

Rebecca K. Smith  
PUBLIC INTEREST DEFENSE CENTER, P.C.  
P.O. Box 7584  
Missoula, MT 59807  
(406) 531-8133  
publicdefense@gmail.com

Timothy M. Bechtold  
BECHTOLD LAW FIRM, PLLC  
P.O. Box 7051  
Missoula, MT 59807  
(406) 721-1435  
tim@bechtoldlaw.net

Attorneys for Plaintiff

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

---

ALLIANCE FOR THE WILD  
ROCKIES

Plaintiff,

vs.

UNITED STATES DEPARTMENT  
OF AGRICULTURE, et al.,

Defendants,

and

BILL MEYERS, individually,

Intervenor.

CV-11-76-M-CCL

**PLAINTIFF'S BRIEF IN  
SUPPORT OF ITS MOTION TO  
COMPLETE AND/OR  
SUPPLEMENT THE  
ADMINISTRATIVE RECORD**

---

## **I. INTRODUCTION**

Plaintiff Alliance for the Wild Rockies hereby files this brief in support of its motion to complete and/or supplement the administrative record and/or take judicial notice of certain evidence. The purpose of this motion is to (a) provide the Court with notice of which documents the Federal Defendants have already agreed to add to the administrative record materials they filed on October 31, 2011, (b) clarify that the Court's review in this case is not limited to an administrative record, (c) move to "complete the administrative record" with documents that are legally part of the administrative record and still missing from the administrative record materials filed with the Court by Federal Defendants; (d) move to supplement the administrative record with documents that should supplement the administrative record as relevant extra-record evidence, and (e) request that the Court take judicial notice of certain evidence.

## **II. NOTICE REGARDING DEFENDANTS' PLANNED ADDITION TO ADMINISTRATIVE RECORD MATERIALS**

Alliance has consulted with Federal Defendants and they have agreed to add the following materials to the administrative record that they filed with the Court on October 31, 2011:

- A. 60 Day Endangered Species Act (ESA) Notices of Intent To Sue for this case;

- B. 2010 U.S. Fish and Wildlife Service Rule relisting the Yellowstone grizzly bear under the ESA;
- C. 1975 U.S. Fish & Wildlife Service Rule listing the grizzly bear under the ESA;
- D. U.S. Forest Service Gallatin National Forest Plan Final Environmental Impact Statement (EIS); and
- E. U.S. Forest Service Final EIS and Record of Decision (ROD) for the Forest Plan Amendment for the Greater Yellowstone Area National Forests regarding management direction for Yellowstone grizzly bears after their 2007 delisting.

Declaration of Rebecca K. Smith in Support of Plaintiff's Motion to Supplement and/or Complete the Administrative Record ¶ 3 (January 15, 2011).

### **III. ARGUMENT**

#### **A. The Court's review is not limited to a set administrative record in this case.**

When addressing supplemental EIS claims, the Court is not limited to an administrative record:

When a plaintiff challenges a final agency action, judicial review normally is limited to the administrative record in existence at the time of the agency's decision. []. In these cases, the agency must justify its final action by reference to the reasons it considered at the time it acted. []. An action to compel an agency to prepare an SEIS, however, is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed." []. In such cases, *review is not limited to the record* as it existed at any single point in

time, because there is no final agency action to demarcate the limits of the record.[].

*Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9<sup>th</sup> Cir. 2000)(internal citations omitted)(emphasis added).

Likewise, “when a court considers a claim that an agency has failed to act in violation of a legal obligation, *review is not limited to the record* as it existed at any single point in time . . . .” *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9<sup>th</sup> Cir. 2002) (internal quotation mark and citation omitted)(emphasis added). Furthermore, the Ninth Circuit holds that it “may consider *evidence outside the administrative record* for the limited purposes of reviewing Plaintiffs' ESA claim.” *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9<sup>th</sup> Cir. 2011)(emphasis added). In both “failure to act” and ESA cases, any relevant evidence is admissible: “the applicable case law suggests that a party should be permitted to supplement the record with evidence that is relevant to the question of whether relief should be granted.” *Wildearth Guardians v. U.S. Federal Emergency Management Agency*, 2011 WL 905656 \*3 (D. Ariz. 2011).

In this case, the following documents are relevant to Alliance’s ESA and NEPA SEIS claims, and may be considered by the Court in upcoming summary judgment briefing, because they are relevant to the determination of the impact on

ESA-listed grizzly bears from low-altitude bison hazing helicopters in the Greater Yellowstone Area:

1. **Whitlock (2000). Fixation of new alleles and the extinction of small populations: drift load, beneficial alleles, and sexual selection. *Evolution*, 54(6), pp. 1855-1861 [attached as EXHIBIT 1]**

This document is relevant to one reason why the grizzly bear population is threatened in the Greater Yellowstone Area. The document explains that hundreds of breeding individuals are necessary to protect against extinction from inbreeding. Exhibit 1 at page 1859. This fact is relevant to gauge the extent and type of impact low-altitude helicopter hazing may have on grizzly bears when they are displaced, because the number of breeding grizzly bears in the area is estimated to be only 100 individuals. Therefore, it is less than viable and more susceptible to negative impact.

2. **Schwartz et al (2006). Temporal, Spatial, and Environmental Influences on the Demographics of Grizzly Bears in the Greater Yellowstone Ecosystem. *Wildlife Monographs* 161: 1-68 [attached as EXHIBIT 2]**

This document is relevant to gauge the impact of spring helicopter hazing displacement on grizzly bears. This is a published scientific study whose authors include at least one researcher with Defendant U.S. Fish and Wildlife Service. The study establishes that grizzly bears heavily depend on their opportunity to consume winter-killed ungulates to nourish themselves and their cubs after den

emergence. Exhibit 2 at page 6, 13, 24. The study finds that the most likely time for a grizzly bear to die of natural causes is during this spring period. Exhibit 2 at 40. The study defines the “spring” period as den emergence through mid-July. Exhibit 2 at 27. Accordingly, this study is relevant to show that the helicopter-induced disruption and displacement of grizzly bears during spring feeding activities could have adverse effects.

**3. U.S. Forest Service. 2007. Biological Assessment Supplement for Threatened, Endangered, and Proposed Species on the Invasive Plant Management Project Kootenai National Forest [attached as EXHIBIT 3]**

This document is relevant to gauge the impact of helicopter hazing on grizzly bears. It is one of the federal defendants’ own analyses of likely effects of low-altitude helicopter use on grizzly bears. The analysis addresses the impacts of low-altitude helicopter herbicide spraying over grizzly bear habitat. This type of activity is more like helicopter bison hazing than any other activity Alliance is aware of. Defendant U.S. Forest Service’s analysis finds that “[g]rizzly bears have been noted to panic and flee areas from over-flights in nearly all cases where they have been observed . . . .” Exhibit 3 at 6 (citing a study by Defendant National Park Service). Defendant’s analysis finds that “indications are that frequent and repeated over-flights may impose a burden on the energy and nutrient supply for

animals . . .” *Id.* Defendant’s analysis also finds that helicopter use may result in grizzly bears avoiding the area where the helicopter is, as well as avoiding the surrounding drainage. *Id.* In the document, Defendant required that “adjacent areas with suitable food and shelter would be immediately available” to grizzly bears during helicopter activities. *Id.*

Despite this precaution, the District of Montana found that the agency’s “not likely to adversely affect” conclusion for the grizzly bear for that project was still arbitrary, even with this mitigation measure. *Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Findings and Recommendations of United States Magistrate Judge at 16-23 (D. Mont. 2009), *adopted in full by Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Order at 2 (D. Mont. 2010). In this case, Federal Defendants have not yet acknowledged any effect at all on grizzly bears from helicopter bison hazing, much less an erroneous “may affect, not likely to adversely affect” conclusion as was the case in *Tidwell*. In part, what the Alliance is seeking in this lawsuit is the initial ESA consultation and NEPA analysis on potential effects.

**4. National Park Service (1994). Report to Congress: Report on Effects of Aircraft Overflights on the National Park System; Chapter 5 Effects of Overflights on Wildlife [attached as EXHIBIT 4]**

This document is relevant to gauge the impact of helicopter hazing on

grizzly bears. It is one of the federal defendants' own analyses of likely effects of low-altitude helicopter use on grizzly bears. In this report to Congress, Defendant National Park Service found that grizzly bears "have been noted to abandon areas in response to small aircraft overflights, even when overflights were infrequent." Exhibit 4 at pdf page 37. Defendant found "Grizzly bears run away from aircraft flying at altitudes as high as 3,000 feet." Exhibit 4 at pdf page 39. Defendant further found "grizzly bears . . . never became tolerant of aircraft, despite very frequent exposure." Exhibit 4 at pdf page 40. Defendant further finds that there is concern among wildlife biologists that "disturbance from overflights could cause sensitive animals to abandon their habitats." Exhibit 4 at pdf page 37. Defendant warns that "the consequences of habitat abandonment can be serious, particularly for species whose high-quality habitat is already scarce." Exhibit 4 at pdf page 37.

**5. National Park Service/U.S. Forest Service/Montana Fish, Wildlife, and Parks (May 13, 2011). Press Release: Officials Remind Visitors to Be Bear Aware [attached as EXHIBIT 5]**

This evidence is a press release by Federal Defendants National Park Service and U.S. Forest Service that states in mid-May of last year that grizzly bears had "emerged from their dens and are feeding primarily on ungulate carcasses and early spring green-up" and that "their primary springtime food source [is] wildlife carcasses." Exhibit 5 at page 1. The press release explicitly found that grizzly



bears were sighted feeding on carcasses “on the Horse Butte Peninsula just north of West Yellowstone.” Exhibit 5 at 1. This evidence is relevant to gauge impacts from helicopter hazing in May, June, and July on grizzly bears on the Horse Butte Peninsula. It establishes, based on Defendants’ own observations, that grizzly bears are present in the same area during the same time period that Defendants conduct helicopter hazing activities.

**6. U.S. Forest Service (May 12, 2011). “Warning: Bears are currently active in this area.” [attached as EXHIBIT 6]**

This evidence is a grizzly bear warning sign posted by Defendant U.S. Forest Service on the Madison Arm road, near West Yellowstone, Montana, which states “Warning: Bears are currently active in this area.” Exhibit 6. It further states “Sow with injured cub. Be very cautious.” Exhibit 6. This evidence is relevant to gauge impacts from helicopter hazing in May, June, and July on grizzly bears. It establishes, based on Defendant U.S. Forest Service’s own observations, that grizzly bears are present in the same area during the same time period that defendants conduct helicopter hazing activities.

**7. National Park Service (January 26, 2010). Letter to Christian Mackay, Executive Officer, Montana Department of Livestock [attached as EXHIBIT 7]**

This evidence is a letter from Defendant National Park Service to Defendant

Christian Mackay regarding Yellowstone bison management. Defendant National Park Service also sent copies of this letter to Defendant U.S. Forest Service via Mary Erickson, Gallatin National Forest and Defendant USDA-APHIS. This evidence is relevant to the loss of the purpose and need for bison helicopter hazing over the Horse Butte area where grizzly bears are being harmed. This letter from Defendant National Park Service finds that “there is essentially no risk of brucellosis transmission from bison to cattle because cattle are not present on Horse Butte or Zone 2 public lands south of the Madison Arm at any time of year.” Exhibit 7 at 1-2 (emphasis added). Defendant National Park Service further stated that “[t]he IBMP managers have acknowledged that the risk of brucellosis transmission from bison to cattle on the Horse Butte peninsula was substantially lower (approximately zero) in 2008-2009 compared to 2000 when the Record of Decisions for the IBMP were signed.” Exhibit 7 at 2 (emphasis added).

**8. National Park Service. Memorandum on “synopsis of the helicopter aerial delivery issue that occurred inside YNP during IBMP operations the week of 5/25/09” [attached as EXHIBIT 8]**

This evidence is an internal memorandum by Defendant National Park Service. It is relevant to gauge impacts from helicopter hazing in May, June, and July on grizzly bears. It establishes, based on Defendant’s own language, that helicopter over-flights conducted for bison hazing are “sustained low level/slow

speed flight.” Exhibit 8.

**9. National Park Service (August 5, 2010). Memorandum to Suzanne Lewis, Superintendent, Yellowstone National Park from P.J. White and Rick Wallen, Wildlife Biologists, Yellowstone National Park. Subject: IBMP Meeting Notes, August 10/11, 2010 [attached as EXHIBIT 9]**

This evidence is an internal memorandum of Defendant National Park Service. It is relevant to the loss of the purpose and need for bison helicopter hazing in the area in which grizzly bears are being harmed. Defendant states “IBMP partners have acknowledged that the risk of brucellosis transmission from bison to cattle on the Horse Butte peninsula is substantially lower (approximately zero) compared to 2000 when the Record of Decisions for the IBMP were signed.” Exhibit 9 at 1.

**10. Montana Department of Livestock (June 29, 2011). Email correspondence to Darrell Geist. [attached as EXHIBIT 10]**

This evidence is an email communication from Defendant Christian Mackay, Montanan Department of Livestock to Darrell Geist, which clearly explains who funds and actually conduct helicopter hazing operations. This document is relevant to the determination of the appropriate parties in this case, and the availability of injunctive relief against the Federal Defendants. This document is a statement by Defendant Christian Mackay, Montana Department of Livestock (MDOL) that establishes the following facts:

- a. Defendant MDOL owns two helicopters;
- b. Defendant MDOL does not employ any of its own MDOL helicopter pilots;
- c. When Defendant MDOL's own helicopter is used for bison helicopter hazing, the pilot is a federal employee of Federal Defendant U.S. Department of Agriculture;
- d. If Defendant MDOL contracts with a private helicopter company to do the helicopter hazing, the helicopter operations are funded by the cooperative agreement between Defendants U.S. Department of Agriculture and the MDOL;
- e. Under the cooperative agreement between the Defendants U.S. Department of Agriculture and MDOL, Federal Defendant U.S. Department of Agriculture provides all of the funding, or at least the majority of the funding, for Defendant MDOL's participation in helicopter hazing operations of bison;
- f. Last year, fiscal year 2010, under the cooperative agreement, Federal Defendant U.S. Department of Agriculture provided \$525,000.00 to Defendant MDOL to conduct bison management activities. The total cost of the activities was \$525,000.00 and Defendant MDOL's contribution or "share" was \$0.00; and
- g. In fiscal year 2009, Federal Defendant U.S. Department of Agriculture gave Defendant MDOL \$660,000.00 for bison management activities.

Exhibit 10 at pdf page 1.

**11. Video footage from May 12, 2010 showing grizzly bear running from bison-hazing helicopter on Gallatin National Forest [conventionally filed at DKT 5-17]**

This video footage documents helicopter bison hazing operations on the

Gallatin National Forest. The video shows undisputable evidence that on May 12, 2011, a bison hazing helicopter flew close to a Yellowstone grizzly bear and caused the bear to flee.<sup>1</sup> Accordingly, this video provides evidence consistent with Defendants' own science and analysis for other projects that low-altitude helicopter overflights cause grizzly bears to flee in panic.

ESA § 9 prohibits all persons, including federal agencies, from "taking" ESA-listed species. *See* 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.3 l(a). "Take" is defined to include "harass." 16 U.S.C. § 1532(19). "Harass" is defined as an "intentional or negligent act . . . which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. This video footage is relevant evidence for Alliance's ESA § 9 take claim because it shows that a bison hazing helicopter can disrupt grizzly bears and cause them to flee in panic from important spring feeding activities and other normal behavioral activities.

In conclusion, Exhibit 1-10 and the May 12, 2010 video footage are relevant to Alliance's ESA claims and supplemental NEPA claims, and thus should be

---

<sup>1</sup>Video footage available online at :  
[http://www.youtube.com/watch?v=fY9uCZbmGtU&list=UUIRWaQWXjK1RXc6\\_hG-kZzQ&index=16&feature=plpp\\_video](http://www.youtube.com/watch?v=fY9uCZbmGtU&list=UUIRWaQWXjK1RXc6_hG-kZzQ&index=16&feature=plpp_video)

considered by this Court in upcoming summary judgment briefing regardless of whether this evidence is part of any administrative record. *Dombeck*, 222 F.3d at 560; *Kraayenbrink*, 632 F.3d at 497; *Wildearth Guardiansm* 2011 WL 905656 \*3.

**B. Alternatively, or in addition, if the Court’s review were limited to a set administrative record in this case, Exhibits 2-10 are already part of that administrative record.**

In the Ninth Circuit, the “administrative record” has a legal definition: “the proper interpretation is that the administrative record consists of those materials in the agency record *at the time the decision was made.*” *Haynes v. U.S.*, 891 F.2d 235, 238 (9<sup>th</sup> Cir. 1989)(emphasis in original). In contrast, the Ninth Circuit has rejected “the proposition that the administrative record for review consists [only] of those materials *actually used by the decision maker.*” *Id.* (emphasis in original). Accordingly, a motion to supplement the administrative record is not required when a party is citing to a document that is not extra-record evidence, but instead is *part of* the administrative record, i.e. it was “in the agency[‘s] record at the time the decision was made.” *Haynes*, 891 F.2d at 238.

All of the exhibits which are Defendants’ own records are thus part of the administrative record and appropriately before the Court: Exhibits 2 (U.S. Fish & Wildlife Service), 3 (Forest Service), 4 (Park Service), 5 (Park Service & Forest Service), 6 (Forest Service), 7 (Park Service/Montana Department of Livestock), 8

(Park Service), 9 (Park Service), and 10 (Montana Department of Livestock).

Alliance requests that the Court formally recognize that these documents are part of the administrative record materials in this case. Only Exhibit 1 and the May 12, 2010 video footage are “extra-record” evidence.

**C. Alternatively or in addition, if the Court’s review were limited to a set administrative record in this case, Exhibits 1-10 and the video footage should supplement the administrative record as relevant extra-record evidence.**

In the Ninth Circuit, a motion to supplement the administrative record in an Administrative Procedure Act case is appropriate when a party seeks to admit extra-record evidence that was not in the agency’s records at the time the decision was made:

In limited circumstances, district courts are permitted to admit extra-record evidence: (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.” [].

*Lands Council v. Powell*, 395 F.3d 1019, 1030 (9<sup>th</sup> Cir. 2005)(footnote and citation omitted).

In this case, Exhibits 1-10, and the May 12, 2010 video footage, are all relevant to Alliance’s concerns and legal claims regarding Defendants’ failure to adequately address the impact of helicopter bison hazing on threatened

Yellowstone grizzly bears, for the reasons discussed above. Although Defendants may argue that they did not consider any of this evidence in the context of helicopter impacts on grizzly bears, such an argument simply reinforces Alliance's claims that the agencies have failed to conduct the necessary legal analyses under NEPA, ESA, and NFMA. In this case "admission [of this evidence] is necessary to determine 'whether the agency has considered all relevant factors and explained its decision'" to conduct, fund, and allow low-altitude helicopter hazing of bison in occupied habitat for the threatened Yellowstone grizzly bear. *See Powell*, 395 F.3d at 1030. Accordingly, Alliance requests that the Court consider this evidence as a proper supplement to the administrative record materials in this case *Id.*

**D. Alternatively, or in addition, Alliance requests that the Court take judicial notice of Exhibits 2-10.**

Recognizing that administrative documents fit well within the ambit of Federal Rule of Evidence 201, courts in the Ninth Circuit have routinely held that "[w]e may take judicial notice of records and reports of administrative bodies. *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529 (9<sup>th</sup> Cir. 1932); *Fletcher v. Jones*, 105 F.2d 58 (D.C. Cir. 1939) *certiorari denied* 308 U.S. 555; *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9<sup>th</sup> Cir. 1954). The court's authority to take judicial notice in APA cases is well established. *See e.g.*,



*Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1124 n. 29 (9<sup>th</sup> Cir. 2002), *overruled on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9<sup>th</sup> Cir. 2011); *City of Houston v. F. A. A.*, 679 F.2d 1184, 1190 -1191 (5<sup>th</sup> Cir. 1982); *Lester v. U.S. Postal Service*, 465 F.Supp.545, 547 (D. Ariz. 1979); *City of South Pasadena v. Slater*, 56 F.Supp.2d 1106, 1120 (C.D. Cal. 1999); *Friends of Yosemite Valley v. Norton*, 194 F. Supp.2d 1066, 1115-1116 (E.D. Cal. 2002); *Center for Biological Diversity v. Norton*, 212 F. Supp.2d 1217, 1225 (S.D. Cal. 2002).

Accordingly, courts in the Ninth Circuit “may take judicial notice of matters of public record . . . .” *U.S. v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9<sup>th</sup> Cir. 2008). Thus, even in an administrative agency review case, a court can take “judicial notice of the agency’s own records,” *Dent v. Holder*, 627 F.3d 365, 371 (9<sup>th</sup> Cir. 2010), and can “take judicial notice of a record of a state agency not subject to reasonable dispute,” *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1223 (9<sup>th</sup> Cir. 2004). *See also Nebraska v. E.P.A.*, 331 F.3d 995, 999 n.3 (D.C.Cir 2003) (“Although the administrative record does not contain these facts, we take judicial notice of the information on the EPA's database”).

In this case, as discussed above, Exhibits 2-10 are the Defendants’ own agency records. Thus, Alliance requests that this Court take judicial notice of these

exhibits for the purpose of considering them as evidence in upcoming summary judgment briefing. *See Holder*, 627 F.3d at 317; *O'Neill*, 386 F.3d at 1223.

#### IV. CONCLUSION

For all or any of the reasons set forth above, Alliance requests that the Court grant its motion to allow Alliance to present the above-discussed evidence in upcoming summary judgment briefing.

Respectfully submitted this 15<sup>h</sup> Day of January, 2012.

/s/Rebecca K. Smith  
Rebecca K. Smith  
Public Interest Defense Center, P.C.

Timothy M. Bechtold  
Bechtold Law Firm, PLLC

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief in support of a motion is 3,717 words, excluding the caption, signature blocks, and certificate of compliance, which complies with the 6,500 word limit for a brief, and is less than the 4,000 word threshold requiring a table of contents and table of authorities.

/s/ Rebecca K. Smith

Rebecca K. Smith

PUBLIC INTEREST DEFENSE CENTER, P.C.

Timothy M. Bechtold

BECHTOLD LAW FIRM, PLLC

Attorneys for Plaintiff