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

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs, v. SALAZAR, et al., Defendants.	CV-09-159-M-CCL PLAINTIFF'S BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION & BACKGROUND

This case involves concern about conserving an "iconic resource" – the bison originating in Yellowstone National Park (YNP) and attempting to use the ecosystem that is its home. Doc. 440 ARY1.[1] The National Park Service and the Forest Service have participated in capture, slaughter, and other manipulations of wild bison in the Yellowstone ecosystem for several years, that is having negative impacts on the bison and other resources the agencies are charged with protecting. Plaintiffs challenge their actions as violating the National Environmental Policy Act, 42 U.S.C. Sec. 4321-4370(h), the National Forest Management Act, 16 U.S.C. Sec. 1600-1687, the National Park Service and the Yellowstone National Park Organic Acts, 16 U.S.C. Sec. 1-4, and the Administrative Procedures Act, 5 U.S.C. Sec. 500-504, 551-559 (2006).

STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. Sec. 701 et seq, this Court "may direct that summary judgment be granted to either party based upon. . .review of the administrative record." Great Basin

[1] Citations to the administrative record are as follows: those to the Yellowstone National Park record are referred to by index document, and identified as ARY to denote "Yellowstone" and either "1" or "2" for the originally filed record or the supplemental record; those to the Forest Service record are referred to by index document number.

Mine Watch v. Hankins, 456 F.3d 955, 961 (9th Cir. 2006). The Court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "short of statutory right," or found to be "without observance of procedure required by law." 5 U.S.C. Sec. 706(2)(A),(C),(D); Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549, 554 (9th Cir. 2006). The review must be "searching" and "careful", and should determine whether the decision was based upon a consideration of the relevant factors. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

An action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43 (1983).

ARGUMENT

I. NEPA AND APA VIOLATIONS

The National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4321 et seq., is "our basic national charter for protection of the environment."

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215-16 (9th Cir. 1998)(quoting 40 C.F.R. Sec. 1500.1(a)). By forcing agencies to take a 'hard look' at the environmental consequences of its proposed action, Earth Island Institute v. United States, 351 F.3d 1291, 1300 (9th Cir. 2003), NEPA seeks to "ensure" that an agency "will not act on incomplete information only to regret its decision after it is too late to correct." Marsh, 490 U.S. at 371; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

NEPA "mandates that an Environmental Impact Statement (EIS) be prepared for all 'major Federal actions significantly affecting the quality of the human environment." High Sierra Hikers Association v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004)(quoting 42 U.S.C. Sec. 4332(2)(C)). An Environmental Assessment (EA) may be prepared to determine whether significant impacts may occur, and thus an EIS necessary. Id. (citing National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) and 40 C.F.R. Sec. 1508.9).

Supplemental documentation is sometimes necessary after an initial assessment, thus "an agency that has prepared an EIS cannot simply rest on the original document." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000); Marsh, 490 U.S. at 371. Instead, NEPA requires the

agency to "be alert to new information" that may alter the results of its original environmental analysis, and continue to take a "hard look at the environmental effects of its planned action, even after a proposal has received initial approval." Id. (quoting Marsh, 490 U.S. at 374).

Here, Defendants violated NEPA and continue to violate NEPA by: (1) failing to consider and take a hard look at new information; (2) failing to consider and take a hard look at substantial bison management changes; (3) unreasonably deciding not to prepare supplemental NEPA analysis for the Plan or for related actions; (4) arbitrarily relying on "adaptive management" to avoid NEPA analysis; and (5) failing to conduct proper NEPA analysis for related bison management actions (for the Ranch Agreement; Horse Butte Trap; and Ranch Fence Permit).

A. Defendants violated NEPA and the APA by failing to take a 'hard look' at new information and circumstances, and impacts of management changes, and by arbitrarily and capriciously deciding not to prepare supplemental NEPA analysis

The Council on Environmental Quality (CEQ) regulations require that agencies "prepare supplements to either draft or final environmental impact statements if (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. Sec.

1502.9(c).

"It would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." Marsh, 490 U.S. at 371.

An agency must carefully evaluate potentially new or different impacts when new information comes to light, Marsh, 490 U.S. at 379-85 (meeting 'hard look' requirement by preparing one SEIS, then a supplemental information report, and hiring independent experts to carefully scrutinize proffered data), or when a project is changed substantially. Price Road Neighborhood Association v. United States Department of Transportation, 113 F.3d 1505, 1508-09 (9th Cir. 1997). An agency must prepare an SEIS if impacts may occur in a significant manner or to a significant extent not already analyzed. Portland Audubon Society v. Babbitt, 998 F.2d 705, 708-09 (9th Cir. 1993); Marsh, 490 U.S. at 374; 40 C.F.R. Sec. 1502.9(c).

1. Defendants failed to take a "hard look" at new information and changed circumstances and unreasonably decided not to supplement the EIS

Defendants have a "continuing duty" to gather new information, and to "consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require" an SEIS. Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980); Stop H-3 Association v. Dole, 740 F.2d 1442, 1463-64 (9th Cir. 1984); See also Ocean Advocates, 402 F.3d at 865; Anderson v. Evans, 371 F.3d 475, 487 (9th Cir. 2004); Ecology Center v. Kimball, 2005 WL 1027203 at *4 (agencies must evaluate new information and circumstances based upon the "significance" factors in the CEQ regulations).

Significant new information and circumstances have come to light since the Plan was adopted in 2000, and which undermine many presumptions of the Plan and the agencies' justifications for it. Examples of this new information and its significance includes:

- Quantified risk assessment for brucellosis transmission from wild bison to cattle indicating transmission risk is nearly zero and more cost-effective alternatives exist. 527 ARY1, Kilpatrick. Such assessment was unavailable when the IBMP FEIS was prepared.
- Removal of cattle from Horse Butte on public and private land, thereby eliminating major justification for Western Boundary Area bison restrictions in the Plan. Increase in seroprevalence since Plan adoption, undermining Plan goals and expectations that slaughtering bison would reduce seroprevalence over time. 611 ARY1; 440 ARY1.
- A real time PCR test has been developed that identified actual infection in live animals. Exhibit 2, Dec. Lindstrom at 2-4.
- Identification of at least two genetically distinct subpopulations of bison, and bison movements not as assumed. The Plan FEIS was

> based on the assumption that bison moving into the Northern Management Area came from the northern range herd (then thought to be part of one genetically indistinct population originating in the Park). New information demonstrates that bison moving into the Northern Area are almost exclusively from the central herd. 611 ARY1. Additionally, the FEIS was based on the assumption that these herds were part of one genetically indistinct population; new information since 2000 shows there to be at least two genetically distinct subpopulations. The implications of this new understanding have not been analyzed by the agencies, and are relevant to the impacts of management on retaining the genetic diversity required to sustain the populations and to other impacts considerations. See Dec. Schubert at 7-9; also 202 ARY1, Gates et al (migrations and lethal removals may threaten viability of northern herd); 241 ARY1, Gross and Wang (suggesting at least 2000 bison in each population may need to be protected to ensure genetic integrity – current management does not provide for any lower limits on populations in subpopulation, but treats the population as one indistinct herd). See Dec. Schubert; 398 ARY1; 81 ARY2.

Defendants have failed to sufficiently evaluate and make a reasoned determination whether new information that has come to light since 2000 demands an SEIS be prepared. In Friends of the Clearwater, the agency met this 'hard look' obligation only after evaluating new information carefully through several documents, including a supplemental information report, several Biological Assessments and Biological Evaluations (related to sensitive and threatened/endangered species), and other documents "all of which contain additional data and analyses supporting the Forest Service's conclusion" that the new information "did not constitute significant new circumstances or information relevant to environmental concerns and

bearing on the proposed action or its impacts that require an SEIS." Friends, 222 F.3d at 561; See also Marsh, 490 U.S. at 379-85.

Here, Defendants' only apparent attempt to formally review its management direction and some new information was through its Status Review in 2005. Doc. 215 ARY1. That review provided only a cursory review of important new information and did not provide detailed evaluation regarding significance of new information and circumstances to impacts of the Plan and related actions. Id. For example, the only mention of an important bison ecology study was to state the topic of the study. ("Bison movements that have occurred since implementation of the IBMP have confirmed that YNP is not a self-contained ecosystem for bison. At current population levels, movements from the park to surrounding areas are normal occurrences, especially during winter (Gates et al 2005)." Id., at 29. Defendants provided no data comparisons or analysis.

This limited review, and Defendants' failure to carefully examine information since that 2005 Review, violates NEPA's requirement to take a "hard look" at whether new information requires supplemental analysis. 40 C.F.R. Sec. 1502.9(c)(iii), and violates the APA's requirement to consider important factors. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43.

2. Defendants failed to take a "hard look" at impacts associated

with their substantial management changes and unreasonably decided not to supplement NEPA analysis for changed management

Defendants are also required to take a "hard look" at impacts associated with management changes that were not considered or that will occur in a different way than originally considered, but they have failed to do so. See Price Road, 113 F.3d at 1508-09.

In Sierra Forest Legacy v. Rey, 577 F.3d 1015 (9th Cir. 2009), the Ninth Circuit held plaintiff conservation groups likely to succeed on the merits of their claim[2] that an SEIS was necessary to evaluate management changes to a timber management "framework." While the defendant agency asserted its changes were merely a "supplement" to the earlier framework, and not a substantial change, the Court found it constituted a change in circumstance "relevant to the development and evaluation of alternatives," because it was designed to "adjust" existing management and "broaden" the basic strategy "to include other management objectives." Sierra Forest, 577 F.3d at 1021-22 (quoting Natural Resources Defense Council v. US Forest Service, 421 F.3d 797, 813 (9th Cir. 2005).

Defendants' similarly "adjusted framework" and new management decisions here require a 'hard look' at impacts "to determine whether [their]

[2] The decision involved granting a preliminary injunction, and evaluation of plaintiffs' likelihood of succeeding on the merits.

analysis and conclusions remained valid in light of the project change." Price Road, 113 F.3d at 1510, and to determine if the adapted plan's "environmental impacts are significant or uncertain and thus warrant further documentation." Id. at 1507.

While the Adapted Plan and the related decisions follow the same "adaptive management" framework, these decisions constitute substantial management changes, especially in conjunction with various other related management changes. For example, the Ranch Agreement changes overall management by concentrating use of the Stephens Creek capture facility, as the Agreement demands that all bison migrating north be captured, tested for exposure to brucellosis, slaughtered if testing positive, and otherwise manipulated. Although this type of management is already in use, the impacts of its concentrated use in this manner and to this extent were not analyzed in prior NEPA documents. Other actions further alter the extent and degree of impacts – many of the impacts uncertain due to failure to analyze – including institution of a "hunting demonstration project" in the Western Management Area, the proposed Remote Vaccination study; APHIS' bull study; the Quarantine Feasibility Study. Each of these management changes involves increased or concentrated bison removals and other impacts not specifically associated with or analyzed in the IBMP FEIS.

See e.g. Doc. 225 ARY1, Quarantine Q & A (all seropositve bison removed for study will be slaughtered, *and* up to half of seronegative bison would also be removed).

The Defendants have not, unlike the agency in Price Road, "reevaluated the original" EIS for the IBMP, or analysis for related actions, "to determine whether its analysis and conclusions remained valid in light of the project change." Price Road, 113 F.3d at 1510. The agencies thus failed to meet NEPA's requirement to take a "hard look" at whether an SEIS is required based upon substantial changes to the project. 40 C.F.R. Sec. 1502.9(c).

3. Defendants violated NEPA and the APA by failing to prepare NEPA analysis for Plan related decisions, including the Horse Butte Permit, Ranch Lease, and Ranch Fence Permit

Defendants' related bison management decisions are similarly without adequate or valid NEPA analysis, and thus violate both the APA and NEPA. Defendants' failure to analyze and disclose the impacts of bison management actions based upon new information and the collection of various Plan iterations and components renders each related decision arbitrary and capricious as well. Nor are these decisions supported by independent NEPA analysis sufficient to satisfy Defendants' NEPA duties.

The Ninth Circuit Court of Appeals stated in Kern v. Bureau of Land

Management, that determining the scope of NEPA analysis requires consideration of three types of related actions – "connected actions," "similar actions," and "cumulative actions." [3] Kern, 284 F.3d 1062 (9th Cir. 2002); 40 C.F.R. Sec. 1508.25(a). Thus "significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." Kern, 284 F.3d at 1075; 40 C.F.R. Sec. 1508.27(b)(7); See also Churchill County v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001).

While NEPA allows an agency to "tier" analysis of one project to that of a broader project or plan, it can only do so when the underlying document has itself met NEPA's requirements. See Kern v. Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002)(agency cannot tier to management guidelines that were not subject to NEPA analysis); 40 C.F.R. § 1502.20. Tiered documents must also include site-specific analysis, and if tiered to a document without adequate NEPA analysis, the site-specific analysis must also include the missing landscape level analysis. Id.; Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 997 (9th Cir. 2004).

[3] "Connected actions" are closely related or interdependent and should be analyzed together; "similar actions" should be analyzed together to evaluate combined impacts; "cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. Sec. 1508.25(a).

Horse Butte permit

The Horse Butte permit was renewed without any supplemental or new analysis. While the Forest Service suggests the decision is supported by the site-specific analysis from 10 years earlier, such analysis does not account for the changed management and information discussed above. Doc. 68 at 2, Permit Decision. The Forest severely limited the scope of its analysis, relying on the stale Plan analysis and assertions the Plan would continue with or without the Permit. Id. at 3. This misses the point – as required by the CEQ and set forth in Kern, *supra*, the Forest must analyze the impacts of permitting the trap use in the context of the related actions, and such must include both site-specific and overall impacts. With the closure of grazing on Horse Butte, and other new information, it is improper for the Forest to so limit the scope, and its decision is a violation of NEPA and the APA.

RTR Lease and Fence permit

The fencing permit is described as "necessary" to restrict bison uses prescribed by the IBMP, and "required" as part of the Ranch Lease agreement. 87 ARY1 at 1, 7. While the Plan contemplated allowing 25 bison to use RTR lands after cattle were removed (Id. at 2-3), the FEIS did not analyze site-specific impacts, and the agencies did not know at the time

how such use of the land would occur. Despite the acknowledged relationship of this action to the IBMP and RTR agreement, the Forest Service issued the fencing permit by categorical exclusion (Doc. 87 at 8), thereby deciding not to consider or analyze any impacts of the fencing decision itself, and as related to the overall management plan which is itself without valid NEPA analysis. This constitutes improper analysis of the scope of the project and its impacts and violates NEPA and the APA.

Similarly, the Park Service failed to prepare any site-specific analysis for the RTR Agreement, despite its substantial funding to enable the Agreement to take effect. 511 ARY1. Nor did the Park Service prepare supplemental analysis to ensure this management change was evaluated for impacts in terms of new information and management direction. Id. This also constitutes improper analysis of the scope of the project and the Park's decision violates NEPA and the APA.

II. THE IBMP, AMP AND OPERATING PROCEDURES (TOGETHER REFERRED TO AS "THE IBMP PLANS"), AS WELL AS REAUTHORIZED GRAZING ACTIVITIES, JEOPARDIZE THE EXISTENCE OF BISON AND SAGEBRUSH DEPENDANT SPECIES, AND REDUCE FOREST DIVERSITY IN VIOLATION OF NFMA AND THE FOREST PLAN

The GNF is required by NFMA to "provide for diversity of plant and animal communities based on the suitability and capability of the specific

land area." 16 U.S.C. § 1604(g)(3)(B); 16 U.S.C. § 1604(i). This duty "requires planning for the entire biological community - not for one species alone," and "requires Forest Service planners treat the wildlife resource as a controlling, co-equal factor in forest management." Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1484, 1489 (W.D. Wash. 1992); aff'd 998 F.2d 699 (9th Cir. 1993). In order to implement the diversity mandate, the Forest Plan adopted the language from the 1982 planning regulations, which required the Forest Service to manage wildlife habitat "to maintain viable populations of existing… species". 36 C.F.R. § 219.19 (2000); See, GNF Forest Plan, A.R. #1, at II-1, VI-42. The Forest Plan requirement is still applicable even though the underlying regulations have been revised. Ecology Center v. Castaneda, 562 F.3d 986, 990-91 (9th Cir. 2009) (finding a similar provision as found in the GNF Forest Plan incorporated the viability standard into the Kootenai Forest Plan, but upholding the FS action where the agency conducted an actual viability analysis). Both the NFMA diversity and the Forest Plan viability requirements apply to site-specific projects. Id.

The Forest Plan defines viability as "a population which has adequate numbers and dispersion of reproductive individuals to ensure the continued existence of the species population in the planning area." A.R. #1, at VI-41. The duty to ensure viable, or self-sustaining populations applies with special

force to "sensitive" species - those that are in population decline or have declining available habitat. Friends of the Wild Swam v. U.S.F.S, 966 F. Supp. 1002 (D. Or. 1997). In order to demonstrate that the FS is ensuring viability, available habitat may be used as a proxy for species viability. However, there must be enough habitat to "support at least a minimum [self-sustaining] number of reproductive individuals, and the habitat must be well distributed so that those individuals can interact with others in the planning area." Inland Empire Pub. Lands Council v. U.S.F.S., 88 F.3d 754, 761 (9th Cir. 1996) (citing 36 C.F.R. § 219.19 (2000)).

Because the Forest Plan does not contain specific standards and guidelines to ensure the viability of bison and sagebrush dependent species, it, and actions implemented under it effecting those species, are invalid under NFMA. Seattle Audubon Soc. v. Evans, 771 F. Supp. 1081 (W.D. Wash 1991), aff. 952 F. 2d 297 (9th Cir. 1991).

A. Activities Impacting Bison

a. *The IBMP Plans*

As discussed in the First Amended Complaint, bison is a textbook example of a functional keystone species. See, First Amended Complaint, Para. 54-56. The IBMP agencies recently acknowledged the importance of bison in promoting diversity of plant and animal species, stating that:

> "new science suggests that several thousands of bison are likely necessary to fully express their ecological role in a wild environment such as the Greater Yellowstone Area (e.g. creation of landscape heterozygosity, nutrient redistribution, competition with other ungulates, prey for carnivores, carcasses for scavangers, stimulation of vegetation primary production)." IBMP Briefing Statement on Bison Population, A.R. # 19 at 2.

The decisions excluding bison from most of the forest in order to protect the livestock industry limit the ability of bison to play their natural role in supporting diversity within the forest ecosystem, in violation of § 1604(g)(3)(B). While the FS is expected to make tradeoffs between competing interests in the implementation of the Forest Plan, eliminating bison is simply not allowed because "NFMA's diversity provisions… substantively limit the Forest Service's ability to sacrifice diversity in those trades." Sierra Club v. Marita, 46 F.3d 606, 624 (7th Cir. 1995).

The IBMP Plans require the capture and slaughter of bison without an adequate assessment of the impacts to forest diversity or bison viability from these actions. At best, the IBMP Plans limit the number of bison on the Forest to 100 animals for a limited duration on small tracts of land. FEIS, A.R. #3, Vol. 1, pg. 192. This 100 animal "tolerance limit" is not set based on the need to ensure viable populations of bison, or based "on carrying capacity limits, but on logistical feasibility, risk management and risk to private property." ROD, A.R. # 2, at 52. Rather than protecting diversity

and ensuring a viable population of bison dispersed throughout the Forest, as required by NFMA and the Forest Plan, the IBMP Plans "[c]learly define a boundary line beyond which bison will not be tolerated." FEIS, A.R. #3, Vol. 1, at xiii. This boundary line is drawn solely based on the IBMP agencies' ability "to monitor, manage and limit bison movements," and expressly without reference to the viability of bison populations on the Forest, or the threats to bison viability caused by harsh winters and limited forage. Id. at 192. This is exactly the opposite of the type of viability analysis required by Lands Council. 537 F.3d at 994 (requiring an assessment of the quantity and quality of habitat necessary for the forest to support viable populations of plant and animal species).

While the Administrative Record lacks the necessary studies and analysis required by Lands Council, it does contain evidence that the actions by the GNF are jeopardizing bison viability. A 2005 study commissioned by the NPS found that "[h]istorical data indicates that most of the northern range bison may migrate into the Gardiner basin [on the GNF] during harsh winters, returning to [the Park] unless removals occur." The Ecology of Bison Movements and Distribution in and Beyond Yellowstone National Park, Gates, et al., pg. 251 (April 2005) (referred to as "2005")(quoted and cited in A.R. #725). This same study found that harsh winters could cause

migration of "bison north to the Gardiner basin [that] could result in management actions (removals) that jeopardize the viability of the Northern Range population." Id. at xii. This study recommended that a population viability analysis be conducted to define a minimum viable bison population for the Northern Range herd. Id. at 251 (concluding that the Northern Range herd was a biologically distinct population).

Neither the NPS nor the FS know how many animals are required to exist on the GNF in order to support a minimum viable population, and ensure the continued existence of the species on the forest. By approving the IBMP Plans, the Horse Butte capture facility, and the RTR Fencing Project, the GNF has repeatedly acted without reliable and accurate assessments of the "quality and quantity of habitat . . . necessary to support" viable populations of bison on the Forest. Native Ecosystems Council, 428 F.3d at 1250. By excluding bison from most of the forest, the GNF is limiting diversity in violation of NFMA, and jeopardizing the viability of the species in violation of the Forest Plan.

The GNF must revise the Forest Plan to provide standards and guidelines to ensure the viability of this species. In Idaho Sporting Congress v. Rittenhouse, the Ninth Circuit found that actions by a national forest that resulted in removing specific breeding pairs of pileated woodpecker was

"alarming given that the Forest Service does not have in place valid standards to ensure that a minimum amount of breeding pairs survive throughout the Forest." 305 F.3d 957, 970 (9th Cir. 2002). The Court went on to state that the action at issue, and the corresponding NEPA document, was invalid with respect to "the Forest Act because it does not assess pileated woodpecker habitat by means of a valid forest-wide standard." Id. Similarly, actions taken pursuant to the IBMP Plans to capture and/or slaughter most bison entering the Forest are alarming considering the GNF does not have in place valid standards to ensure that a minimally viable amount of bison occur throughout the Forest. As such, these actions must be found to be in violation of the "Forest Act" and the Forest Plan. Id.

The capture and slaughter activities authorized in the IBMP Plans are particularly alarming considering the potential impacts these activities have on the viability of bison on the Forest and elsewhere. The Gates Study concluded that lethal removals of bison could jeopardize the viability of the northern herd. Gates 2005, at xii. The IBMP FEIS acknowledged that nonrandom selective removal of bison could "negatively influence the resultant genetic integrity and viability of a population." A.R. #3, Vol. 1, at 288. Additionally, recent studies have confirmed the threat posed by loss of genetic integrity. These studies, representing best available science,

conclude that *at least* 2000 bison must be retained *in each distinct population* to preserve 95% of genetic diversity, and thus population survival, over 200 years. Effects of Population Control Strategies on Retention of Genetic Diversity in National Park Service Bison, Gross and Wang 2005. Because, according to the Gates study, the entire northern herd may migrate onto the GNF during harsh winters, it follows that a minimally viable population would be 2,000 bison on the GNF. However, without a viability assessment and/or Forest-wide standards to ensure viable populations of bison, the GNF is unable to ensure that lethal removal of bison will not jeopardize the viability of bison on the Forest.

b. Grazing Permits and AOI's

It is clear that cattle are the driving force for management of bison on the GNF. The GNF repeatedly authorizes cattle grazing without an adequate suitability analysis in violation of NFMA, and without adequately protecting forest diversity. 16 U.S.C. § 1604(g)(3)(B). There may be areas on the forest where cattle grazing is suitable, and will not impact forest diversity. But the authorization of cattle grazing in bison habitat precludes the use of the habitat by bison, and results in lethal actions to remove bison that could jeopardize the viability of the species. This directly limits diversity on the forest, as "diversity, of course, can exist only if individual species survive."

Seattle Audubon Soc. v. Lyons, 871 F. Supp. 1291, 1315 (W.D. Wash. 1994).

On numerous occasions, Plaintiffs have requested that the Forest Service consider retiring or changing the use of current cattle allotments on the GNF to better accommodate bison. By removing cattle from allotments near the northern and western boundaries of the Park, the Forest Service would make additional habitat available for use by bison and improve the potential for the Forest to support viable populations of bison. The D.C. District Court echoed this idea, concluding that closing an "allotment to livestock grazing would significantly reduce the need for hazing and killing bison. Greater Yellowstone Coalition v. Bosworth, A.R. #839, FN 11 (D.C.C. 2002). Nonetheless, without ever analyzing the direct and indirect impacts on bison, the GNF has repeatedly declined to even consider closing or retiring allotments based on the needs of bison.[4] Because risk of transmission of brucellosis to cattle is the stated reason the GNF must exclude and slaughter bison, reauthorizing cattle allotments and issuing annual operating instructions without an understanding of the quantity and quality of habitat required to ensure viable populations of bison violates NFMA and the Forest Plan. Native Ecosystems Council, 428 F.3d at 1250.

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[4] For a list of cattle allotments potential threatening the viability of bison on the GNF, *see Complaint*, pg. 77-78.

B. Activities Impacting Sagebrush Dependent Species

Compounding the loss of diversity from excluding bison, the FS has also failed to adequately provide for diversity of plant and animal species by not providing for Forest Plan standards, objectives or guidelines related to sagebrush habitat and sagebrush dependent species, in spite of the existence of sagebrush habitat sagebrush dependent species in areas of the GNF. See e.g. Exhibits 10 & 11; A.R. #707, 708. Because the Forest Plan fails to provide management direction with respect to sagebrush habitat, the FS is failing to ensure that viable populations of sagebrush dependent species, such as the sage grouse, survive – thereby threatening forest diversity.

The FS knows very little about the presence of sagebrush dependent species on the GNF, and as stated by the Committee of Scientists during the initial NFMA rulemaking, "[i]t is simply not possible to assess diversity without knowing what kinds of species compose the different communities in a region and numbers of each that are present for the simple reason that kinds and numbers are the biological ways that diversity is measured." 44 Fed. Reg. 53975 (Sept. 17, 1979). Despite this lack of knowledge, the GNF continues to approve grazing on the forest in sagegrouse habitat. See Complaint, at 77-78. Additionally, the grazing pastures are repeatedly burned to benefit cattle grazing, and further destroying sagebrush habitat.

The failure to adequately assess and protect sagebrush habitat and associated species violates NFMA's diversity mandate and the Forest Plan viability requirements. Idaho Sporting Congress, 305 F.3d at 970 (9th Cir. 2002).

III. NATIONAL PARK ORGANIC ACT AND YELLOWSTONE NATIONAL PARK ORGANIC ACT VIOLATIONS

A. The Park is violating its National Park Service Organic Act duties to conserve Park wildlife and prevent their impairment

The National Park Service and Yellowstone National Park (Park) must conserve bison and other Park resources, and prevent against impairment of them, yet the Park is acting contrary to those mandates. The interrelated mandates demanding the highest protection by the Parks of wildlife and other resources do not provide for destroying Park wildlife such as bison, absent some direct and specific authorization by Congress. No such authorization exists for the Park to participate and direct management activities that negatively impact wild bison and other resources.

Congress demanded in establishing the National Parks that such Parks be managed to fulfill the fundamental purpose of the Parks "which is to conserve the scenery and the natural and historic objects and the wildlife therein 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. Sec. 1 ("Section 1")(emphasis supplied).

The General Authorities Act of 1970 (and the Redwood Amendment in 1978), reaffirmed the mandate that National Parks be managed to support their primary purpose - conservation. The Act states: "Congress further reaffirms, declares, and directs that the promotion and regulation . . . [of parks] . . . shall be consistent with and founded in the purpose [of the Organic Act provisions for conservation and no impairment], to the common benefit of all the people of the United States . . . The <u>authorization of activities</u> shall be construed <u>and the protection, management, and administration</u> of these areas shall be conducted in light of the high public value and integrity of the National Park System and <u>shall not be exercised in derogation of the values and purposes</u> for which [the parks] have been established, <u>except as</u> may have been or shall be <u>directly and specifically provided by Congress</u>." 16 U.S.C. Sec. 1a-1("Section 1a-a")(emphasis supplied).

The Park Service considers the "not. . .in derogation" language of Section 1a-1 and the "unimpaired" language of Section 1 to be a single standard prohibiting the Park from allowing management actions that would "impair" Park resources. MP 1.4.2.[5] The Park *never* has authority to allow

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[5] MP refers to the Park's Management Policies, which it published in 2000 at 65 Fed. Reg. 56,003 (Sept. 15, 2000), and updated in 2006. The Park Service has stated that section 1.4 of the MP "serves as NPS's official interpretation of the Organic Act and is

impairment unless directly and specifically provided by Congress. MP 1.4.3-1.4.4.

While the Park Service has discretion to determine what actions best fulfill its conservation mandate, that discretion "is bounded by the terms of the Organic Act itself." Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008); Daingerfield Island Protective Society v. Babbitt, 40 F. 3d 442, 446 (D.C. Cir. 1995). Indeed, Section 1a-1 ". . .limit[s] . . . the Secretary's discretion in discharging his statutory duties" under section 1, which duties are to conserve and not impair park resources, by allowing derogation only where directly and specifically provided by Congress. Sierra Club v. Andrus, 487 F. Supp. 443, 448-49 (D.D.C. 1980). The amendments "reflect a renewed insistence on the part of Congress that National Parks be managed in accordance with the primary purpose of the NPSOA, namely conservation of wildlife resources." Edmonds Institute v. Babbitt, 42 F. Supp. 1, 16 (D.D.C. 1999).

The Park's "conservation" mandate does not itself leave discretion to destroy wild bison or other Park resources, as the Park Service has itself asserted and a court agreed. In National Rifle Association v. Potter, the Park Service asserted, and the court held, that the Park does not have authority

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therefore enforceable against NPS." Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183, 190, n.1 (D.D.C. 2008).

under Section 1 to permit destruction of wildlife, but only has such authority as directly authorized by Congress, such as under Section 3, when wildlife are found to be "detrimental" to the "use" of the Park. 628 F. Supp. 903, 910 (D.D.C. 1986). The court in Potter thoroughly examined the legislative history of Section 1 to support its conclusion, and noted ". . . the overriding purpose of the bill was to preserve, 'nature as it exists'". Id. at 910 (quoting H. Rep. 700, 64th Cong., 1st Sess. 3 (1916). Accordingly, the court held the Secretary's "primary management function with respect to park wildlife is its preservation, unless Congress has determined otherwise." Id. at 912.

16 U.S.C. Sec. 22 also limits Park authority to destroy wildlife: the Secretary "shall provide against the wanton destruction of the . . . game found within the park . . . and generally is authorized to take all such measures as may be necessary or proper to fully carry out the objects of this section." In light of these relevant and interrelated legal provisions, it is appropriate to conclude that Section 1 does not in fact allow the Park Service to kill bison for purported "conservation" purposes.[6]

[6] Past cases in this Court discussing the Park's conservation mandate and participation in another plan that allowed capture and slaughter of bison, are distinguishable here. While the court concluded in one instance that the Park has

Even if this Court concludes the conservation mandate allows discretion to destroy wildlife to serve broader conservation goals, the Park is not fulfilling such conservation mandates through participation in the Plan and related actions. This is demonstrated in the fact the Park has not even taken actions to ensure it meets its higher standard of wildlife protection under the "no impairment" mandate. Even if the Park's conservation mandate allowed discretion to destroy wildlife, the Park may never allow impacts that rise to the level of impairment, unless specifically authorized by Congress. MP 1.4.2-1.4.3.[7] Accordingly, the Park Service sets forth procedures it must follow in order to determine whether its activities or those it authorizes may cause impairment, and to take steps to eliminate impairment whenever it becomes clear that impairment of park resources may be occurring. MP 1.4.7.

The Park Service is failing to fulfill both its conservation and its no impairment mandates through participation in the Plan and actions taken pursuant to the Plan and related actions and decisions. Under the duties and authorities outlined above, the Park must take actions to prevent impairment to bison even from outside influences, rather than acting in concert with such outside influences to destroy bison. In a case involving logging adjacent to

[7] This "no impairment" duty in Section 1 and 1a-1 was also apparently not discussed in previous bison management cases.

Redwood National Park, the district court of Northern California held the Secretary of the Interior had abused his discretion under his Section 1 duty and a protective duty similar to that of the Park's duty to prevent wildlife destruction, when he did not take steps to prevent logging outside the park boundaries. Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974), 398 F. Supp. 284 (N.D. Cal. 1975). The Park in this instance must take steps to prevent the impairment of bison and other resources, rather than participate in and authorize their destruction.

The administrative record evidences potential impairment and certainly unacceptable impacts to bison that the Park has not analyzed in terms of its conservation and no impairment duties. Much of the relevant information is the same as that discussed above and includes: Gates, 202 YAR1 (management removals could jeopardize the viability of the northern herd); Freese, 48 YAR2 (bison are ecologically extinct); Gross, 202 ARY1 (scientists are concerned about the genetic health of bison). The Park must evaluate this information to determine whether impairment is occurring, but it has failed to do so.

B. The Park Service is causing and not providing against the wanton destruction of bison, in violation of 16 U.S.C. Section 22

This specific demand on the Secretary of Interior requires the same level of action required of the Secretary in Sierra Club, *supra*. 16 U.S.C.

Sec. 22 states the Secretary "shall provide against the wanton destruction of the . . . game found within the park . . . and generally is authorized to take all such measures as may be necessary or proper to fully carry out the objects of this section."

The court in Potter referred to this statute in its investigation of legislative history which revealed a strong intent to prevent "consumptive" uses of the park system, and to protect parks as "game preserves." Potter, 628 F. Supp. at 910. That discussion indicates a strict application of this statute is required.

Wanton is not defined in the statute, but its common definitions include: "having no just foundation or provocation." *Merriam-Websters Dictionary Online*, http://www.merriam-webster.com/ (last accessed June, 29 2010).

The bison slaughter has been shown to be without foundation by the GAO Report, 298 ARY1 (indicating the agencies are acting without justification); and by Kilpatrick, 527 ARY1 (quantifying brucellosis risk from free roaming bison to cattle nearly zero in most years, and identifying more cost-effective alternatives that would also conserve more bison). Indeed, killing over 1700 bison in one season, and causing wild population fluctuations that

impact the integrity of the herd, constitutes "wanton destruction." 440 ARY1 (comparing Plan predictions with actual impacts).

The agencies also cause wanton destruction by failing to even test for exposure (447 ARY1 – 1218 bison killed without testing; 343 ARY1 – hundreds of bison killed without testing), let alone use a test for actual infection, even when the risk of transmission is nearly zero. In fact, one Park Service employee was discouraged from pursuing research to develop a more accurate test that could have resulted in less slaughter. Dec. Lindstrom.

For these and many of the same reasons identified above as signaling impairment and unacceptable impacts, the Park's bison capture, slaughter, hazing, confinement, and other manipulative actions are incongruous with its requirements to protect wildlife.

CONCLUSION

Based on the foregoing, Plaintiffs are entitled to summary judgment on claims I through 14 in their First Amended Complaint, and respectfully request this court grant summary judgment in Plaintiffs favor.

Dated this 1st day of July, 2010.

/s/Summer Nelson

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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 6293 words, excluding caption and certificates of service and compliance. The undersigned relied upon the word count of the word-processing system used to prepare this brief.

/s/Summer L. Nelson

___July 1, 2010___ ____________________________

Date Summer L. Nelson