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

<p>WESTERN WATERSHEDS PROJECT, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>SALAZAR, et al.,</p> <p>Defendants.</p>	<p>CV-09-159-M-CCL</p> <p>BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER</p>
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INTRODUCTION

Plaintiffs Western Watersheds Project, *et al.*, seek immediate injunctive relief against intended actions of federal defendants the National Park Service and United States Forest Service, including the slaughter and/or extended confinement of native bison originating in Yellowstone National Park (YNP). Plaintiffs respectfully seek a temporary restraining order and/or preliminary injunction to prevent the imminent slaughter of bison held in the Stephens Creek capture facility, of which there are currently over 300 bison being held for test and slaughter or extended confinement, and the likely killing of additional bison this winter and spring.

Plaintiffs filed this civil action against the National Park Service and United States Forest Service in November 2009, seeking declaratory and injunctive relief until the agencies prepare a supplemental environmental impact statement (SEIS) to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4331 *et seq.*, and the Forest Service took measures to ensure it was providing habitat for bison and ensuring a viable population of bison and other native species was maintained on the Gallatin National Forest as required by the National Forest Management Act (NFMA), 16 U.S.C. Sec. 1600 *et seq.*, and the Park Service took measures to ensure its actions against bison were not causing impairment or unacceptable

impact to the bison and other Park resources, as required by the National Park Service and Yellowstone National Park Organic Acts, 16 U.S.C. Sec. 1 *et seq.* Summary judgment briefing was completed on September 17, 2010, and oral argument was held on September 21, 2010. No decision has yet been rendered on the cross motions for summary judgment.

The administrative record shows the Park Service's own biologists and other scientists recognize the harmful impacts non-random culling and other management actions have had on the bison population. ARY6565; 9218, 9194-95; 7676-7701. The biologists have additionally documented harmful impacts to bison when they are captured and held in confinement for later release. ARY6767; 4856; 3604. Substantial areas of additional habitat exist to which bison could migrate for winter and spring forage, rather than being killed or confined in a trap within Yellowstone National Park (YNP), including federal lands such as the Gallatin National Forest, state public lands, and private lands with bison-friendly landowners both west and north of YNP. See Second Dec. Hockett, pars. 12-16; Second Dec. Geist, par. 6.

Plaintiffs desire to view and observe the native bison unmolested on their traditional habitat, without being captured, tested and killed by the federal Defendants. Second Dec. Geist, pars. 5, 9, 42. The Plaintiffs have attested to their cultural and spiritual connections with bison, and the importance to

these and other interests such as aesthetic interests, of maintaining free-roaming, viable populations of bison originating in Yellowstone. Second Dec. Geist, pars. 53-57; Dec. Little Thunder Dkt. # 34, pars. 2, 5-7, 9, 13, 18; Second Dec. Hockett, pars. 7, 20, 28, 29. These interests are harmed by removal of these bison from the population and from the landscape, and the losses associated with such unnecessary killing and confinement.

Given the documented lack of justification for the capture and slaughter, and the failure of the IBMP to accomplish either of its purposes – to maintain a free-roaming population of bison, and prevent brucellosis transmission to domestic cattle – emergency relief is warranted to maintain the status quo until this Court has an opportunity to rule on the merits of the case. ARY7301-7302 (transmissions occurring from elk to cattle, but not from bison to cattle, even where bison and cattle comingle); ARY6565-6568; ARY9218, 9194-95 (disruptions to bison population demographics and threats to genetic viability). The requested temporary and injunctive relief is necessary to prevent irreparable harm to the bison and to Plaintiff's and the public's interest in protecting this species and its habitat.

ARGUMENT

I. Standard of Review

To obtain a preliminary injunction a plaintiff must establish it “is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 374 (2008). Environmental injury “can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable.” Earth Island Institute v. United States Forest Service, 351 F.3d 1291, 1299 (9th Cir. 2003)(quoting Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987)). Thus, when environmental injury is “sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment.” Id.

II. Plaintiffs are likely to succeed on the merits

As noted above, summary judgment briefing was completed on September 17, 2010. Dkt #32 & 33 (July 1, 2010); Dkt # 39 & 41 (August 4, 2010); Dkt # 50 (September 3, 2010); Dkt # 52 (September 17, 2010). Oral argument was had on September 21, 2010. Dkt # 55.

For all the reasons set forth in the briefs and oral argument, Plaintiffs are likely to succeed on the merits or have raised at least “serious questions” that they will succeed on the merits¹ of their claims that the federal defendants’ decisions to take actions against bison under the IBMP and related decisions without the benefit of a new or supplemental analysis, without a determination regarding what would constitute a viable population of bison, and without measures to maintain a viable population and provide habitat for such population, and to protect against impairment or unacceptable impacts are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law because such decisions violate the National Environmental Policy Act, 42 U.S.C. Sec. 4331 *et seq.*, the National Forest Management Act, 16 U.S.C. Sec. 1600 *et seq.*, the National Park Service and Yellowstone National Park Organic Acts, 16 U.S.C. Sec. 1 *et seq.*, and the Administrative Procedures Act, 5 U.S.C. Sec. 701 *et seq.*

III. Plaintiffs and the environment will likely suffer irreparable harm without a preliminary injunction and/or temporary restraining order

The Supreme Court has stated that because “[e]nvironmental injury, by its very nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration [it is] irreparable.”

¹ The Ninth Circuit recently clarified that the “serious questions approach survives Winter when applied as part of the four-element Winter test.” Alliance for the Wild Rockies v. Cottrell, -- F.3d ---, 2011 WL 208360 *4 (9th Cir. 2011).

Amoco, 480 U.S. at 545. Accordingly, the Ninth Circuit has repeatedly held the same. See e.g. Sierra Club v. Bosworth, 510 F.3d 1016, 1033-34 (9th Cir. 2007)(“[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.”); also see Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1382 (9th Cir. 1998); City of Tenakee Springs v. Clough, 915 F.2d 1308, 1314 (9th Cir. 1990)(holding that environmental effects of logging suffice to establish irreparable injury for preliminary injunctions).

The lethal taking of wildlife is “by definition, irreparable.” Humane Society of the United States v. Gutierrez, 527 F.3d 788, 790 (9th Cir., 2008). This view comports with the well-established rule that plaintiffs have legally protectable interests in viewing wildlife. See e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) (“desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest”); Humane Society of the United States v. Hodel, 840 F.2d 45, 52 (D.C.Cir. 1988) (plaintiffs have protectable interest in preventing federal actions that “deplet[e] the supply of animals and birds” and where members “witness animal corpses and environmental degradation” in an area).

Courts have often recognized that impacts to wildlife – even indirect impacts through effects on habitat – amount to irreparable injury for purposes of preliminary injunctions and temporary restraining orders. See e.g., Southeast Alaska Conservation Council v. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) (construction of a permanent dam would adversely affect the environment “by destroying trees and other vegetation, and by *killing aquatic life*.”)(emphasis added). Even where the number of animals to be killed is a relatively small proportion of the population, the fact some will be lethally removed represents irreparable harm, because killed wildlife cannot be returned and a monetary award cannot recompense such a loss. See e.g. Fund for Animals v. Norton, 281 F.Supp.2d 209, 220-21 (D.D.C. 2003)(holding plaintiffs met irreparable injury burden where defendants would kill 525 mute swans out of a 3600 swan population, in remote locations and over the course of several months)(citing Fund for Animals v. Clark, 27 F.Supp.2d 8, 14 (D.D.C. 1998)(plaintiffs would suffer irreparable injury by seeing or *contemplating* bison being killed in an organized hunt where even smaller proportion of bison population than proportion of swan population in Fund v. Norton was to be killed).

In Gutierrez, the Ninth Circuit Court of Appeals granted an

emergency injunction in part, reversing the district court's denial of a preliminary injunction, and prevented three states from lethally removing sea lions below a dam in the Pacific Northwest where the lions were feeding on salmon protected under the federal Endangered Species Act. Id. at 789-90. Even though the sea lions were feeding on protected salmon species and would diminish the salmon numbers, the court held the balance of harms tipped in favor of the plaintiff-appellants because it appeared the salmon run could sustain the level of consumption anticipated, and the harm to plaintiffs' interests in the sea lions would be irreparable given the sea lions would be killed. Id.

Here, the loss of numerous bison lives, and the displacement of others held in confinement for an extended period similarly results in irreparable injury as that in Gutierrez and the other cases. Without a temporary restraining order and/or preliminary injunction, the damage of removing bison cannot be remedied, no matter what proportion of the population would ultimately be killed or remain alive after this season. Norton, 281 F.Supp.2d at 220-21; Clark, 27 F.Supp.2d at 14.

Further environmental harm will likely occur to the bison population as a whole and to the ecological processes within the ecosystem, if the slaughter and confinement activities are not enjoined. Such injury is

irreparable by law. Amoco, 480 U.S at 545. Park biologists reported the negative impacts of large kills and population fluctuations in 2009, documenting:

More than 1,000 bison (21%) and 1,700 bison (37%) were culled from the population during winters 2006 and 2008, respectively. Culls differentially affected population segments, altered gender structure, created reduced female cohorts, and dampened productivity. Over time, these effects could diminish the ecological role of the largest remaining free-ranging plains bison population in the world which, in turn, would diminish the ecological processes within the park and the suitability of the park to serve as an ecological baseline (i.e., benchmark) for assessing the effects of human activities outside the park.
ARY7677.

The report went on to recommend smaller selective culls rather than large slaughters, and other actions to increase tolerance for and range of bison outside YNP boundaries. Id. Plaintiffs have also raised concerns and the record substantiates such concerns about the genetic viability of the population, and associated ecological processes. See e.g. Second Dec. Geist, pars. 31, 40, 42; and Dkt. # 49 pars. 78-121.

Should the agencies go forward with the non-random removal of the bison currently in the capture facility – and likely more throughout the season - the very harm the Park biologists feared will likely be caused. Such harm represents irreparable harm to the environment and to Plaintiffs' interests.

The Ninth Circuit also holds that plaintiffs are harmed when agency action will limit their ability to “view, experience, and utilize [] areas in their undisturbed state” regardless of how many other areas would remain available for such use. Cottrell, 2011 WL 208360 at *8. In Cottrell, a national forest timber sale would have disturbed one area of the forest that plaintiff’s members “viewed, experienced, and utilized.” The defendant agency argued no irreparable harm would occur because the affected area of the forest was only six percent of the type of area plaintiffs were concerned about (burned areas). Focusing on the harm to the plaintiffs, the Ninth Circuit rejected that argument as “too much,” explaining the “logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed.” Id.

The same principle applies here. Plaintiffs have identified numerous interests that would likely be irreparably harmed even if the majority of the bison population survives the winter and the agencies’ activities, so that Plaintiffs could “view and experience” other bison. Plaintiffs’ interests that will be harmed include the close cultural and spiritual connection of bison and American Indian people, and the spiritual connections others have with bison as well. Little Thunder Dec., Dkt # 34, pars. 2, 5-7, 9, 13, 18; Second

Dec. Geist pars. 53-57. They also include the desire to have bison allowed to roam as other wildlife and to access their necessary year-round range, in order to view bison in a natural setting and to someday support a fair chase hunt. Second Dec. Hockett, pars. 7-8, 28. Such interests will be harmed per se by the slaughter and confinement of the bison and prevention of their access to necessary winter range, and cannot be remedied by anything other than injunctive relief.

IV. A preliminary injunction and/or temporary restraining order is in the public interest

The Ninth Circuit has noted the importance of preserving the public's interest in "preserving precious, unreplenishable resources," and the preservation of our environment as required by NEPA and NFMA. Earth Island Institute v. United States Forest Service, 442 F.3d 1147, 1177 (9th Cir. 2006), *overruled on other grounds by Winter*, 129 S.Ct. at 375. The court has also held the public has an interest in "preserving our national forests in their natural state." Alliance for the Wild Rockies v. Wood, 2008 WL2152237 *2 (citing Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002); see also Bosworth, 510 F.3d at 1033-34.

The "natural state" of the Gallatin National Forest includes native bison and the species associated with them. ARY4017, 4028. Bison migrations to winter range outside YNP boundaries are natural events, and

are necessary for the conservation of the species. ARY5305, 5307; 6941; 7706; 6586; 6978; 6537; 6589; 6537. Bison originating in Yellowstone are a “precious, unreplenishable resource” in that they are one of few or the only population remaining that retains its genetic integrity and has not been interbred with domestic cattle. ARY5329-5340. The Yellowstone bison are also ecologically and evolutionarily significant to the species as a whole. ARY4029. Clearly the public interest in preserving such “precious, unreplishable” resources and our National Forests in their natural state includes allowing bison to migrate as needed to winter range on the Gallatin National Forest and other areas, and not to be killed or held in confinement. See also Second Dec. Hockett, pars. 7, 12-18 (expressing desire to see bison roaming to access available habitat, and identifying known areas of accessible habitat). The public has demonstrated a great interest in preserving the bison as a wild, free-roaming species, as evidenced by incidents such as 109,000 people contacting the Park Service director in one season asking her to end the bison slaughter. Second Dec. Geist, par. 39.

In addition to the preservation of the environment, “ensuring that government agencies comply with the law is a public interest of the highest order.” National Wildlife Federation v. National Marine Fisheries Service, 235 F.Supp.2d 1143, 1162 (W.D. Wash. 2002); see also Colorado Wild Inc.

v. United States Forest Service, 523 F.Supp.2d 1213, 1223 (D. Colo. 2007).

Given the potential violations of law in this case, a preliminary injunction and/or temporary restraining order is justified to maintain the status quo until the Court has an opportunity to render its decision on the merits.

V. The balance of harms favors a preliminary injunction and/or temporary restraining order

The Ninth Circuit holds that “[i]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.” High Sierra Hikers Association v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004). Here, the harm is certain in that over 300 bison are already trapped and a number of them will be slated for slaughter. More harm is sufficiently likely, as the conditions in and around Yellowstone this winter mirror those of other seasons when over a thousand bison were killed in a single winter. Second Dec. Geist, pars. 44-47 (outlining similarities between the same time of year in 2008 and 2011, and indicators of large kill years for bison, including snowpack at 30% above average and groups of 200-300 bison already captured and other already moving towards Park boundaries).

The environmental harms – including potential reduction in genetic diversity - that will be suffered by Plaintiffs and the bison population will also be suffered by future generations of the human community. A loss of

genetic diversity is “truly” irreparable harm. Balelo v. Baldrige, 724 F.2d 753, 768 (9th Cir. 1984)(Nelson, J., concurring). Plaintiffs have raised concerns and the record substantiates the concerns about the loss of unique alleles, and other genetic impacts that may threaten the long-term health and survival of the bison population. Second Dec. Geist, pars. 31, 40, 42; ARY4012-4340 (management removals could jeopardize the viability of the northern herd, especially in harsh winters).

Given the lack of justification for the capture and slaughter (ARY7219-7228 study indicating no management of bison could effectively protect cattle herds in most years; ARY7301-7302 documenting transmissions occurring from elk to cattle, but not from bison to cattle, even where bison and cattle comingle), and the failure of such actions to accomplish either of the IBMP goals as noted in the introduction above, the Defendants are not likely to suffer any harms if their planned actions to kill bison and/or hold them in confinement for an extended period are enjoined.

Nor could the federal Defendants be harmed by a preliminary injunction or temporary restraining order because realistic options exist that would allow the bison to remain free from confinement or slaughter. While the bison have not reached their food-limited carrying capacity in the Park (ARY6941), they do need to migrate beyond Park boundaries to access

winter forage. ARY5305. Such areas are available if they were allowed to access them instead of being captured while still within YNP boundaries. Second Dec. Geist, pars. 15-16 (bison captured inside YNP), par.6 (bison welcome on various lands, including private land surrounding YNP); Second Dec. Hockett, pars. 12-16 (identifying private lands where bison would be accepted and welcomed, and public lands that could serve as winter range for bison).

Additionally, the Ninth Circuit holds that “[i]n cases where parties seek the suspension of all action until NEPA requirements are met, the courts weigh the scales in favor of those seeking the injunction.” Thomas v. Peterson, 753 F. 2d 754, 764 (9th Cir. 1985). Plaintiffs have asked the court to enjoin the Defendants’ decisions adopting and implementing iterations of the IBMP until the Defendants prepare a new or supplemental environmental impact statement to analyze and disclose impacts associated with substantial new information and changed circumstances. Without such analysis to guide and inform the agencies’ actions, the purposes of NEPA cannot be fulfilled. Thus, as the Ninth Circuit holds, the scales tip in Plaintiffs’ favor here.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request this Court issue an order temporarily restraining and/or preliminarily enjoining the federal Defendants from slaughtering the bison currently held in the Stephens Creek capture facility, from holding the bison in confinement for several months instead of allowing them to access necessary habitat inside and outside YNP boundaries, and from further use of the capture facilities to capture bison, send bison to slaughter, and/or hold bison in confinement for extended periods. Plaintiffs respectfully request this Court act in an expedited manner, as the harms to the bison and to Plaintiffs' interests appear quite imminent and cannot be remedied apart from the relief requested herein.

Respectfully submitted this 3rd day of February, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to the United States District Court for the District of Montana, Local Rules of Procedure 7.1(d)(2)(E), this brief complies with the word limits of this rule. This brief contains 3,331 words, excluding caption, signature block, and certificates of compliance. The undersigned relied upon the word count of the wordprocessing system used to prepare this brief.

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