Summer L. Nelson
Western Watersheds Project
Montana Legal Counsel
P.O. Box 7681
Missoula, MT 59807
(406)830-3099
(406)830-3085 FAX
summer@westernwatersheds.org

Rebecca K. Smith
Public Interest Defense Center, P.C.
P.O. Box 7584
Missoula, MT 59807
(406) 531-8133
(406) 830-3085 FAX
publicdefense@gmail.com

Attorneys for Plaintiffs

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 PLAINTIFFS' BRIEF IN RESPONSE TO AND OPPOSING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

ARGUMENT

I. Judicial Review does not Require "Rubber Stamping" and Blind Deference.

While Defendants rely heavily upon assertions of deference, this Court's review must be "searching and careful," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), and the Court "must not 'rubber-stamp'" the Defendants' actions. Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 859 (9th Cir. 2005). A reviewing court need not blindly defer to an agency when reviewing agency decisions. Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 482 (W.D.Wash. 1998). Blind deference to an agency on critical points would essentially "render judicial review meaningless." Greenpeace v. National Marine Fisheries Service, 55 F.Supp. 2d 1248, 1275 (W.D. Wash. 1999).

The Defendants must examine all relevant data *and* articulate a satisfactory explanation for their decisions, without relying on post hoc rationalizations. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 50 (1983)("agency's action must be upheld, if at all, on the basis articulated by the agency itself"); American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 539 (1981)("Whether these arguments have merit . . . post hoc rationalizations of the agency . . . cannot serve as a sufficient

predicate for agency action"); Ocean Advocates, 402 F.3d at 859 (agency must "articulate[] a rational connection between the facts found and the choice made").

II. The Agencies are Violating NEPA and the APA.

A. The Agencies did not Take a "Hard Look" at New Information and Changed Circumstances, and did not Prepare a "Convincing Statement of Reasons."

The Defendants' decisions to forego preparing a supplemental EIS (SEIS)[1] are arbitrary and capricious because they have not taken a "hard look" at potential new or different impacts in terms of the "significance" factors set forth in the Council of Environmental Quality (CEQ) regulations, and they have not provided a "convincing statement of reasons" to explain their decisions not to prepare a SEIS. Id. at 865; 40 C.F.R. Sec. 1508.27.

[1] The Defendants have decided to forego preparing any new or supplemental analysis for the IBMP and related actions at several points, including: 1) in response to a March 3, 2008 letter from Earthjustice outlining new information and changed circumstances on the Horse Butte peninsula (ARY6203-6210; Response at ARY6460); 2) in response to requests sent by WWP and other organizations on October 21, 2008 and January 13, 2009 outlining several changed circumstances and new information warranting a SEIS (ARY6967-6973; ARY7245-7248; Responses at ARY7062 and 7282-7283); 3) in response to a February 27, 2009 letter from the Natural Resources Defense Council and other organizations identifying additional changes that warrant a SEIS (ARY7299-7305; Response at 7415-7416); 4) for each Adaptive Management adjustment decision signed by the agencies that serve to further implement the IBMP framework with changes (ARY4368-4369; ARY5319-5320; ARY7179-7188); 5) when the Forest Service approved the RTR fencing permit to implement the RTR Agreement (FS798); 6) when the Park Service provided funding and approval for the RTR Agreement (ARY7208-7214); 7) when the Forest Service issued a new permit for the Horse Butte capture facility (FS68); and 8) when the agencies adopted new Operating Procedures to implement the IBMP and Adaptations (ARY5972-5983; ARY7284-7294).

A "convincing statement of reasons" is absent here and is "crucial" to demonstrate Defendants have taken a "hard look", and to persuade the Court that impacts of new information and management changes will not be more than insignificant. Id. at 864-865 (citing Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)(Court was "left . . . unpersuaded" that project would have only negligible impact because agency did not provide "requisite convincing statement of reasons").[2] Defendants must provide analysis or additional data, and not just conclusory statements as they offer in their response. Klamath-Siskiyou Wildlands v. Bureau of Land Management, 387 F.3d 989, 996-997 (9th Cir. 2004); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998)(decision not to prepare EIS unjustified where agency report did not provide additional data). Counsel's post hoc rationalizations are equally unavailing. See Motor Vehicles and American Textiles, *supra*.

Defendants' continuing duty to take a "hard look" at the environmental effects of their actions and decisions under the IBMP and related decisions (Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989)), requires they

[2] The Forest Service Handbook also dictates the agency prepare a document (often called a Supplemental Information Report) to record and explain how it reviewed new information to determine its significance, and whether supplemental NEPA analysis is required. FSH 1909.15 NEPA Handbook, section 18. The Forest Service has not completed any such review, nor provided *any explanation* for its decisions not to supplement the EIS.

consider, evaluate, and make a reasoned determination about the significance of new information. Warm Springs 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). This requires evaluation of new information and management changes based on the CEQ "significance factors." Ocean Advocates, 402 F.3d 845; Anderson, 371 F.3d at 487; Ecology Center v. Kimbell, 2005 WL 1027203 at *4.[3] Defendants have not pointed to *any* evidence in the record demonstrating they have considered the admittedly substantial new information and circumstances in terms of the "significance" criteria in the CEQ regulations, nor do they provide any convincing statement of reasons in the record. (ARY7678[4]; "the signatories have collected substantial new information regarding bison, brucellosis, and the management of transmission risk").

1. Kilpatrick quantified brucellosis transmission risk assessment.

Defendants point to no consideration in the record of the Kilpatrick report, which is the first quantified assessment for risk of transmission of brucellosis from bison to domestic cattle. ARY7220. They merely offer counsel's interpretation of

[3] "Significance" must be evaluated in terms of context and intensity. 40 C.F.R. Sec. 1508.27. Context refers to the setting in which action takes place (1508.27(a), and intensity refers to "the severity of the impact." 1508.27(b).

[4] ARY refers to the YNP administrative record, cited to the bates numbers. FS record references are cited as FS##, except the Forest Plan, the IBMP FEIS and ROD are each referred to by name and pdf page number.

the report and counsel's conclusion that it does not represent significant new information. This post hoc rationalization is inadequate to satisfy *the agencies'* duty to evaluate the new information and provide an explanation for their decisions. Motor Vehicles, *supra*.

2. Removal of Cattle from Horse Butte and other areas.

The Defendants assert they took a "hard look" at changes in cattle grazing on Horse Butte through their "acknowledgement" of the changed circumstance in a Status Review of the IBMP prepared in 2005. The Review contains nothing more than an "acknowledgement," stating that "the Horse Butte Grazing Allotment is the only allotment within zone 2 of the Western IBMP Management Area. The permittee has vacated the allotment and relocated to the Targhee National Forest." ARY4410. This "acknowledgement" and Defendants' "adaptive adjustments" cannot replace the evaluation, data, and discussion required for a "hard look." See Warm Springs, 621 F.2d at 1023-24.

3. Rate of Seroprevalence of Brucellosis.

Defendants again simply assert that "awareness" and "consideration" of studies is sufficient to satisfy its "hard look" duty in terms of new information about brucellosis seroprevalence in bison. They point to no evaluation of the significance factors or explanation. Ocean Advocates, 402 F.3d at 864-65.

Defendants' counsel offer their own post hoc explanation for why the new information is insignificant, asserting the studies Plaintiffs cite to only demonstrate the rate of seroprevalance in female bison has remained constant and there is no clear increase. In fact, the record cited indicates that seroprevalence in adult females has *increased or remained constant* at about 60%, contrary to FEIS modeling which predicted the selected alternative would result in a seroprevalence decrease from 50% to 33% in ten years. ARY7691; also see ARY7622 and 7681. The post hoc rationalizations and the record do not explain why this information is not significant, when the predicted decrease formed the basis for analyzing impacts and cost-benefit analysis in the FEIS. FEIS Vol. I, p. 27-31.

4. PCR Test for Infection rather than exposure.

Defendants' counsel suggests the agencies have adequately considered new information related to development of a more accurate test for brucellosis infection rather than mere exposure, by pointing to documents that simply indicate a test is available or being developed (at the time of the documents), but that it *may not* be reliable for field testing bison. ARY3196; ARY8996-8999. Elsewhere in the record, the agencies suggest a more accurate field test *is* available. ARY ARY6126-6127. However, they have not pointed to any evaluation of the test and its availability for use, or the significance of its potential availability, despite the

fact one of the initial developers of the test and a former YNP Biologist has indicated the test is reliable when appropriately used, and would prevent the slaughter of disease-free bison. Lindstrom Dec., par. 10, 11, 14.

5. Genetic Diversity and Population Demographics.

Each of Defendants' arguments regarding why new genetics and population information is not relevant significant information fails to satisfy NEPA's "hard look" duty. Defendants argue first that they have "kept abreast of" and "commissioned" studies, and "considered" new studies they are "aware of." The record documents Defendants point to are summaries and presentations to IBMP agencies of new information – they do not provide additional data from the agencies, evaluation, or an explanation that they are not significant. See ARY6885-86; 6910-25; 6926-36; 6593; Warm Springs, 621 F.2d at 1023-24 (requiring agency to support decision not to supplement EIS with a statement of explanation or additional data).

Defendants next argue the FEIS considered genetics of the bison population, as if this somehow relieves them of any duty to respond to *new* information. In fact, the FEIS admitted genetic information was limited, and assured the public the agencies would reevaluate the minimum population assessment when information became available. FEIS Vol. II, 183-184

(presuming 580 bison might be sufficient to preserve genetic viability, but acknowledging information was limited); Vol. I, p. 114-115; 150-152.

New genetics information indicates there may be two to three genetically distinct subpopulations of bison in the Greater Yellowstone Ecosystem (GYE). ARY3236-3448 (Halbert 2003); ARY5700-5762 (Gardipee 2007); ARY7374-7379 (Luikart model study plan May 2009); ARY9196 (Geremia, et al., recognizing two semi-distinct subpopulations); ARY6940 (Briefing Statement Oct. 15, 2008); ARY4020 (Gates et al. 2005, recognizing two bison subpopulations). A minimum population must be protected in *each subpopulation* rather than the population as a whole, and the number is likely much higher than thought in the FEIS. ARY6918 (maintaining diversity in bison depends upon maintaining adequate abundance in the central and northern breeding groups); ARY7374-7379 (may need 1000-2000 bison *or more* in each breeding group); ARY7372 (may need 2000-3000 in each differentiated population to maintain genetic variation and prevent inbreeding depression); ARY7229-7235, ARY6940, ARY6588-6589 (all recognizing many thousand bison may be necessary to protect genetic diversity for evolutionary potential or to fully express their ecological role).

Defendants have not considered any of this information in terms of the significance factors, rendering their decisions not to prepare a SEIS arbitrary and capricious.

B. There are "Substantial Questions" that Significant Impacts May SEIS is required.

Moreover, while the record indicates the agencies have not evaluated the new genetics information in terms of "significance" nor satisfactorily explained its insignificance, the record belies the significance of the information and the need for a SEIS. First, Defendants' failure to evaluate the "significance" factors raises a "substantial question" whether the impacts of their actions *may* be significant, and thus demands a SEIS. Ocean Advocates, 402 F.3d at 864-65, 867 (plaintiffs raised substantial question where agency did not evaluate significance factors, and EIS *must* be prepared if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor'). [5] The "substantial question" test is a "low standard." Klamath-Siskiyou Wildlands Center v. Boody, 468 F.3d 549, 562 (9th Cir. 2006).

Additionally, the agencies' reliance on "stale" scientific evidence and analysis based upon false assumptions also renders the initial NEPA analysis

[5] The decision "whether to prepare a SEIS is similar to the decision whether to prepare an EIS in the first instance." Marsh, 490 U.S. at 374.

invalid and demands Defendants prepare a SEIS. Seattle Audubon Society v. Espy, 998 F.2d 699, 704-705 (9th Cir. 1993) (agency required to reexamine alternative chosen in EIS because intervening information rendered EIS science "stale" and evidence false assumptions about impacts of action).

The IBMP and FEIS were based upon assumptions that brucellosis could be eliminated in wildlife (FEIS Vol. I, p. 14, 114), elk were poor transmitters and thus bison were the focus of management (ARY9349; FEIS Vol. I, p. 33-34, 106-110, 153), cattle would continue to occupy areas of the GNF adjacent to YNP and thus bison management would be required to ensure temporal and spatial separation (FEIS Vol. I, p. vii, 33), management would decrease the seroprevalence rate in bison (FEIS Vol. I, p. 27-29), the bison population would stabilize (FEIS Vol. I, p. 27, 459), and management would not affect bison population demographics. FEIS Vol. I, p. 459-461. The FEIS did not use a quantified risk assessment for transmission from bison to cattle, and thought quantification was impossible. FEIS Vol. I, p. 11. Additionally, the FEIS was based upon limited genetics information (FEIS Vol. II, 183-184), and a miscalculation about bison movements and population substructure. ARY7622, ARY7681; ARY6586.

New information indicates transmission is occurring from elk to cattle, but not from bison to cattle even where they co-mingle (ARY7301-7302), and that elk have higher rates of brucellosis than previously thought, and outside the GYE. ARY9348-9358. The agencies have also documented unanticipated disruptions in the age and sex ratios of the bison population, and threats to viability due to large-scale culls. ARY6565-6568; ARY9218, 9194-95; and see Plaintiffs' Statement of Genuine Issues (SGI), pars. 78-121.[6]

All the "stale" scientific evidence and false assumptions render the initial FEIS invalid and requires the agencies prepare a SEIS to fully analyze the impacts of their actions. Seattle Audubon, 998 F.2d at 704-05.

Moreover, even if the Court was unconvinced at the obvious import of the new information, the existence of more than one of the significance factors in this instance also demands the Defendants prepare a SEIS. Ocean Advocates, 402 F.3d at 868 (even if Court was unconvinced about "obvious severity" of impacts, CEQ factors of uncertainty and cumulative impacts demonstrated likely significance). Significance can be demonstrated by the presence of just one of the

[6] Also see "IBMP Changes 2000-2008" powerpoint on the Interagency Bison Management Program website, available at **http://ibmp.info/library.php** (last accessed 8/30/10).

factors. Id. at 865 (citing National Parks and Conservation Association v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).[7]

Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS. 40 C.F.R. Sec. 1508.27(b)(5); National Parks, 241 F.3d at 731-32; Anderson, 371 F.3d at 489. In Anderson, the court required an EIS to account for uncertainty and controversy inadequately addressed in an EA approving a whale management hunt. 371 F.3d at 492. Plaintiffs and the government disputed the existence of a genetically distinct subpopulation of whales in a local area of the hunt, and no one had a "firm idea" how a hunt would impact that population. Id. at 480-82, 489-90. There was disagreement about the whales' migrations, and whether whales removed from the local population would be replaced by migrating whales. Id. at 480-82. Although the government attempted to minimize the impacts by claiming the populations were not genetically distinct, the court held that assertion

[7] The relevant factors here include: 4) the effects are likely to be highly controversial; 5) there are uncertain effects or unique or unknown risks; 7) the actions are related to other actions; 9) the action may harm a threatened or endangered species; and 10) the action threatens a violation of Federal law imposed for the protection of the environment. 40 C.F.R. Sec. 1508.27(4),(5),(7),(9),(10).

"irrelevant" to the significance regulations as removal of one population would be significant regardless of genetic distinction or lack thereof. Id. at 491.

The same controversy and uncertainty exists here. While adverse impacts are already evident, there is disagreement and uncertainty about whether the bison breeding groups are genetically distinct, how much genetic interchange occurs between the two groups, and what genetic diversity might be lost if one group is impacted more heavily than another. See ARY6911, 6923 ("acknowledged uncertainty" about genetic subdivision, rates of gene flow between breeding groups, and how management removals affect conservation of genetic diversity); ARY7683 (differential culling lowered central herd growth rate); ARY7694 (disproportionate calf-mother pairs culled could "reduce the rates of genetic recombination and lead to a higher probability of lost genetic diversity"); ARY6885-6886 (outlining various scientific possibilities regarding subpopulations, minimum population needs, and conflicting evidence regarding movements between subpopulations). The lack of a "firm idea" about the impacts associated with this information, and the evidence of unanticipated adverse impacts, requires a SEIS just as the lack of "firm idea" regarding impacts to whales required an EIS in Anderson.

There is additional uncertainty and controversy about the availability and viability of the PCR test for actual infection, and the risk of brucellosis transmission, as explained in section A(4), above. As well there is uncertainty about the impacts bison population fluctuations may have on threatened grizzly bears, bringing to play the significance factor regarding impacts on threatened or endangered species. 40 C.F.R. Sec. 1508.27(b)(9). With the recent severe decline in whitebark pine – another key grizzly food source in addition to bison – and the large bison culls that were not anticipated, uncertainty has arisen that further demands preparation of a SEIS. See ARY7299-7305.

C. Significant Impacts May Occur due to Substantial Management Changes.

Defendants' combined adaptive adjustments and other management changes represent substantial management changes that may impact the environment "in a significant manner or to a significant extent not already considered." Marsh, 490 U.S. at 374. While Defendants respond that the "adaptive adjustments" have been within the management framework of the FEIS and ROD, this does not account for other management changes and the cumulatively substantial changes it results in. Nor do Defendants point to any record evidence of evaluating the changes for significance.

The IBMP management changes include: 1) implementing the Quarantine Feasibility Study (QFS) which results in removing additional bison from the population, and which may skew already disrupted age and sex ratios within the population as discussed *supra*, and requires handling that may not have otherwise occurred (ARY4495-4502); 2) implementation of a state public bison hunt which also results in removal of additional bison from the population during times they may otherwise be hazed instead of captured or slaughtered (ARY4368-4369); Adaptive Adjustments on the western and northern management areas based upon stale science and false assumptions for predicting impacts in the FEIS (Id, ARY5319-5320, FS832); and adopting the RTR Agreement which requires all bison moving towards the YNP northern boundary be captured, tested, seropositives slaughtered, seronegatives collared and females fitted with vaginal transmitters, all before allowing up to 25 to pass over a portion of land temporarily (see ARY7008-7009, pointing out ROD did not dictate capture of bison at northern boundary, as RTR Agreement does).

Even if the management changes would result in overall beneficial impacts as the Defendants urge, this does not alleviate the duty to prepare NEPA analysis. 40 C.F.R. Sec. 1508.27(b)(1)(intensity requires consideration of both beneficial and adverse impacts and "a significant effect may exist even if the Federal agency

believes that on balance the effect will be beneficial"). However, because it is unclear how these various management changes may impact bison and other resources in ways different than anticipated and analyzed in the FEIS - because the agencies have not evaluated them in terms of the significance factors, for their cumulative impacts, or in light of new information and circumstances identified above - the agencies must take a "hard look" to evaluate the impacts of the changes, and if the evaluation reveals the impacts may be significant in a manner or extent different than previously analyzed, they must prepare a SEIS. Marsh, 490 U.S. at 374.

D. Adaptive Management does not Substitute for NEPA Compliance.

The adaptive management framework does not relieve Defendants of their NEPA duties regarding the substantial management changes resulting from multiple actions under the IBMP and the new information and circumstances discussed above. Defendants essentially ask this Court to allow them to put the "blinders" back on and grope their way through "adaptive adjustments" without the benefit of analyzing what impacts their actions may have. Marsh, 490 U.S. at 371-72 ("It would be incongruous 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.") Defendants would also leave the public facing the possibility of never again participating in bison management decisions that are continuously "adapted", thus thwarting the other of NEPA's "twin goals." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Even where adaptive management changes are contemplated in an initial EIS, "there must be limits to how dramatic 'modifications' can be before they are deemed 'amendments.'" Klamath Siskiyou, 468 F.3d at 558. The agencies' own management direction clarifies that adaptive management (AM) is not a substitute for a SEIS. 43 C.F.R. Sec. 46.145 (AM analysis must not only identify range of management options, but analyze effects of each option); 73 FR 61300-61301 (comment & response regarding need for NEPA compliance with adaptive management); FSH 1909.15, 14.1, 15 (2008); 73 FR 43090 (comment & response that AM alternative must analyze changes *and their impacts*). The FEIS did not analyze the effects of each adjustment made, but merely suggested various actions might be taken at a later date, such as the RTR Agreement and quarantine.

Even Congress' General Accounting Office assailed the Plan, finding that "contrary to sound principles that define adaptive management, the IBMP "does not have clearly defined, measurable objectives, and the partner agencies share no

common view of the objectives. Consequently, the agencies have *no sound basis for making decisions or measuring the success of their efforts*." ARY6171. This is the very definition of capricious: "governed or characterized by impulse of whim: as *lacking a rational basis*", and "not supported by the weight of evidence." Merriam-Webster's Dictionary of Law, 1996 Merriam-Webster, Inc.

E. There is also No Valid NEPA Analysis for the RTR Agreement, the RTR Fencing Permit, or the Horse Butte Trap Permit.

As explained in Plaintiffs' opening brief, Defendants cannot "tier" their analysis for site-specific actions to NEPA analysis that is no longer valid. Dkt.33, p. 12-13. Thus, the actions approving the RTR Agreement, RTR Fence permit, and Horse Butte permit – all part of the IBMP – cannot be supported by the "stale" EIS for the IBMP that Defendants continue to rely on. See ARY6195, 6201, 7208-7214 (RTR); FS798 (RTR Fence Decision Memo); FS68 (Horse Butte Decision Memo); ARY7062-7072 (Letter & comments to YNP regarding why EIS/SEIS is necessary to analyze impacts of the specific RTR Agreement, and YNP Response).

Morevoer, NEPA requires that all connected actions be addressed in a single EIS. See 40 C.F.R. Sec. 1508.25; Great Basin Mine Watch v. Hankins, 456 F.3d 955, 968-69 (9th Cir. 2006). Actions are connected if they "are interdependent parts of a larger action." 40 C.F.R. Sec. 1508.25(a)(1). As

explained in Plaintiffs' opening brief (Dkt.33, p. 14-15), the decision documents belie their interdependent nature, and it is ingenuous for Defendants to assert they have any "independent utility" – the only justification for segmenting the analysis of impacts for each of these actions. Great Basin, 456 F.3d at 968-69. The independent utility test involves the question "whether the actions would have taken place with or without the other." Id.

Because a Categorical Exclusion (CE) can only be applied to actions that *do not* have an individually *or cumulatively* significant impact on the environment, 40 C.F.R. Sec. 1508.4, they are inappropriate for connected actions such as these. Also see Washington Trails Association v. USFS, 935 F.Supp. 1117 (WD Wash. 1996) (enjoining ORV project for NEPA violations including use of C.E. & failure to consider connected actions); and Anderson, 371 F.3d at 492 (EIS required because EA did not adequately address certain impact).

The USFS Handbook regarding NEPA compliance supports a conclusion that a CE is not appropriate for renewing the Horse Butte capture facility permit or for issuing the permit for the RTR fence. When supplementation is necessary due to new information or management changes, this applies to any level of NEPA analysis – CE, EA, or EIS. FSH 1909.15, 18.2-18.4. Where new information indicates the project *may* have a significant impact (such as through having

cumulative impacts), the Forest Service *must* prepare an EIS. Id. at 8.3. The Forest Service must also examine new information impacting analysis in a previously prepared EA, and again supplement or prepare an EIS as necessary. Id. at 8.4. The Forest Service has failed to do this for the Horse Butte EA, and improperly applied a CE to the RTR Fencing decision as well. Both agencies failed to prepare any NEPA analysis for the RTR Agreement itself, or to support any of these decisions by tiering to a *valid* EIS.

III. The Forest Service is Violating NFMA, NEPA and the APA

A. The GNF Failed to Follow the Forest Plan Requirement to Maintain Diversity and Ensure the Existence of Viable Populations of Bison and Sagebrush Dependent Species on the Forest.

In the course of approving the actions at issue in this lawsuit[8], the GNF was required to follow, *inter alia*, two specific directives.[9] First, the NFMA diversity mandate requires the diversity of plant and animal species be maintained based on the suitability and capability of specific land areas to provide for various uses. 16 U.S.C. 1604(g)(3)(B); 16 U.S.C. § 1604(i). Second, the Forest Plan incorporated

[8] Such as: the IBMP Adaptive Management Adjustments and Annual Operating Procedures, the Horse Butte Capture facility authorization, the RTR Fencing project, and numerous grazing permits and annual operating instructions ("AOIs"). See Complaint, 57-78.

[9] These directives govern GNF actions regardless of the authority the state may have to shoot bison that enter Montana. In other words, the GNF may not violate its statutory mandate to maintain diversity and follow Forest Plan direction to maintain viable populations of existing species to aid in enforcing state law.

the viability provisions of the 1982 NFMA planning rules, and requires the GNF "provide habitat for viable populations of all indigenous wildlife species and for increasing populations of big game animals." FP, II-1; Ecology Center v. Castaneda. 562 F.3d 986 (9th Cir. 2009)(The Plan defines "viable population" as "a population which has adequate numbers and dispersion of reproductive individuals to ensure the continued existence of the population in the planning area," meaning in the GNF. FP, VI-43; Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1050, 1069 (9th Cir. 2002).

In order to demonstrate compliance with these requirements, GNF must have completed analyses showing that the diversity and viability of species existing on the forest is ensured. Lands Council v. McNair, 537 F.3d 981, 994 (9th Cir. 2008); *see e.g.*, Inland Empire Pub. Lands Council v. U.S.F.S., 88 F.3d 754, 761 (9th Cir. 1996); Seattle Audubon Soc. v. Evans, 771 F. Supp. 1081 (W.D. Wash 1991), aff. 952 F. 2d 297 (9th Cir. 1991); Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 970 (9th Cir. 2002). Specifically, Lands Council states that in order to show that the viability requirement is being met:

> The Forest Service must support its conclusions that a project meets the requirements of NFMA and relevant Forest Plan with studies that the agency, in its expertise, deems reliable. The Forest Service must explain the conclusions it has drawn for its chosen methodology, and the reasons it considers the underlying evidence to be reliable.

537 F.3d at 994.

GNF has never demonstrated, through studies or other analysis, that bison or sagebrush dependent species' numbers and dispersion of reproductive individuals on the GNF are adequate to ensure the continued existence of the population as required by the Forest Plan. FP, VI-43. Nor does the GNF know what level of habitat or species population is necessary to support viable populations of these species on the Forest. Without this information, the GNF cannot know whether individual actions directly or indirectly limiting available habitat, jeopardize the continued viability of these species on the Forest, or unlawfully reduce plant and animal diversity. As a result, the individual actions and the Forest Plan standards (or lack thereof) are unlawful. Idaho Sporting Congress, 305 F.3d at 970.

B. The GNF Must Maintain Diversity and Ensure Viability of Species on the Forest.

Defendants' attempt to read out the requirement to maintain diversity and viability on the Forest, in favor of a requirement that adequate wildlife populations remain elsewhere, perhaps within YNP. Def. Mot., 32-33. This is not how the plain language of the Forest Plan reads, nor is it how Courts have interpreted it. See FP, VI-43; Neighbors, 303 F.3d at 1069 (in order to meet viability

requirement, "habitat must be 'well distributed' throughout the forest."). Whether the diversity and viability requirements apply via NFMA, the 1982 regulations, or the Forest Plan, Defendants' arguments to this effect must fail. Dkt. 41 p. 30, 32-33.

C. The GNF's Failure to Ensure Viability of Existing Species on the Forest.

Defendants argue that Plaintiffs cited no evidence that the actions challenged in this case violate the viability provision found in the GNF Forest Plan. But it is the Forest Service that is charged with ensuring and providing viability and diversity (and, as with NEPA, provide methodology used – 40 C.F.R. Sec. 1502.24), but they have done no analysis of the effects of their actions on the viability of bison or sagebrush-dependent species. See e.g. Def. Answer, 4 ("Defendants admit that they have not analyzed the impacts of cattle grazing on bison viability"). However, GNF, through repeated approvals of grazing allotments in bison habitat and the adoption of the IBMP, has cut off a "huge area of biologically suitable bison winter range" that potentially 1,500 bison would use if given the opportunity. See FS802-2.

An illustrative example of a court-approved implementation-approach for a Forest Plan containing similar viability language to the GNF Forest Plan is found

in Ecology Center, 562 F.3d 986. In Ecology Center, the Ninth Circuit reviewed the adequacy of a USFS decision to support viable populations of old-growth dependent species through a Forest Plan standard requiring ten percent of wildlife habitat provide old-growth characteristics. The Court approved the USFS action in Ecology Center because the decision was based on a thorough analysis and explanation of methodology used to determine the quality and quantity of old-growth habitat necessary to support a viable population of these species on the forest. Id. at 992, 997. For each of the projects in that case, the USFS specifically assessed the project impacts on the viability of old-growth dependent species on the Forest through the use of the ten percent standard. Id.

In stark contrast to the level of analysis considered in Ecology Center, the GNF has never conducted an analysis of the quality and quantity of habitat necessary to support viable populations of bison or sagebrush dependent species on the GNF; nor has it estimated the number of individual animals necessary to support viable populations of each species on the Forest. Without such analysis, Plaintiffs' are left to point out that the GNF limits bison on the Forest to at most 100 animals in a small patch of the GNF for a limited duration (a number based on

administrative factors, not habitat or population needs)[10]; and that the GNF does not even know how much sagebrush habitat exists on the Forest. In neither instance can the GNF be said to be ensuring the viability of these species on the Forest.

Defendants argue the Forest Plan protects the viability of bison by providing standards related to big game management, using elk as a management indicator species to ensure viability for all similar species. This argument might hold water if bison were treated similarly to elk on the GNF. However, while elk are allowed to roam unimpeded throughout the entire Forest, although they pose similar or greater risks of brucellosis transmission, bison are limited to a tiny portion of the Forest for a limited amount of time. See e.g. ARY6108, pg. 3 (there have been "multiple elk to cattle transmissions in recent years"). Therefore, standards providing viable elk populations, while adequate to protect deer and moose, are inapposite to provide for viable populations of bison (unless bison are similarly allowed to roam free on the Forest).[11]

---

[10] Indeed, the majority of the GNF is "zone 3" under the IBMP, where no bison are tolerated. ROD, p. 24, 25, 29.

[11] Additionally, the record and GNF's management history does not support the contention that they apply elk as an indicator to ensure viable populations of bison. When asked in a FOIA request to clarify *any* FP management direction the GNF has for bison, GNF responded they had "none." See Ex. 11 (Information request and GNF response). The Court may consider Exhibit 11 as it provides information relevant to GNF's decisions, helps determine if the GNF's course of inquiry was sufficient, and is a

For the elk habitat proxy methodology to be valid, it "must reasonably ensure that proxy results mirror reality." *Compare*, Gifford Pinchot Task Force v. U.S. Fish and Wildlife, 378 F.3d 1059, 1066 (9th Cir. 2004)(the habitat proxy deemed valid where it used a detailed model based on the analysis of the habitat and biological needs of the species in question); *with* Native Ecosystems Council v. Tidwell, 599 F.3d 926 (9th Cir. 2010) (habitat proxy method not valid where almost no sage grouse had been seen in the project area for fifteen years). Because no amount of elk habitat can ensure viable populations of bison where bison are physically kept off nearly 100% of habitat, the proxy method here does not mirror reality, and is invalid. Id. Thus, the GNF must amend the Forest Plan to include standards and guidelines based on the quality and quantity of available habitat necessary to ensure bison and sagebrush-dependent species viability on the Forest.[12]

Defendants' attempt to misdirect the Court's attention from the GNF's lack of information about habitat necessary to support viable populations of these species on the Forest by incorrectly stating that Plaintiffs' believe that the GNF

---

factor the agency relied on. Hells Canyon Preservation Council v. Jacoby, 9 F.Supp. 2d 1216, 1223 (D. Or. 1996).

[12] Alternatively, the GNF could conduct a viability analysis to obtain the information necessary to form the basis of non-arbitrary decisions for individual projects potentially affecting the viability of these species.

simply may not participate in the IBMP. Def. Mot., 32. Rather, the IBMP does not trump GNF's statutory mandates, nor is there anything inconsistent with GNF's IBMP role to provide habitat and the statutory obligations. In order to make valid decisions regarding the various IBMP projects, grazing permits, and grazing AOI's (which limit bison use of otherwise suitable habitat), the GNF must determine the quality and quantity of habitat necessary to support viable populations of these species such that decisions will not inappropriately limit the amount of available habitat below the necessary amount.

Even if the Forest Plan viability standard is applied to the "population level" rather than the "planning area" level (which the plain language indicates), the record evidences current management activities that limit bison access to the GNF may jeopardize the viability of the Northern herd during harsh winters. See ARY4023; Plaintiffs' Mot., 19-20; ARY5305; SGI par. 10-13. GNF simply does not know how many bison must be allowed on the Forest, or alternatively how much habitat must be made available to bison to ensure the viability of the species. Because the IBMP cuts off a huge area of available bison winter range (FS802-2), the GNF must assess whether the viability of either herd or the overall population is in jeopardy.

The Forest Plan direction is clear the GNF must also provide for adequate numbers and dispersion of reproductive individuals of sagebrush-dependent species to ensure the continued existence of these species on the Forest. FP, I-1, VI-43. Despite this charge, the Forest Plan fails to provide any guidance on sagebrush habitat or dependent species, except to state that it may be burned as part of cattle forage improvement projects. See e.g. FP, III-53; FS415-5; FS549-10, FS528-15, Johnson Declaration, 6-7. While the GNF acknowledges sagebrush habitat is found throughout the Forest, for example, on the Cache-Eldridge cattle allotment (FS480-35; FS833-3), the GNF did not conduct analyses concerning the quality and quantity of habitat necessary to support viable populations of species dependent upon this habitat type. See e.g. FS68-5; FS69-Vol.-1-10-4,7; FS217; FS311-5,6. Therefore, the GNF cannot validly conclude that actions affecting sagebrush-dependent species, i.e. approving grazing permits that destroy sagebrush habitat (through burning and grazing), will not result in an unallowable decrease in the habitat needed by these species to remain viable. Therefore, the decisions affecting this habitat type, must be set aside until assessments are completed. Native Ecosystems, 599 F.3d 926; Idaho Sporting Congress, 305 F.3d 957.

In an effort to disprove Plaintiffs' claims, Defendants' Motion states that the "Montana Department of Fish, Wildlife, and Parks Heritage database shows limited distribution of sagebrush dependent species on the GNF." It is unclear whether this statement is somehow meant to prove viable populations of these species exist on the Forest, or whether it is meant to show that not enough of these species exist to warrant particularized attention. It is telling, however, that Defendents' were unable to cite to any of the GNF's own assessments of sage grouse, its habitat, or other sagebrush dependent species.

D. The GNF is Failing to Protect Plant and Animal Diversity.

Substantively, NFMA places a duty on the GNF to "provide for the diversity of plant and animal communities based on the suitability and capability of the specific land area." Native Ecosystems, 599 F.3d at 932 (quoting 16 U.S.C. 1604(g)(3)(B)). In order to ensure compliance with the Forest Plan and NFMA, the GNF must "conduct an analysis of each 'site-specific' action" to ensure compliance with NFMA's diversity mandate. Id. Despite this mandate, the GNF adversely affected Forest diversity by implementing various IBMP projects limiting bison to a fraction of the overall Forest, and repeatedly approving grazing permits that directly resulted in loss of habitat diversity (Johnson Declaration, 3-8) and indirectly resulted in the need to limit the habitat available to bison to

minimize the alleged risk to cattle. See e.g. FS57-1; FS680-Final-Decision-Notice-18.

To satisfy NFMA, the GNF must analyze the "suitability" of the specific land area proposed for grazing, and consider the environmental uses forgone. Wilderness Society v. Thomas, 188 F.3d 1130, 1133 (9th Cir. 1999). In each of the suitability analyses contained in the record, the GNF fails to assess any environmental uses foregone, and specifically fails to discuss or consider the loss of sagebrush habitat (through cattle overutilization or sagebrush burning, See e.g. FS415-5; FS549-10; FS528-15; FS515-7; FS652-6), the loss of diversity associated with committing a land area to cattle use (Johnson Declaration, 3-4; SGI par. 6-9), or the resulting need to keep bison out of the lands covered by the allotment due to the presence of cattle (See e.g. FS57-1; FS680-Final-Decision-Notice-18). See e.g. FS833; FS834.

These are significant errors. Bison are critical to maintaining healthy grassland ecosystems (ARY6093-6107), where they serve as a keystone (or focal) species for that habitat type. Johnson Declaration, 3; ARY6536. Whereas cattle grazing supports and encourages the loss of ecosystem diversity (i.e. through promoting uniform forage, burning sagebrush and noxious weed infestation), bison create diverse ecosystems. ARY6536; SGI par. 4-10. The effects of grazing

on the loss of diversity are highlighted in Defendents' Answer, where they claim the sagebrush that occurs on the GNF is patchy and in small areas. Def. Answer, 21. While Plaintiffs do not agree with this assertion, it is clear that there is significantly less sagebrush habitat than historically because of the Forest Plan's guidance, and the grazing program's adoption of the need to burn sagebrush habitat to promote forage for cattle. FS415-5. These actions result in a significant loss of forest diversity in violation of NFMA and must be vacated.

E. The GNF Failed to Use the Best Available Science in Violation of NFMA.

The GNF failed to properly consider, or even mention, the "best available science" standard in approving the projects at issue in this case; including all grazing permits and AOIs, and the IBMP Operating Procedures and amendments. Under the 2000 Transition Rules, projects implementing the GNF Forest Plan are required to be "developed considering the best available science," and the failure to consider, or even mention, the best available science standard is grounds for vacating the approval of those decisions. 36 C.F.R. § 219.35; Forest Watch v. U.S. Forest Service, 410 F. 3d 115, 118-19 (2nd Cir. 2005). Among the science the GNF failed to consider is: that the risk of transmission of brucellosis from bison is almost zero in most years (ARY7219-7228); that due to newly understood risks of

brucellosis transmission from elk, the focus on bison is insufficient to control risk to cattle (ARY9355); that large culls may threaten the long-term viability of the bison populations (ARY9194-9195) and large culls are occurring regularly (ARY6586); that there are at least two, and maybe three, distinct bison populations, whereas the GNF treats the population as one (ARY 9196; ARY 3236-3448); that many thousands of bison may be necessary to maintain viability for each subpopulation (ARY 7229-7235); that the movements of the various bison populations is significantly different than previously considered (ARY7681; ARY6586); and that bison culling may jeopardize the viability of the northern bison herd, especially in harsh winters (ARY4012-4340). The failure to consider (or even mention) the best available science standard in approving the IBMP projects and the grazing permits and AOIs must result in these decisions being vacated, and sent back to the agency for reconsideration. Forest Watch, 410 F. 3d at 119.

IV. The Park Service is Violating the NPS Organic Act and YNP Organic Act, NEPA, and the APA.

A. NPS is not Ensuring Conservation and No Impairment of Bison and other Park Resources.

Even if, as Defendants contend, NPS may slaughter thousands of bison (many without testing) without *per se* violating the conservation mandate

contained in 16 U.S.C. Sec. 1 and Sec. 1a-a, (which Plaintiffs do not concede), here it is clear the Defendants are unable to confirm their actions are indeed conserving the bison populations and preventing impairment of the bison population and other park resources.[13] In fact, when this Court agreed with NPS that the conservation mandate provided it discretion to determine whether "selective removal of individual bison protects and conserves the YNP herd," it expected the removal would be "selective." This has not been the case under the IBMP.[14] ITBC, 25 F. Supp. at 1138. Between IBMP implementation and 2008, the Park has authorized or participated in slaughtering over 3500 bison, including hundreds that were never even tested for exposure to brucellosis, or tested negative. ARY7681, 7693. This can hardly be considered "selective" removal.

[13] In fact, the conservation mandate interpretation Defendants refer to from the past case Intertribal Bison Cooperative v. Babbitt, 25 F. Supp. 2d 1135, 1138 (D. Mont. 1998), is in direct contrast with the position the NPS took in the Potter case, in which the court concluded NPS could not authorize destruction of wildlife unless *specifically and directly* authorized by Congress, such as where wildlife are found to be "detrimental" to the use of the Park. National Rifle Association v. Potter, 628 F. Supp. 903, 910 (D.D.C. 1986).

[14] Defendants contend Plaintiffs cannot challenge the Parks' participation in the IBMP as an ongoing management activity. Plaintiffs here challenge final agency actions including the Adaptive Adjustments that amended and re-implemented the IBMP in 2008, the Operating Procedures adopted in 2009 to implement the IBMP as amended, the decision not to prepare a SEIS to determine the impacts of continued actions under the IBMP (including whether such actions are causing impairment to bison and other Park resources), and the decision not to prepare any NEPA analysis for the RTR Agreement (which also should have included a no impairment assessment and written determination).

NPS asserts it has fulfilled its conservation and no impairment duty by relying on insufficient evidence similarly to its NEPA decisions. First, NPS asserts it has fulfilled its obligations under Sec. 1 and 1a-1 and its MP, by including a statement in the ROD that the management plan would not cause impairment. ROD p. 40, Brief at 27. However, the ROD specifically stated that neither the DEIS nor FEIS "evaluated specifically whether the bison management actions would impair park resources and values." ROD p. 40. Regardless, the conclusion in 2000 is no longer valid, even if it was at the time.

The Park is required to continue to assess the impacts and make written determinations *for each decision* whether actions might cause impairment, and the requirement applies throughout the life of an activity. MP1.4.7. These determinations must be based upon any NEPA analysis, relevant scientific and scholarly studies, advice or insights of experts and others with relevant knowledge. Id. "If there would be an impairment, the action *must not be approved*. Id. (emphasis supplied). Notably, impairment may result from "sources or activities outside the park." "Impairment" is an impact that would "harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values" and depends upon the particular resources and values that would be affected; the severity,

duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts. MP1.4.5.

The Park has not evaluated or made written no impairment determinations in bison management decisions since the IBMP was implemented. If it had, it clearly would have to conclude the actions may be causing impairment and thus take appropriate actions to correct the impairment, as suggested by its own staff.

In fact, the record is replete with evidence of potential impairment, and concerns about the ability of the agencies to predict future trends in order to protect the genetic integrity and diversity of the bison population. Rather than these being only "select studies" chosen by Plaintiffs from the record, as Defendants assert (Dkt. 41 at 28), many of these concerns are expressed by NPS biologists themselves, and nowhere does the record demonstrate the NPS has come to any other reasoned conclusion.

The Park's biologist, P.J. White, noted in a document comparing expectations in 2000 to realities in 2008, that the management actions "could diminish the ecological role of the largest remaining free-ranging 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; MP1.4.6 (park resources and values includes "ecological, biological, and physical processes that created the park and continue to act upon it"). In other words, continued participation in the IBMP and authorization of activities as they have been, would result in (or already is resulting in) the NPS violating its statutory duties. Accordingly, the NPS also has acknowledged internally "there is a lower population bound for Yellowstone bison and elk beyond which NPS cannot support management that further reduces abundance and distribution." ARY6588.

That same document and another internal Park document (ARY6586-6587, also outlining differences between 2000 expectations and realities in 2008) identify other impacts and impairments as well. These include information that large, non-random culls have altered age and sex ratios and the genetic structure of the bison population, large management culls may be unintentionally threatening the viability of the bison populations, and affecting bison demographics and vital rates, the differential culls lowered the growth rate of the central herd, and disproportionate culling of calf-mother pairs could "reduce the rates of genetic recombination and lead to a higher probability of lost genetic diversity," and that large-scale culls would likely create an "unstable bison population that may not

respond quickly to future challenges" and that may have consequences persisting for multiple generations. ARY7676-7701; ARY6586-6587.

The NPS's duty to consider impacts and mitigate any impairment is similar to its NEPA duty, and it must provide a reasoned analysis for its decisions, rather than relying upon conclusory language that merely recites its compliance with Organic Act duties. Bluewater Network v. Salazar, ---F.Supp.2d---, 2010 WL 2680823 (D.D.C. 2010) at *18 (re conclusory language) and *30 (impairment analysis can serve as NEPA analysis where they are not distinguished, and same requirements for reasoned explanation and rational connections between facts found and decisions made, apply); Sierra Club v. Mainella, 459 F.Supp.2d 76, 103 (D.D.C. 2006); Greater Yellowstone Coalition v. Kempthorne, 577 F.Supp.2d 183, 201-202 (D.D.C. 2008) (court held NPS' impairment determination arbitrary and capricious when NPS failed to explain why certain impacts did not rise to level of impairment).

However, Defendants' record citations urged as support for conclusion they have considered and responded to information about impacts to bison and other park resources are unavailing. The 2005 Status Review (ARY4407-4456) did not even consider an important genetic study (ARY4012-4340, Gates et al. 2005) that identified two populations of bison in the GYE and indicated management

removals could jeopardize the viability of the northern herd, especially in harsh winters. The Surveillance Plan (ARY6529-6571) identified uncertainty and needs for information and action to protect the genetic integrity of the population, but did not provide a full analysis, explanation, or conclusions about what actions NPS would take to prevent impairment. Lastly, the 2008-2009 Annual Report (ARY7570-7605) refers to the Surveillance Plan as a plan to monitor and research information to guide conservation actions, but did not identify actions NPS would take.

The record indicates NPS' actions may be causing impairment of bison and other Park resources, and NPS has failed to evaluate, determine, and eliminate such impairments.

B. NPS is causing "Wanton Destruction" of Bison.

Defendants have not even attempted to explain how their unnecessary bison slaughter (Ex. 2, Lindstrom Dec.; ARY 7299-7305, explaining "futility" of restricting bison movements), and unjustified actions under the IBMP (ARY6143-6194, GAO Report), and other adverse impacts do not violate their charge to prevent the wanton destruction of YNP wildlife. Under the weight of all the evidence of unjustified slaughter, actions based upon false assumptions, and

detrimental impacts to one or both breeding populations, one can only conclude the IBMP management actions are causing rather than preventing the wanton destruction of bison, as explained in Plaintiffs' opening brief.

V. An Injunction Pending Compliance with NEPA, NFMA, the Organic Acts and the APA is Appropriate Relief.

While Defendants urge the court not to enjoin any damaging bison management activities, and instead remand to the agency, the Court is not limited to that remedy. In numerous NEPA cases, courts have enjoined the proposed activity until the agency complied with NEPA. See e.g. Portland Audubon Society v. Babbitt, 998 F.2d 705 (1993) (court enjoined logging in owl habitat pending completion of SEIS); Washington Trails, 935 F.Supp. 1117 (enjoining ORV project for NEPA violations).

Although Defendants claim the IBMP has resulted in less bison slaughter than previous years during which Montana was the primary entity killing bison, the record indicates that is not the case. In fact, more bison were killed during the first eight years of the IBMP – over 3,600 bison – than during the *fifteen* years prior to it, when 3,100 bison were killed. ARY7678; ARY6592. Other adverse impacts have been documented as a result of IBMP and related management actions, as discussed *infra*. All this suggests the Defendants' actions under the

purview of the IBMP are causing negative impacts to bison, a valuable public resource.

The Court can use its discretionary powers to craft an appropriate injunctive remedy that protects the bison population and Plaintiffs' interests from further harm, until the agencies comply with NEPA, NFMA, and the Organic Acts. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2758-60 (2010). In doing so, the Court need not require repealing only those actions that may provide increased tolerance for bison, but may and should require the agencies to halt activities such as large-scale culls and other actions that the record indicates are having adverse impacts on the bison populations.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, deny Defendants' Motion for Summary Judgment, and enter judgment on all Plaintiffs' claims against Defendants.

Respectfully submitted this 3rd Day of September, 2010.

/s/Summer L. Nelson
Summer L. Nelson
Western Watersheds Project
Montana Legal Counsel
P.O. Box 7681

Missoula, MT 59807
(406)830-3099
(406)830-3085 FAX
summer@westernwatersheds.org

Rebecca K. Smith
Public Interest Defense Center, P.C.
P.O. Box 7584
Missoula, MT 59807
(406) 531-8133
(406) 830-3085 FAX
publicdefense@gmail.com

Attorneys for Plaintiffs

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 7,961 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.

/s/ Summer L. Nelson
Summer L. Nelson
Attorney for Plaintiffs