federal Defendants acknowledged this change in a 2005 Status Review, SER217, 224, and made corresponding adaptive management adjustments

in 2005, 2006, 2008, and 2009 to allow more untested bison to migrate out of Yellowstone to the west of the park onto Horse Butte. *See* ER385 (2005); ER387 (2006); SER392; ER401 (2008); SER450, 456-57, 462, 467 (2009); ER484-85 (2009 Annual Review); SER539 (2010 discussion of Horse Butte); Park Service, Draft Environmental Impact Statement for the Brucellosis Remote Vaccination Program for Bison in Yellowstone National Park (“2010 DEIS”), 15, 21, 53 (March 24, 2010), available at ibmp.info/Library/RemoteVaccinationEA.pdf. These adaptive management adjustments are consistent with the FEIS and ROD. ER837-39.

The Forest Service also addressed the Horse Butte changes when it renewed Montana’s permit for the Horse Butte Bison Capture Facility. The Forest Service explained that in spite of the absence of cattle on that allotment, the operation of the capture facility was still necessary to keep migrating bison separate from cattle grazing nearby on the southwest side of the Horse Butte peninsula and north of Hebgen Lake. *See* ER495-96, 500, 505 (explaining that bison can and do swim across the lake, walk across it when it is frozen, or walk around the water’s edge to enter areas occupied by cattle); SER224 (explaining that permittees graze cattle adjacent to Horse Butte allotment). The record thus demonstrates that the Federal Defendants anticipated and analyzed impacts of changes in Horse Butte cattle

grazing in the FEIS, and have made appropriate management adjustments beneficial for bison within the framework of the IBMP.

As to the Wapiti allotment, one grazing permit on that allotment was approved for nonuse in 2007, 2008 and 2009. ER787 (USFS Doc 677) (operating plan); *see also* SER18-26 (Jarrett Brothers permit). Although not cited by WWP, the record also reflects that there is a second permit for cattle grazing on the Wapiti allotment, which was approved for nonuse only in 2009 to allow the livestock operator a chance to determine whether another allotment (Jackson Creek) would be sufficient to graze its cattle herd. SER10-17 (Camp Creek permit); SER5-9 (operating plan). In 2008, the Forest Service proposed a plan to revise the Wapiti Grazing Allotment to improve rangeland over the long-term, while providing for domestic livestock grazing. SER27. The proposed plan did not allow bison on the allotment because the Forest Plan directs the area to be managed to emphasize livestock grazing and the IBMP specifies that bison will not occupy that area. SER30. The proposal noted, however, that should the agencies adjust the IBMP to permit bison into the area or should the Forest Plan be amended, the Forest Service “would have the ability to modify or cancel the grazing permit at that time to accommodate use of the Wapiti area by bison.” *Id.* Because that area is still being managed for livestock grazing, the nonuse of the allotment in 2009 does not present any information indicating that the impacts of the IBMP have changed.

WWP relies upon *Russell Country Sportsmen v. United States Forest Service*, --- F.3d ---, 2011 WL 4820942, at *8 (9th Cir. Oct. 12, 2011), which cites *Massachusetts v. Watt*, 716 F.2d 946, 948-49 (1st Cir. 1983), to assert that changes in cattle grazing alter the IBMP's cost-benefit analysis, thereby necessitating supplemental analysis.⁷ Br. at 38. *Russell Country* does not support WWP's argument and *Watt* is distinguishable on its facts. *Russell Country* does not stand for the proposition that an agency must supplement an EIS every time there is new information which might indicate that a project's "overall cost-benefit analysis" may have changed. *Id.* at *5-*8. Instead, the case cited *Watt* for the proposition that a "new alternative" to a project "may lessen environmental impacts and yet fall outside the range of alternatives discussed in a draft EIS" when the new alternative "also alter[s] the overall cost-benefit analysis." *Id.* at *8. *Watt* is distinguishable because the changes that necessitated supplemental analysis in that case, unlike here, were truly radical—new estimates of available oil were 97% lower than the amounts estimated in the FEIS. 716 F.2d at 948-49. Here, changes in cattle grazing were anticipated and were accounted for in adaptive management

⁷ To the extent that WWP attempts to argue that NEPA requires analysis of non-environmental impacts of a project, Br. at 38, that argument is similarly unavailing. NEPA requires only an analysis of a project's impacts on the environment. *Metro Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983); see also 42 U.S.C. § 4332(C); 40 C.F.R. § 1500.1(c).

practices. Also, unlike in the situations presented in both *Russell Country* and *Watt*, the agencies here adequately evaluated potential changes in cattle grazing. WWP fails to show how the changes in cattle grazing demonstrate that the IBMP will have any impacts that were not previously considered.

D. The changed regulatory consequences of brucellosis outbreaks in Montana do not mean that bison management is no longer necessary because there still exists the possibility of brucellosis transmission and there are still consequences of brucellosis outbreaks.

WWP asserts that changes to Montana's and APHIS's regulations reduce the impacts of brucellosis outbreaks on the livestock industry and thus require supplementation of the EIS. Br. at 38-39. WWP cites Montana's and APHIS's regulations in its brief, but does not explain the regulations, how the regulations changed, and why any changes constituted significant information that had not been previously analyzed in the FEIS. *Id.* at 39. "Judges are not like pigs, hunting for truffles buried in briefs." *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 652 F.3d 999, 1010-11 (9th Cir. 2011) (citations omitted). Because WWP has failed to explain this argument, it has been waived. *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (arguments made in passing and inadequately briefed are waived). It is also inappropriate for this Court to consider this argument because it was not raised before the district court. *See Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) (courts do not consider issues raised for the first time on appeal).

Even if considered on the merits, WWP's argument is not persuasive.

Montana changed its regulations in January 2010 after the state regained its Class Free status. "Class Free" status means that all cattle herds with the state were free of brucellosis from a period of 12 consecutive months preceding classification. 9 C.F.R. § 78.1. The regulations establish designated surveillance areas in several Montana counties and require brucellosis testing and vaccination in those areas because cattle there may be exposed to brucellosis from wildlife. Admin. R. Mont. §§ 32.3.433 to 32.3.437 (Feb. 11, 2011); *see* FAQ – Brucellosis & the Designated Surveillance Area, *available at* http://liv.mt.gov/brucellosis/dsa_faq.mcp.

The APHIS regulations establish procedures for tracing and documenting interstate shipment of cattle, bison, and swine. 9 C.F.R. §§ 78.1-78.24. The regulations were amended effective December 27, 2010 to, among other things, remove the provision for automatic reclassification of a Class Free state to a lower status if two or more herds are found to have brucellosis within a two-year period or if a single brucellosis-affected herd is not depopulated within 60 days. *See* 75 Fed. Reg. 81090 (Dec. 27, 2010); 76 Fed. Reg. 6322-01 (Feb. 4, 2011).

Downgrading a state's status has serious economic impacts on livestock growers because, without Class Free status, among other limitations, a grower cannot ship cattle out of the state without first testing the cattle. ER610. APHIS changed its regulations because it concluded that whole herd depopulation was not necessary

to manage brucellosis; individual animals could be tested and removed without placing the whole herd at risk. 75 Fed. Reg. at 81091. APHIS also found that flexibility in reclassifying a state would allow it to direct its scarce resources more effectively and efficiently. 75 Fed. Reg. at 81091.

Neither of these regulatory changes constitutes significant new information. Under the Montana regulations, cattle operators in the greater Yellowstone area must still test their cattle for brucellosis. Admin. R. Mont. § 32.3.435. Under the new APHIS rule, cattle exposed to brucellosis must still be tested, and, if found positive, slaughtered or quarantined. 9 C.F.R. §§ 78.1, 78.7-78.8. APHIS may still lower Montana's brucellosis status if the state fails to comply with the regulatory conditions for maintaining Class Free status. 9 C.F.R. § 78.40. The mere fact that the reduction in status is not automatic does not mean that it may not occur. Thus, there are still regulatory and economic consequences of cattle contracting brucellosis and a corresponding need for bison management to minimize the probability of such occurrences.

Nor do the regulatory changes present information that demonstrates the IBMP will have impacts not previously considered in the FEIS. Because the IBMP was based on the concept of increasing tolerance for bison in certain areas outside of the park, while also "preventing socioeconomic impacts to livestock operators," the FEIS analyzed measures to increase tolerance and reduce economic impacts to

livestock operators. SER124-31; ER741. The FEIS also noted that APHIS rules could possibly provide flexibility in the downgrading process in order to reduce economic impacts of a brucellosis outbreak in Montana. ER611; *see also* SER448-49. APHIS agreed to advocate on Montana's behalf to concerned states, fund certification of at-risk cattle as brucellosis-free, conduct special investigations of any brucellosis-infected cattle found within areas where bison are permitted, and pay for additional testing and vaccination of cattle. ER738-39, 741. The FEIS anticipated changes in the way APHIS, the state of Montana, and other states would treat the risk and consequences of brucellosis-infected cattle. WWP wholly fails to show how the regulatory changes present new information indicating that the IBMP will have impacts that were not previously considered.

E. The 2009 Kilpatrick study concerning the risk of brucellosis transmission from bison to cattle does not indicate that bison management is no longer necessary.

WWP alleges that the presumption that “hands-on bison management was necessary” and the “baseline for measuring impacts to the livestock industry” of “no bison management,” have both changed because “brucellosis risk transmission was quantified” at zero in a 2009 Kilpatrick study. Br. at 39. As a result, WWP contends bison management is no longer necessary and this circumstance requires a supplemental EIS. *Id.* This argument is without merit.

WWP misinterprets the 2009 Kilpatrick study, which does not support the proposition that the risk of brucellosis transmission is near zero under all scenarios and that bison management is therefore not necessary. The 2009 Kilpatrick article identifies a reduction in the risk of brucellosis transmission, but attributes this reduction to management under the IBMP. SER505. Under the IBMP, in which spatial and temporal separation of bison and cattle is maintained, and only a limited number of bison are permitted in certain carefully monitored areas outside the park, the risk of transmission of brucellosis from bison to cattle was low or near zero in many years. ER950. Risk of brucellosis transmission was significantly higher in years when winter was severe and more bison migrated from the park. ER953. The article concluded that the “risk of transmission will change” as bison start to occupy additional area outside Yellowstone. ER957.

The Federal Defendants considered the 2009 Kilpatrick study and concluded that it supports further use of “adaptive management” strategies under the IBMP to provide greater tolerance for bison outside the park while at the same time reducing the risk of brucellosis transmission. SER504, 511; *see also* Park Service, Draft Environmental Impact Statement for the Brucellosis Remote Vaccination Program for Bison in Yellowstone National Park, at 12, 55, 82 available at ibmp.info/Library/RemoteVaccinationEA.pdf (noting that the Kilpatrick 2009 study demonstrates that implementation of the IBMP has greatly reduced the risk

of brucellosis transmission from bison to cattle). Because the goals of the IBMP are to increase bison tolerance and control the risk of brucellosis transmission, SER66; ER741, 722, the fact that the 2009 Kilpatrick study demonstrates that there can be greater tolerance for bison and that there has been a reduction in a risk of brucellosis transmission does not constitute new information that the agencies must consider in a supplemental EIS.

F. Information about seroprevalence rates does not indicate that bison management is ineffective.

WWP contends the EIS must be supplemented to address “evidence that the seroprevalence rate in bison has increased or remained the same under the IBMP, rather than decreasing as predicted” by the FEIS. Br. at 39.⁸ This argument overlooks the fact that the agencies have recently evaluated this information and provided opportunities for public comment in their preparation of a Draft EIS analyzing whether to proceed with developing a remote vaccination program for bison. *See* SER467; Park Service, Draft Environmental Impact Statement for the Brucellosis Remote Vaccination Program for Bison in Yellowstone National Park (“2010 DEIS”), 12, 80-84, 89, 93-94 (March 24, 2010), available at ibmp.info/Library/RemoteVaccinationEA.pdf; *see also* 75 Fed. Reg. 30022 (May 28, 2010).

⁸ WWP has not made this argument “specifically and distinctly,” and therefore this Court should not consider it. *Indep. Towers of Wash.*, 350 F.3d at 929.

The Federal Defendants need not supplement the FEIS. The FEIS analyzed alternatives that incorporated vaccination of bison for brucellosis, including the IBMP. SER78. The IBMP anticipated that a vaccination program would be developed and implemented over time. SER212. The vaccination program could help “lower the brucellosis infection rate of Yellowstone bison,” which was estimated at between 40% and 60%. 2010 DEIS at v-vi; *see also* SER73, 170, 183; ER726. Reduction in infection (seroprevalence) rates, could result in the release of untested bison outside the park. 2010 DEIS at v-vi; *see also* SER170; ER726. Implementation of a vaccination program and removal of some seropositive female bison under the IBMP would reduce the estimated 40-60% seroprevalence rate. SER73, 183. Vaccination would be implemented incrementally, when a safe vaccine became available, SER210, 212, and the IBMP, “inherently a long-term adaptive management program,” would take many years to be effective at reducing seroprevalence rates. SER427.

The vaccination program has been sporadically and opportunistically implemented under the IBMP. *See* 2010 DEIS at vii, 32-35; SER309-10, 213-14. It is therefore no surprise that studies show that seroprevalence rates in female bison has remained constant or increased slightly during the IBMP implementation period. SER395-96, 443, 508. Because the vaccination program has not been fully

implemented, information relating to current seroprevalence rates does not indicate that the IBMP is impacting the environment in a manner not previously considered.

Nevertheless, the agencies analyzed information on seroprevalence rates and the impacts of the IBMP's vaccination efforts in the 2010 DEIS. The 2010 DEIS explains that "the small proportion of bison vaccinated [under current management practices] would likely have a minimal effect on reducing brucellosis infection in the population." 2010 DEIS at 81-84; *see also* 2010 DEIS at 46-47 (seroprevalence reduction would be "minor to moderate"). There would thus be "little impact on reducing infection and managing transmission risk to cattle." *Id.* at 84. Because the seroprevalence information does not indicate that the impacts of the IBMP are significantly different from those previously anticipated, and because the Federal Defendants have already prepared a new Draft EIS, there is no need for the Federal Defendants to further supplement its environmental analysis.

G. Studies of the risk of brucellosis transmission from elk to cattle do not demonstrate that bison management is unnecessary.

WWP asserts that the FEIS must be supplemented because "transmissions by and increased brucellosis prevalence in elk undermines the Agencies' presumption that elk are not a transmission risk, and that bison management was not only necessary but sufficient." Br. at 39. WWP's single sentence on this subject fails to explain both the information upon which it appears to rely and the

alleged import of that information. Hence, this argument is waived. *See Indep. Towers of Wash.*, 350 F.3d at 929.

The information upon which WWP appears to rely comes from two studies. One study, Cross 2010, indicates that seroprevalence in four to six free ranging elk populations in Wyoming increased from 0-7% in 1991-1992 to 8-20% in 2006-2007. SER517-18. Another study, Beja-Pereira 2009, posited that elk were responsible for brucellosis outbreaks in cattle in Idaho and Wyoming. SER488. The findings of the Beja-Pereira 2009 study were consistent with the fact that elk in those areas commingle with cattle, whereas bison are kept separate through management by government agencies. SER488. However, the “origin (elk versus bison) and management of brucellosis outbreaks in cattle are controversial and uncertain” and there are not a lot of data on these issues. SER486.

These studies do not present significant information that was not previously considered in the FEIS. The FEIS analyzed the fact that elk are carriers of brucellosis. ER624-25; SER162-63. Montana elk in the northern portion of the greater Yellowstone area exhibited seroprevalence rates of approximately 0.3-9.5%. ER624. Elk in Wyoming in the southern portion of the greater Yellowstone area had much higher seroprevalence rates ranging from 3% to 65%. *Id.* The FEIS nevertheless rejected from further analysis the “[c]ontrol or eradication of brucellosis in elk” as an alternative to bison management under the IBMP.

SER70. First, the IBMP was designed to “maintain a wild, free-ranging population of bison” and address the risk of transmission from those bison to cattle, not to eradicate brucellosis in bison or manage elk. *Id.* The IBMP therefore focused on bison, and not elk, management. SER427. Second, the FEIS found that the lower seroprevalence rates of elk in Montana “suggests that the risk of transmission from those elk to cattle is lower than that of bison.” ER625. Because seroprevalence in northern greater Yellowstone area elk populations was 1%-2% and elk behave in a way that reduces the risk of transmitting brucellosis, SER70, elk in Montana were “not considered to present enough of a risk of transmission to warrant risk management actions such as those being proposed for bison.” ER625. Third, although the FEIS noted that brucellosis could not be eradicated in bison until it was eradicated in elk, the eradication of brucellosis in elk was not possible due to “feedground situations in Wyoming and Idaho where elk are congregating at a time when abortions are occurring.” SER70. The FEIS explained that though the proposed action would not include elk management, “[s]eparate discussions and planning efforts are underway to address the issue of high seropositivity in southern greater Yellowstone area elk herds and the risk they present of transmitting brucellosis to cattle.” ER625.

In 2008, there were two incidents of brucellosis transmission from *elk* to cattle in Idaho and Montana. ER934. The agencies acknowledged that elk play a

role in maintaining brucellosis in the ecosystem and that there are studies indicating that elk seroprevalence rates are increasing in certain parts of the greater Yellowstone area. 2010 DEIS at 2, 21, 26, 54-55.

However, subsequent developments have not indicated a high frequency of transmissions from elk to cattle, and hence there is no need for the agencies to actively manage elk. *See* ER934. A recent study, Proffitt et al. 2010, indicates that while bison and elk are maintenance hosts for brucellosis, bison to elk transmission is rare and the rate of infection among northern greater Yellowstone area elk is still low (2-4% seropositive). SER519, 526. The study did not indicate that bison management is no longer necessary. Further, as discussed above, the 2009 Kilpatrick study indicates that the IBMP is effective at preventing brucellosis transmission from Yellowstone bison to cattle. SER504-05. The record reflects that the Federal Defendants thoroughly evaluated the risk of transmission of brucellosis from elk and determined that the risk of transmission from Montana elk to cattle is still relatively low. Nothing about the Wyoming and Idaho studies cited by WWP indicates a need for the Federal Defendants to supplement their analysis.

H. The Polymerase Chain Reaction (“PCR”) Test does not change the impacts of bison management because it is not available for use in bison.

WWP alleges that the FEIS is insufficient because “uncertainty and controversy about the readiness of the PCR test for actual brucellosis infection,” could “impact management actions and the bison population by affecting the

number of bison killed based upon brucellosis testing.” Br. at 42. WWP did not bother to explain what the PCR test is or what “uncertainty and controversy” surrounds it; hence, this argument has been abandoned. *Indep. Towers of Wash.*, 350 F.3d at 929.

Should the Court address this argument, it should find that the existence of the PCR test does not present significant new information warranting NEPA supplementation. The PCR test is designed to identify active brucellosis infections in bison, rather than testing whether the animal has developed antibodies to brucellosis (which is how the current test determines the presence of infection). The record shows that the PCR test is not ready for use in bison and may never be suitable for use in bison. ER1040; *see also* 2010 DEIS at 72-73. In 2007, the inventors of the PCR test reported that the studies of the usage of the PCR test in cattle, bison, and elk, “suggest the application of the assay for blood testing may be best suited to cattle, as results in bison have largely been negative (no positive results compared to culture results for the same animals), and the sampling for elk has been too limited to draw definitive conclusions.” ER1030. The Federal Defendants are studying the issue, SER188, but there is no new test available for use in bison. *See* 2010 DEIS at 72-73; *see also* SER283-84 (discussing vaccines).

In summary, none of the new information relied upon by WWP demonstrates that the IBMP will have any significant impacts not previously considered in the ample and thorough FEIS.

II. THE FOREST SERVICE’S IMPLEMENTATION OF THE IBMP IS CONSISTENT WITH NFMA.

WWP makes two claims relating to the validity of the Forest Service’s actions under NFMA. WWP first argues that the Gallatin National Forest Plan, under which the Gallatin National Forest is managed, is invalid because it provides no specific guidance relating to bison. WWP next contends that the Forest Service’s bison management actions under the IBMP violate NFMA because the Forest Service is not managing habitat to ensure bison viability on the Gallatin National Forest. Both of these arguments fail.

A. WWP’s challenge to the Forest Plan is not justiciable.

WWP broadly argues that the Forest Plan is invalid because NFMA requires the Forest Plan to provide guidance for the management of bison. Br. at 44-47.

However, a “general challenge to a forest plan untethered to any specific or concrete harm [is] not ripe for adjudication and therefore not justiciable.”

Wilderness Soc’y v. Thomas, 188 F.3d 1130, 1133-34 (9th Cir. 1999); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732 (1998).

Under NFMA, forest management occurs at two levels. At the first level, a broad and programmatic Forest Plan is developed to guide management decisions. Forest Plans must identify broad planning goals, objectives, and guidelines for management of forest resources to “provide for multiple use and sustained yield of the products and services” derived from the National Forests. 16 U.S.C. §§ 1604(e)(1), 1604(g)(1)-(3). At the second level, the Forest Service implements the Forest Plan through site-specific projects, which it must ensure are consistent with the Forest Plan. 16 U.S.C. § 1604(i); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167-68 (10th Cir. 1999); *Ohio Forestry Ass’n*, 523 U.S. at 729-30; *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1512 (9th Cir. 1992).

For a “challenge to a forest plan to be justiciable under [NFMA], [a] plaintiff[] must allege . . . a site-specific injury causally related to an alleged defect in the forest plan.” *Wilderness Soc’y*, 188 F.3d at 1133-34 (*citing Ohio Forestry Ass’n*, 523 U.S. at 732). WWP alleges that the Forest Plan is inadequate because the Forest Service’s adoption and continuing implementation of the 2000 IBMP violates NFMA. Br. at 48. However, a challenge to the 2000 IBMP is foreclosed by the statute of limitations. 28 U.S.C. § 2401(a). And though WWP challenged some of the Forest Service’s more recent management actions in the district court, such as the Forest Service’s 2009 renewal of the Horse Butte Capture Facility Special Use Permit or its issuance of the Royal Teton Ranch Special Use Permit,

WWP's brief on appeal contains no arguments relating to those actions.⁹ WWP cannot press, as it does before this Court, a generalized challenge to Forest Service management. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

B. The Gallatin National Forest Plan Complies with NFMA.

Assuming WWP's NFMA claim is justiciable (which it is not), WWP fails to identify any specific Forest Service actions in its opening brief that result in a violation of the Forest Plan or demonstrate that the Forest Plan is inconsistent with NFMA. Instead, WWP broadly alleges that the Forest Plan does not comply with NFMA because there is not sufficient habitat for bison on the Gallatin National Forest. This argument fails. First, the record belies WWP's claim, demonstrating that there is ample habitat for bison and other wildlife on the Gallatin National Forest, which migrating bison graze upon as permitted under the IBMP, and that

⁹ Though WWP briefly mentions the Horse Butte permit and "cattle grazing" decisions in its brief, it never specifically argues that the renewal of the Horse Butte permit was invalid. Br. at 50. Instead it argues that the Forest Service is violating "NFMA by taking bison management actions and deferring solely to the IBMP without guidance," and cites the Horse Butte permit to argue that "[t]he Forest Service's reliance on the IBMP rather than its Forest Plan is evident." *Id.* Similarly, WWP states that the Forest Service "defers to the IBMP in assessing renewal of cattle grazing in potential bison habitat," *id.*, but does not challenge the Forest Service's actions with respect to any particular grazing allotments. These allegations, without more, do not constitute challenges to site-specific final agency action. Even so, the record reflects that the Forest Service determined that those actions comply with the Forest Plan and NFMA and that determination is not arbitrary. *See, e.g.,* ER465-508, 465-78; SER5-17, 426.

the bison population is viable in the greater Yellowstone area. Second, the Forest Service's management of bison is consistent with the Forest Plan, which sets forth guidance on habitat for big game. WWP has not identified any problem with the Forest Plan's guidance. Last, the Forest Plan requires that the Forest Service manage bison in conjunction with the state of Montana. The Forest Service has done so under the IBMP. WWP's dissatisfaction with those policy choices does not mean that they violate NFMA.

i. There is ample bison habitat on the Forest and bison are viable within the Yellowstone ecosystem.

WWP's claim that the Yellowstone bison population is not viable is undermined by the record. The record demonstrates that Yellowstone bison are viable throughout the greater Yellowstone area, due in no small part to the IBMP. *See* Sections A-B, I.B., *supra*. Bison have historically been absent from the Gallatin National Forest, migrating there only occasionally to forage. Under the IBMP, bison are now allowed to migrate on certain parts of the Forest at certain times of the year. In addition, the IBMP establishes mechanisms to ensure a minimum viable bison population, with a target population of 3,000 animals, which will maintain its genetic diversity in the long term. ER613-14, 634-35; SER78, 171; *see* Section I.B, *supra*. The IBMP maintains the bison population as a self-sustaining, genetically diverse population, ER614; SER67, 97-98, that is not threatened or endangered throughout any part of its range, and "has continued to

grow despite culling for population and brucellosis control.” 72 Fed. Reg. 45717, 45721-22 (Aug. 15, 2007) (rejecting petition to list the Yellowstone bison population under the Endangered Species Act). There is no merit to WWP’s argument that the Yellowstone bison are not viable.

ii. The Gallatin National Forest Plan and the IBMP comply with NFMA.

NFMA broadly requires that forest management plans be developed to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to *meet overall multiple-use objectives*.” 16 U.S.C. § 1604(g)(3)(B) (emphasis added); *see also* Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”), 16 U.S.C. §§ 528-531 (forest must be managed for multiple uses); *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (MUSYA provides agency with substantial discretion). Relevant regulations in effect at the time provided that “wildlife habitat shall be managed to maintain viable populations of existing native . . . species in the planning area.” 36 C.F.R. § 219.19 (1982). The relevant law does not require that the Gallatin Forest Plan establish standards to maintain habitat for bison or that the Forest Service ensure the existence of a bison population that lives exclusively on the Gallatin Forest to the exclusion of other forest uses. *See Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (NFMA does not require an agency to select alternatives that provide the highest likelihood of species viability to the exclusion

of other Forest uses). Providing for diversity of plant and animal communities is one of many forest management goals, which the Forest Service must balance with other competing and sometimes inconsistent uses (here, livestock grazing). *Id.*

The Forest Plan complied with NFMA, MUSYA, and the 1982 regulations by creating guidelines and standards for wildlife management. The Forest Plan sets forth a goal of “provid[ing] habitat for viable populations of all indigenous wildlife species and for increasing populations of big game animals.” ER751. This goal was to be accomplished by “[m]anag[ing] [] wildlife habitat [to] emphasize forage and cover needs on big game winter range” for animals such as deer, elk, moose, and other game species, “in coordination with other uses.” ER753, 754, 767, 768. And though the Forest Plan does not expressly mention bison, ER488,¹⁰ the Forest Plan identifies elk as a management indicator species for “big game” species, which includes bison. *Id.* at II-18, 19. The Forest Plan’s designation of elk as a

¹⁰ WWP cites to ER488 in the administrative record to argue that the Forest Service “conceded the Forest Plan contains no management direction for bison.” Br. at 48. WWP takes this document out of context. The cited page is a part of the Forest Service’s Decision Memo concerning the renewal of the permit for the Horse Butte Bison Capture Facility. There, the Forest Service states that the permit decision is consistent with the Forest Plan, which “contains no specific direction relevant to management of bison,” but provides guidance for coordinating management with other agencies and for issuing special use permits. ER488. The statement is best read as meaning that the Forest Plan does not have any standards relevant to federal action at issue—the bison capture facility.

management indicator species is reasonable.¹¹ Elk and bison share habitat, eat similar foods, and are both considered “big game.” SER102-03, 135-36; ER616. There is no evidence in the record that elk habitat is somehow unsuitable for bison. WWP has not demonstrated that Forest Plan violates NFMA.

Nor has WWP demonstrated that the Forest Service’s adoption and implementation of the IBMP is inconsistent with the Forest Plan. NFMA, MUSYA, applicable regulations, and the Forest Plan do not specify how the Forest Service must demonstrate that any site-specific plans it adopts, such as the IBMP, adequately provides for wildlife viability. *Lands Council v. McNair*, 629 F.3d 1070, 1081 (9th Cir. 2010); *Lands Council*, 537 F.3d at 992. The Forest Service is therefore afforded substantial discretion under the applicable law. *Lands Council*, 629 F.3d at 1081.

¹¹ WWP relies on *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 933 (9th Cir. 2010) to argue that if a species (i.e. bison) is not actually present in a project area, it cannot be considered viable there. Br. at 46. *Tidwell* does not support that proposition. In *Tidwell*, the court found that using sage grouse habitat as a proxy to assess viability for sage grouse, which was itself a proxy (management indicator species) for sagebrush communities is “questionable” when sage grouse is absent. 599 F.3d at 933. Unlike the sage grouse, elk (the management indicator species for big game) are present on the forest. SER99, 103, 134; SER135-36. And so are bison under conditions set forth in the IBMP, which reflects careful consideration of appropriate uses of the Gallatin and a compromise between multiple federal and state agencies. *Tidwell* is simply irrelevant to this case.

The Forest Service evaluated the IBMP and concluded that it is consistent with the Forest Plan's guidance.¹² SER73, 135-56, 171. Under the IBMP, "standards for range condition" would be "met in accordance with" the Forest Plan. SER73. Range conditions could support a limited number of bison. SER77-79 (describing number of bison that could be supported in Eagle Creek/Bear Creek); ER610 (Eagle Creek is forest land). The IBMP would also provide more winter habitat for elk, mule deer, bighorn sheep, and pronghorn, SER135-36, 153-55, as required by the Forest Plan, SER3.

Since adopting the IBMP, the Forest Service has continued to ensure that its actions comply with the Forest Plan.¹³ When renewing the permit for the Horse Butte Bison Capture Facility (a facility in which bison exiting the park are captured), for example, the Forest Service evaluated its action for consistency with the Forest Plan. ER479. The Forest Service concluded that the only guidance

¹² Though not challenged here, the FEIS also determined that operation of a bison capture facility sited on Forest land would also satisfy the Forest Plan's "visual quality objectives." SER74, 110.

¹³ WWP argues that the Forest Service cannot rely "on documents outside the Forest Plan—e.g. the IBMP and related decisions" to "'save' its bison management actions from NFMA violations," citing to *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 970 (9th Cir. 2002). Br. at 49. *Rittenhouse* does not apply here because, in that case, the Forest Service evaluated a timber sale using a definition of old growth that was inconsistent with the definition set forth in the Forest Plan. Here, the Forest Plan itself establishes standards for wildlife habitat and cooperation among federal and state agencies.

relevant to the permit renewal decision directed the Forest Service to coordinate its management decisions with other federal and state agencies. ER480-81 (limiting scope of document to the renewal of the permit); ER488 (stating there is no direction relevant to management of bison). The Forest Service concluded that the adjustment was consistent with that guidance. ER488. Similarly, when renewing grazing permits, the Forest Service has considered Forest Plan guidance that emphasizes livestock grazing in those areas, as well as the fact that bison will not be tolerated by Montana in those areas, and determined that renewal of those permits is appropriate. *See* ER796, 799 (Cache-Eldridge Allotment); ER801, 804 (Wapiti Allotment). There is no evidence in the record to support WWP's assertion, Br. at 51-53, that the IBMP violates NFMA.

iii. The Forest Plan requires the Forest Service to manage bison cooperatively with the state of Montana.

WWP complains that the IBMP does not permit bison to graze throughout the entire Gallatin Forest year-round. But the Forest Plan requires the Forest Service to manage bison cooperatively with the state of Montana, which it has done under the IBMP. ER751, 767. States have “historical police powers to manage wildlife on federal lands within its borders” unless Congress manifests a contrary purpose. *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002), Congress has not manifested a contrary purpose here. *See, e.g.*, 16 U.S.C. § 528 (“Nothing [in the MUSYA] shall be construed as affecting the jurisdiction or

responsibilities of the several States with respect to wildlife and fish on the national forests.”). Montana has therefore historically not allowed bison to migrate onto Forest land in order to prevent the spread of brucellosis to cattle that graze on adjacent Forest grazing allotments and private land. SER35, 280; *see also Intertribal Bison Cooperative*, 25 F. Supp. 2d at 1137. Bison migrating out of the park and into Forest and private land in Montana have generally been killed because “some members of the population were infected with brucellosis.” SER268, 286, 430-31. The IBMP has changed that policy by permitting bison to migrate on the Gallatin in certain situations.

The IBMP is not invalid under NFMA because it does not allow more bison to migrate on larger portions of the Forest. NFMA does not require the Forest Service to override a cooperative federal-state management plan designed to ensure a free ranging bison herd while controlling the spread of a contagious disease. Instead, courts have afforded the Forest Service broad latitude to determine how to best meet NFMA’s diversity standard. *See Lands Council*, 537 F.3d at 992; *Lands Council*, 629 F.3d at 1081. And the Forest Plan requires cooperation with other federal and state agencies. The Forest Service acted consistently with the Forest Plan and NFMA by developing a joint federal-state plan that provides bison with access to portions of the Gallatin Forest while also ensuring that the Forest can be used for livestock grazing.

III. THE PARK SERVICE’S MANAGEMENT OF BISON DOES NOT VIOLATE THE PARK ORGANIC ACT OR THE YELLOWSTONE ENABLING ACT.

A. The Park Service has statutory discretion to lethally remove bison.

WWP argues that the Park Service does not have the ability to lethally remove bison under the Park Organic Act and the Yellowstone Enabling Act. Br. at 58-60. This argument ignores the plain language of those statutes, which expressly grant the Park Service the discretion to lethally remove Yellowstone bison.¹⁴

The National Park Service Organic Act provides that the Park Service is to “conserve the scenery and the natural and historic objects and the wild life [in the national parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. The Park Organic Act also authorizes the agency to make regulations that it deems “necessary or proper for the use and management of the parks” and to “provide in his discretion for the destruction of such animals . . . as may be detrimental to the use of any of said parks, monuments, or reservations.” 16 U.S.C. § 3. The “Park Service has broad discretion in determining which avenues best achieve the Park Organic Act’s mandate.” *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996) (quotations omitted).

¹⁴ Aside from the merits, WWP’s claim must be dismissed because it constitutes a challenge to policy determinations that were made by the agency when it adopted the IBMP in 2000, rather than any new agency action adopted since then. A challenge to the IBMP is barred by the statute of limitations. 28 U.S.C. § 2401(a).

The Yellowstone Enabling Act similarly grants the Park Service authority to issue “such rules and regulations as he may deem necessary and proper for the management and care of the park.” 16 U.S.C. § 26. The Yellowstone Act also requires the agency to “provide against the wanton destruction of the fish and game found within the park, and against their capture or destruction for the purposes of merchandise or profit.” 16 U.S.C. § 22. However, in 1923, Congress provided the agency with discretion to give, sell, or otherwise dispose of surplus Yellowstone bison. 16 U.S.C. § 36.

These statutes grant the Park Service broad discretion to carry out its duties, as well as the express authority to destroy, sell, or otherwise dispose of surplus bison. 16 U.S.C. § 1, 3, 36. Since the early 1900s, the Park Service has interpreted these statutes as permitting it to manage the Yellowstone bison population at levels that can be accommodated on the available range and to cull bison, including bison infected with brucellosis. SER43-45, 300; ER605; *see Interior Dep’t Appropriations Bill, Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 67th Cong. 45-46 (1923) (statement of Arno B. Cammerer, Acting Director of the National Park Service); *see also* 36 C.F.R. § 10.1.

The Park Service’s interpretation of its statutory authority has been affirmed by the Ninth Circuit. In *Greater Yellowstone Coalition*, 175 F.3d at 1150, the Ninth Circuit adopted the district court’s “well-reasoned opinion” set forth in *Intertribal*

Bison Cooperative, 25 F. Supp. 2d at 1138-39. In that case, the district court held that 16 U.S.C. § 3 and 16 U.S.C. § 36, expressly gave the Park Service the authority to destroy, sell, or otherwise dispose of surplus bison and the discretion “to determine whether selective removal of individual bison protects and conserves the YNP bison herd.” 25 F. Supp. 2d at 1138-39; *see also N.M. Game Comm’n v. Udall*, 410 F.2d 1197, 1200-01 (10th Cir. 1969) (holding that the Park Service is authorized under 16 U.S.C. § 1 and § 3 to “make reasonable investigations and studies to ascertain the number [of animals] which the [park] will support without detriment to the general use of the park” and manage the animal population accordingly).

WWP alleges that those decisions are not controlling because the Park Service is not “selectively” removing bison under the IBMP, the park can carry more bison than was thought at the time the cases were decided, and because genetic diversity of bison is at risk. Br. at 60-61. But those factual issues have nothing to do with the issue of whether the Park Service has statutory authority to remove bison, which is the issue that was addressed by the court. The legal question of the Park Service’s authority did not turn on whether the Park Service had “selectively” removed certain bison, on the estimated carrying capacity of the park, or on the bison population’s status. *See* 25 F. Supp. 2d at 1136-39. Moreover, the record belies WWP’s factual assertions. *See* SER465 (removing only four

bison that could not be returned to the park); ER612 (preferred alternative minimizes lethal removals); SER166 (same); SER167 (same); ER726 (same); ER407-08 (outlining adjustments reducing lethal removals and implementing smaller cull sizes); ER839 (same); *see* Section I.B., *supra* (discussing genetic diversity); SER92 (indicating that the 3,000 target population of bison is number above which bison are most likely to leave the park); SER434 (discussing range in park). WWP has not demonstrated that the Park Service's interpretation of the relevant statutes is invalid.

B. The Park Service's bison management has not impaired park resources or resulted in the wanton destruction of bison.

WWP makes two arguments relating to the IBMP. WWP first contends that the Park Service violated its 2006 Management Policies because the Park Service has not made a written determination that its management actions will cause "no impairment." Br. at 62.¹⁵ The Park Service has, contrary to this assertion, made a written determination that bison management actions contemplated in the IBMP

¹⁵ The Park Service's Management Policies provide that the Park Service must consider the impacts of any proposed action and determine, in writing, that the activity will not lead to an impairment of park resources. *See* Mgmt. Pol. at 12, *available at* www.nps.gov/policy/MP2006.pdf. However, these policies "are intended only to provide guidance within the Park Service, not to establish rights in the public generally" and are not enforceable against the Park Service. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-96 (D.C. Cir. 2006).

will not impair park resources. ER715-16; SER169-171. The Record of Decision states:

Neither the DEIS nor the FEIS evaluated specifically whether the bison management actions would impair park resources and values, although the valuation of the level of effects on park resources and values provides sufficient analysis to draw conclusions about whether impairment will occur. As explained above and based on the impact analysis in the DEIS and FEIS, there is no indication that the actions set out in the Joint Management Plan will cause the impairment of any park resources and values. The National Park Service recognizes that with this cooperative Joint Management Plan, it is better able to preserve bison and is in keeping with the Yellowstone Enabling Act.

SER171. Since the IBMP was adopted, the Park Service has continued to comply with the internal procedures for determining whether there will be impairment due to an ongoing activity. ER646-48, 714; SER176-77, 214-63, 345-87, 450-85.

WWP also complains that Park Service's management decisions have resulted in the wanton destruction of bison and impaired park resources. Br. at 61-65. The record does not support this contention. The Park Service's conclusion that it must manage the bison population for brucellosis and cull bison to maintain a target population is not arbitrary. SER57. The target population was selected, in part, because studies show that when overall population size is greater than 3,000, more bison migrate out of safety of Yellowstone's boundaries, increasing the risk of lethal removal and brucellosis transmission. SER92-93, 101. The IBMP ensures there will be a sufficient number of bison so that the population will be conserved and remain genetically diverse. *See* Sections A-B, I.B., *supra*. The population is

not threatened or endangered throughout any part of its range and “has continued to grow despite culling for population and brucellosis control.” 72 Fed. Reg. at 45721-22. The Park Service’s 2008 and 2009 adjustments (which were found consistent with the FEIS and ROD) further reduced the potential for adverse effects from culling by reducing lethal removal of bison and developing a more consistent culling strategy. SER339-44, 450, 490-502; ER401-410. The record also reflects that the IBMP has not impaired other park resources or the public enjoyment of the park. *See, e.g.*, ER603, 616; SER66-67, 109-110, 170-171.

The record demonstrates that the Park Service’s actions “maintain a wild, free-ranging population of bison[,] address the risk of brucellosis transmission,” SER64, and do not result in the wanton destruction of bison. WWP cannot demonstrate that the Park Service’s ongoing management of bison is arbitrary or in violation of the Park Organic Act and the Yellowstone Enabling Act.

IV. THIS COURT SHOULD NOT CONSIDER THE EXTRA-RECORD DOCUMENTS SUBMITTED BY WWP.

WWP submitted extra-record declarations to the district court, which the district court refused to consider, and also submitted an extra-record declaration to this Court, which it did not previously submit to the district court. WWP requests that the Court consider this information on appeal. Br. at 36 n.6; Motion, Dkt. 23. This Court should reject WWP’s extra-record submissions.

A. The extra-record documents submitted to the district court were properly excluded.

This Court reviews the district court’s decision not to consider the extra-record submissions for abuse of discretion. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996). Review of an agency’s decision is properly confined to the administrative record. *Nw. Envtl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). A court may only consider extra-record information in limited situations, such as if it is “*necessary* to determine whether the agency has considered all relevant factors and has explained its decision.” *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (emphasis added).

The district court correctly concluded that the extra-record declarations were not necessary to demonstrate whether the agency had considered all relevant factors. As the district court found, the declarations contain the “opinions of lay people and activists” and were submitted as an “attempt to introduce post-decision quasi-expert scientific opinions for the purpose of setting up a battle of the experts.” Op. at 16. The new information that WWP claims the agencies

disregarded is adequately explained in the administrative record. There is thus no need for this Court to consider those documents.

B. The extra-record documents submitted to the Ninth Circuit are inadmissible.

WWP submitted to this Court an extra-record declaration by Stephany Seay, who is an employee of Buffalo Field Campaign, one of the plaintiffs in this case. The extra-record declaration contains a description of her experiences watching bison being hazed back into Yellowstone. Dkt. 22-2. The declaration also refers to its attachment titled “2010 Bison Relocation Summary,” which includes information related to 2010 bison monitoring and hazing operations. *Id.*

WWP could have, but did not, submit this extra-record declaration and attachment to the district court for review. WWP now argues that this court may take judicial notice of the declaration because (1) it has been signed under penalty of perjury and (2) the document attached to the declaration is a public document prepared by the Park Service. *See* Motion, Dkt. 23 at 2.

“Save in unusual circumstances, [courts] consider only the district court record on appeal.” *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). Appellate courts may consider information not submitted to the district court only in limited situations, such as to correct inadvertent omissions from the record, take judicial notice, or exercise inherent authority to supplement the record in extraordinary cases.

The proffered information does not qualify for any of these exceptions. WWP does not cite the declaration to demonstrate whether the agency has considered all relevant factors. *See Ctr. for Biological Diversity*, 450 F.3d at 943. The declaration is cited for no other reason than to support WWP's argument that the IBMP is reducing public enjoyment of Yellowstone (which is irrelevant to its claims). Br. at 63. This reason does not justify the consideration of extra-record material on appeal. And while it might be appropriate for the Court to take judicial notice of the attachment as a public record, if the attachment actually is a public document and if it qualified for consideration under some other exception, it would not be appropriate for the Court to take judicial notice of the extra-record declaration. *See United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (“[c]ourts may take judicial notice of some public records, including the records and reports of administrative bodies”) (quotation marks omitted). This Court should thus affirm the district court's decision to strike the extra-record documents, and should refuse to consider the extra-record documents submitted on appeal.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION**

This brief complies with the type volume limitation set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure. Excepting the portions described in Rule 32(a)(7)(B), the brief contains 13,816 words.

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CERTIFICATE OF SERVICE

On February 3, 2012, I electronically filed copies of the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants, including the following, in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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