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

GALLATIN WILDLIFE ASSOCIATION,	)	Civil No. 2:15-cv-00027-BU-
Plaintiff,	)	BMM
)	
vs.	)	MFBF’S AMICUS BRIEF
	)	OPPOSING PLAINTIFFS’
UNITED STATES FOREST SERVICE, et	)	MOTION FOR SUMMARY
al.,	)	JUDGMENT AND IN
Defendants,	)	SUPPORT OF DEFENDANT/
	)	INTERVENORS’ MOTIONS
and	)	FOR SUMMARY
	)	JUDGMENT
HELLE LIVESTOCK, a partnership; and)	
REBISH/KONEN LIVESTOCK LIMITED)	
PARTNERSHIP.)	
Defendant-Intervenors.)	

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There are no exhibits to this brief. This brief refers to documents which are already in the Administrative Record.

INTRODUCTION

Montana Farm Bureau Federation (“MFBF”) is an independent, non-governmental, voluntary organization with its roots in agriculture. MFBF provides an organization where members may secure the benefits of united efforts in a way that could never be accomplished through individual effort. MFBF is the state's largest agriculture organization with over 22,000 member families.

The Forest Service has followed its multiple use mandate in its current Revised Forest Plan as well as the Allotment Management Plans. Gallatin Wildlife Association is challenging the rights of livestock owners falsely stating these Plans have not been properly analyzed. Livestock grazing permits are legally protected interests. More specifically, the grazing permits are protected by the provisions of the Administrative Procedures Act (“APA”), and various Forest Service regulations. *Anchustegui v. Department of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001) (holding that a grazing permit is a federal license within the meaning of the APA). The protections afforded to MFBF members’ grazing

privileges by the APA are significant.

A grazing permit cannot be terminated and/or modified without giving each permittee an opportunity to achieve or demonstrate compliance with the terms and conditions of the permit. 5 U.S.C. § 558(c); *see also Anchustegui*, 257 F.3d at 1129. Additionally, the Taylor Grazing Act (“TGA”) states that “grazing privileges recognized and acknowledged shall be adequately safeguarded.” 43 U.S.C. § 315b.

In this case, even though this Court’s earlier ruling found there was no need to supplement, Plaintiffs argued the Forest Service failed to supplement its 2009 National Environmental Policy Act (“NEPA”) analysis. *See* Court’s July 24, 2015 Memorandum in Support of Order Denying Plaintiff’s Motion for Preliminary Injunction, Doc. 55. Plaintiffs ignored this Court’s earlier ruling and the Administrative Procedure Act’s (“APA”) limit on what types of claims can be brought. MFBF limits its brief by only discussing Plaintiffs’ claims the Forest Service violated NEPA by failing to supplement its 2009 analyses. MFBF adopts and will not replicate the Federal Defendant’s and Intervenors’ legal and factual background portions of their briefs.

Plaintiffs fail to state a claim that meets the standards of the APA. Plaintiffs’ failure to correctly apply the APA and NEPA, in addition to

ignoring of this Court's previous ruling, make Plaintiffs' claims frivolous. The Court should find against Plaintiffs' claim that the Forest Service should have done supplemental NEPA analysis and find that Plaintiffs have acted frivolously in arguing this claim.

ARGUMENT

A. Plaintiffs fail to state a claim under the APA in their failure to supplement claim.

Since NEPA does not provide for a private right of action, Plaintiffs cloak their challenge to end livestock grazing under the review provisions in the APA. To obtain judicial review under the APA, Plaintiffs must challenge a final agency action. *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). Once an EIS has been solidified into a Record of Decision ("ROD"), "an agency has taken final agency action, reviewable under 5 U.S.C. § 706(2)(A)." *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1139 (9th Cir. 2008).

In addition to § 706(2)(A) claims, the APA provides for the right to "compel agency action unlawfully withheld or unreasonably delayed," pursuant to § 706(1). *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (internal citations omitted). In the *Dombeck* case, the Court found the Forest Service failed to prepare a supplemental EIS prior to approving future proposed timber sales. *Id.*

In 2004, the United States Supreme Court provided very specific guidance about when a plaintiff may proceed with a claim pursuant to § 706(1) of the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373 (2004) (“SUWA”). The Court found “a claim under to § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” *Id.* at 64 (emphasis in original). The *SUWA* Court also found that there is no need to supplement NEPA if there is no ongoing major Federal action. *Id.* at 73.

The Forest Service issued the grazing permits related to this case in 2006 or 2008. USFS 000010, USFS 000347. “A grazing permit is a license,” and are issued for ten-year periods, according to the Ninth Circuit Court of Appeals. *Oregon Natural Desert Ass’n v. U.S. Forest Service*, 465 F.3d 977, 983 (9th Cir. 2006) (citing *Anchustegui v. Dept. of Agric.*, 257 F.3d 1124, 1126 (9th Cir. 2001)). The issuance of the grazing permits in 2006 or 2008 were final agency actions under the APA. *Id.* Once a grazing permit is issued, there is no ongoing major federal action for the purposes of NEPA. *Western Watersheds Project v. Bureau of Land Management*, 971 F.Supp.2d 957, 977 (E.D. Calif. 2013). “A permittee has a presumption of permit renewal unless the permittee fails to comply with a permit condition or requirement contained in an AOI.” *Oregon Natural Desert Ass’n v. U.S.*

Forest Service, 2005 WL 1334459 (D. Or. June 3, 2005) unpublished opinion cited by Plaintiffs.

In this case, Plaintiffs attempt to weave between the 1995 Rescissions Act, Pub. L. 104-19 § 504(b), and the 2004 Appropriations Act, Pub. L. 108-108 § 325, which this Court already addressed, and the United States Supreme Court's ruling that there is no NEPA requirement to supplement unless there is an ongoing major Federal action. *See* Court's July 24, 2015 Memorandum in Support of Order Denying Plaintiff's Motion for Preliminary Injunction, Doc. 55, *SUWA*, 542 U.S. at 73. However, Plaintiffs' attempt to find a legal justification under NEPA to stop grazing fails for several reasons.

Contrary to Plaintiffs' argument, there is no ongoing major federal action in this case because the grazing permits were issued in 2006 or 2008. *Western Watersheds Project*, 971 F.Supp.2d at 977 (E.D. Calif. 2013). Neither the holdings in the *Sabo* case, nor the *Dombeck* case cited by Plaintiffs apply to the facts in this case. *Oregon Natural Desert Ass'n v. Sabo*, 854 F.Supp.2d 889 (D. Oregon 2012); *Friends of the Clearwater v. Dombeck*, 22 F.3d 552, 557 (9th Cir. 2000). The *Dombeck* case involved future proposed timber sales. *Id.* (stating, "If there remains major Federal action to occur, and new information is sufficient ... a supplemental EIS

must be prepared.”). The *Dombeck* case did not involve a circumstance where the Forest Service issued a grazing permit and where there was no ongoing major Federal action. *Id.* In that case, the Forest Service had a proposed future timber sale, not a grazing permit. In this case, the permits at issue occurred in 2006 and 2008, which is the final agency action. *Id.* Therefore, there is no ongoing major Federal action for Plaintiffs to utilize to bring a § 706(1) claim under the APA.

The *Sabo* case is also distinguishable from this case. In *Sabo* the sensitive species were found on the allotment at issue. *Sabo*, 854 F.Supp.2d at 923-24. In this case, it is undisputed, based on the record, the bighorn sheep are six to eight miles from the allotments at issue. USFS 008142, USFS 008548. In the *Sabo* case, the Court found the plaintiffs had shown harm to the sensitive species on the allotment caused by livestock grazing. *Id.* at 923. In this case, the bighorn sheep are not even on the allotments, which means there was never any finding that livestock grazing has caused any harm to the bighorn sheep.

After ignoring the *SUWA* decision and Congress’ acts related to livestock grazing and NEPA requirement, Plaintiffs next allege the Forest Service violated NEPA by providing dates to schedule NEPA review of the Allotment Management Plans (“AMPs”) at issue. Plaintiffs’ Brief in Support

of Motion for Summary Judgment, Doc. 115, p. 20. In addition to failing to invoke the APA pursuant to a failure to act claim, this claim also fails because the Forest Service statements about potential scheduling of AMPs in the future are not final agency actions. The Supreme Court states a § 706(1) claim can proceed only where a plaintiff asserts that an agency failed to take discrete agency action that it is required to take. *SUWA*, 542 U.S. at 64, 124 S.Ct. at 2379. To obtain judicial review under the APA, Plaintiffs must challenge a final agency action. *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). The Supreme Court has found, “[a] statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1).” *SUWA*, 542 U.S. at 71, 124 S.Ct. at 2384. In this case, the Forest Service statements about future NEPA planning are exactly the type of statements that the *SUWA* Court found are not actionable pursuant to the APA. *Id.*

As this Court stated, “the Secretary of Agriculture has sole discretion to determine the priority and timing for completing NEPA analysis,” Court’s Order, Doc. 55, p. 21. Based on *SUWA*, and the 1995 Rescission Act and the 2004 Appropriations Act, the Forest Service has no legal

requirement to supplement its NEPA analysis. Moreover, Plaintiffs fail to bring an actionable claim pursuant to the APA.

B. Plaintiffs' argument for an APA violation contradicts case law and is a frivolous claim.

In the Ninth Circuit, the court will consider a case frivolous if the result is obvious and the argument completely lacks merit. *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984). Based on this Court's earlier ruling and based on the law and consideration of the facts, it was obvious that Plaintiffs would not prevail in this argument. Furthermore, based on the precedent related to NEPA and the APA, Plaintiffs' argument completely lacks merit.

CONCLUSION

The grazing permits were a final agency action in 2006 or 2008 when the grazing permits were issued. *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d at 983. Those grazing permits are a license that the Forest Service cannot terminate or modify without providing due process to the permittees. 5 U.S.C. § 558(c); see also *Anchustegui*, 257 F.3d at 1129. Instead of following the law, the Plaintiffs are asking this Court to ignore the license protections afforded to permittees, and to exert undue judicial interference into issues that are within the Forest Service's discretion. *SUWA*, 542 U.S. at 71, 124 S.Ct. at 2384.

Based on the foregoing, the Court should find that Plaintiffs failed to state a claim that is actionable under the APA in its argument that the Forest Service failed to supplement its NEPA. Further, even if Plaintiffs had an APA claim, the Forest Service did not fail to supplement NEPA because there was no ongoing major Federal action. Lastly, the Court should find Plaintiffs' claims are frivolous. Therefore, the Court should grant summary judgment in favor of the Defendants.

Respectfully submitted this 24th day of March, 2016.

/s/ Hertha L Lund _____
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CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding the caption, certificates of service and compliance, table of contents, table of authorities, and exhibit index contains 1,833 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24th 2016, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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