MICHAEL COTTER
United States Attorney
MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103
(406) 247-4667

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division
PAUL D. BARKER, JR.
ANNA K. STIMMEL
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
(202)-305-3895
Anna.Stimmel@usdoj.gov

Attorneys for Defendants

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

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs, v. KENNETH SALAZAR, Secretary of the Interior; et al., Defendants.	Case No.: 9:09-cv-00159- CCL DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER

DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER

Defendants Kenneth Salazar, Secretary of the United States Department of the Interior; Colin Campbell, Acting Park Superintendent, Yellowstone National Park ("the Park"); the National Park Service ("Park Service" or "NPS"), an agency of the U.S. Department of the Interior; Leslie Weldon, Regional Forester, U.S.D.A. Forest Service Northern Region; the United States Forest Service ("Forest Service"), an agency of the U.S. Department of Agriculture; and Mary Erickson, Gallatin National Forest Supervisor, by their undersigned counsel, hereby file their Response Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order (Dkt. 57). Plaintiffs have not demonstrated a likelihood of success on the merits of their lawsuit or that they are likely to suffer irreparable harm in the absence of preliminary relief. Additionally, the balance of equities tips in Defendants' favor and preliminary relief is not in the public interest. Accordingly, the Court should deny Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order.

I. Introduction

In November 2009, Plaintiffs filed the original complaint against the NPS and the Forest Service, which was amended in May 2010, challenging the Interagency Bison Management Plan ("IBMP") approved in 2000 by the Park

Service; the Forest Service; the U.S.D.A. Animal and Plant Health Inspection Service ("APHIS"); the Montana Department of Livestock; and the Montana Department of Fish, Wildlife and Parks, to guide bison management actions in and around Yellowstone National Park. Plaintiffs assert that Defendants' actions violate the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"); the National Forest Management Act ("NFMA"); the National Park Service Organic Act ("Organic Act"); and the Yellowstone Enabling Act. The parties filed cross-motions for summary judgment, which have been fully briefed and argued, and are currently pending before this Court. On February 3, 2011, in the face of implementation of the IBMP as a result of harsh winter conditions, Plaintiffs filed a motion for a preliminary injunction and/or a temporary restraining order. For the reasons explained below, their motion should be denied.

II. Factual Background

The Park Service and Forest Service, along with partner agencies APHIS, the Montana Department of Livestock, and the Montana Department of Fish, Wildlife and Parks, developed the IBMP to cooperatively manage Yellowstone bison when they migrate outside of the Park during winter in search of forage. During periods of heavy snowpack, Yellowstone bison migrate to lower elevations north and west of the Park boundary in the State of Montana in search of areas with less snow in an attempt to find food. NPS AR 512. Pursuant to the IBMP,

when bison begin to move toward the Park boundary, the agencies are authorized to use hazing to prevent bison movements outside the Park into areas where they are not tolerated by the State of Montana. NPS AR 2795-869; see also White Decl. ¶3. If hazing becomes ineffective, the IBMP authorizes capture of bison attempting to exit the Park. NPS AR 2795-869; see also White Decl. ¶3. The Stephens Creek capture facility within the Park is used to prevent bison from moving into areas north of the Park boundary where they may commingle with cattle on private lands. NPS AR 7014. Due to the risk of the spread of brucellosis from bison to cattle, bison are not tolerated by the State of Montana. NPS AR 7014. This capture facility has been used for these purposes since at least 1996. See NPS AR 2798.

When bison are captured, the IBMP authorizes agencies to (1) consign bison to quarantine facilities if such facilities are available, (2) if the population is estimated to be greater than 3,000 individuals, consign bison directly to slaughter, (3) if the population is estimated at less than 3,000 individuals, send bison that have tested seropositive for brucellosis to slaughter, (4) vaccinate seronegative calves and yearlings that are captured with a safe vaccine, and (5) temporarily hold seronegative bison for release back into the park in the spring. NPS AR 2807, 2814; see also White Decl. ¶3. When the agencies must haze, capture, or otherwise handle bison, humane methods are used. NPS AR 2848.

The IBMP has a contingency plan in place for harsh winters, to limit bison removal due to management action when the population declines to 2,300 animals and below. NPS AR 2828. Pursuant to the 2008 Adaptive Management Plan signed by the IBMP partner agencies, when the population declines to 2,300 or less bison, the agencies will "increase the implementation of non-lethal management measures." NPS AR 7185. When the population declines to 2,100 or less bison, the agencies will "cease lethal brucellosis risk management and hunting of bison and shift to non-lethal management measures." NPS AR 7185.

This winter has been particularly harsh thus far, with snowpack levels currently 30 percent higher than their average for this time of year. See White Decl. ¶ 2. On both January 29 and 30, 2011, large numbers of bison were hazed back into the Park after they were found on private and public land north of the Park boundary. See White Decl. ¶ 2. Despite this hazing, a large number of bison were again discovered north of the Park boundary on January 31, 2011. See White Decl. ¶ 2. Accordingly, the IBMP partners determined that hazing was no longer effective, and approximately 380 bison were captured from January 31-February 2, 2011 at the Stephen Creek facility. See White Decl. ¶ 2. This action was consistent with the IMBP, which provides that when it is no longer effective and safe to haze bison back into the Park, the animals can be captured and held at the Stephens Creek facility. NPS AR 2822; see also White Decl. ¶ 3. The bison

captured at Stephens Creek will be tested for exposure to brucellosis and those that test seropositive will be shipped to slaughter.[1] See White Decl. ¶ 6. Defendants will endeavor to hold seronegative bison in the facility to release back in the Park in the spring. See White Decl. ¶ 6. The current estimated population of the bison herd is 3,700 animals, and NPS intends to monitor bison abundance as winter progresses. See White Decl. ¶ 5. The Park Service predicts that more than 1,000 bison may migrate to the Park boundary this winter. See White Decl. ¶ 4.

III. Argument

A. Temporary Restraining Order and Preliminary Injunction Standard

Preliminary injunctive relief "is an extraordinary remedy never awarded as of right." Winter v. Nat'l Res. Def. Council, 555 U.S. 7, 129 S.Ct. 365, 376 (2008). In order to obtain a temporary restraining order or a preliminary injunction, Plaintiffs "must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter, 129 S.Ct. at 374). Additionally, a showing that there are "serious questions going to the merits and a hardship balance that tips

[1] The IBMP does not require that slaughter be limited to seropositive animals until the estimated population is below 3,000 animals. NPS AR 2807, 2814; see also White Decl. ¶3. Thus, this is a voluntary measure being taken by Defendants at this time.

sharply toward the plaintiff can support issuance of an injunction," when the other two prongs of the Winter test are also met. Alliance for the Wild Rockies v. Cottrell, No. 09-35756, 2011 WL 208360, at *4 (9th Cir. Jan. 25, 2011) (internal quotation omitted) (emphasis added); see also id. *7 (concluding that this sliding scale test survives Winter). If a plaintiff fails to meet its burden on any of the four requirements for injunctive relief, its request must be denied. See Winter, 129 S. Ct. at 376 (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation NEPA).

When analyzing whether Plaintiffs have met the first prong of the preliminary injunction standard – likelihood of success on the merits – the narrow standard of review applicable to Plaintiffs' claims should be taken into account. Plaintiffs' claims are governed by the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, et seq. The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Court's role is "not to make its own judgment" on the matters considered and resolved by the agencies, as the APA simply "does not allow the court to overturn an agency

decision because it disagrees with the decision or with the agency's conclusions about environmental impacts." River Runners for Wilderness v. Martin, 593 F.3d 1064, 1070 (9th Cir. 2010). To the contrary, the reviewing court's "task is simply ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotations omitted).

An injunction should not be imposed if a less dramatic remedy will adequately address plaintiff's injury. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 276 (2010). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter v. NRDC, 129 S. Ct. 365, 376-77 (2008). Even if the Court determines that an injunction should be issued, injunctive relief must be narrowly tailored to give only the necessary relief. See Califano v. Yamasaki, 442 U.S. 682, 702 (1979); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990).

B. Analysis of the Four-Factor Test

1. Plaintiffs Cannot Show a Likelihood of Success on the Merits

As Plaintiffs have noted, the parties have fully briefed, argued, and submitted to the Court their cross-motions for summary judgment. Accordingly,

Defendants will not repeat their arguments here, but submit that, for all of the reasons previously stated in their briefs (Dkt. 39, 40, 41, 52) and at the hearing on these motions, they are entitled to an entry of summary judgment in their favor. Therefore, Plaintiffs cannot show a likelihood of success on the merits, or even a serious question going to the merits.

Because Plaintiffs cannot show a likelihood of success on the merits, or even a serious question going to the merits, the Court's inquiry should end here. Doe v. Reed, 586 F.3d 671, 681 n.14 (9th Cir. 2009). However, even if the Court disagrees with Defendants on this factor, neither a temporary restraining order nor preliminary injunction are appropriate because Plaintiffs cannot show that they are likely to suffer irreparable harm, that the balance of hardships weighs in their favor (or sharply in their favor, if the Court finds they have only shown a serious question), and that an immediate injunction would be in the public interest.

2. Plaintiffs Cannot Show That They are Likely to Suffer Irreparable Harm Absent Preliminary Relief

To succeed on their motion, Plaintiffs must show that they are likely to suffer irreparable harm in the absence of preliminary relief. Winter, 129 S.Ct. at 374. Due to the extraordinary nature of the remedy, Plaintiffs must show that irreparable harm is *likely*, not just possible, for an injunction to be appropriate. See Alliance for the Wild Rockies, 2011 WL 208360, at *3 (citing Winter, 129 S.Ct. at

375-76); see also Small v. Operative Plasterers' & Cement Masons' Int'l, 611 F.3d 483, 491 (9th Cir. 2010).

Although recognizing that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable," the Supreme Court has rejected a presumption of irreparable injury even where an agency fails to evaluate thoroughly the environmental impact of a proposed action. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545–46 (1987); see also Tribal Vill. of Akutan v. Hodel, 859 F.2d 662, 663-64 (9th Cir. 1988). Recently, the Ninth Circuit has reaffirmed that irreparable harm should not be presumed in environmental cases and alleged environmental injuries may in fact be outweighed by other considerations, including the risks to resources caused by an injunction of the challenged action. Lands Council v. McNair, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), overruled on other grounds by Winter, 555 U.S. 7 (2008) (finding that preventing risks of catastrophic fire, insect infestation, and disease and aiding the struggling local economy and preventing job loss may outweigh alleged harm to individual species).

To meet the irreparable injury requirement, a plaintiff must do more than simply allege imminent harm; it must demonstrate it. Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). This requires a plaintiff to

demonstrate by specific facts that there is a credible threat of immediate and irreparable harm. Fed. R. Civ. P. 65(b)(1)(A). Mere "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." Caribbean Marine, 844 F.2d at 674-75.

Plaintiffs assert that "the loss of numerous bison lives, and the displacement of others held in confinement for an extended period of time…results in irreparable harm" to Plaintiffs' interests and the environment. Pls.' Mot. at 9 (Dkt. 57). However, Plaintiffs have not met their burden to demonstrate that Defendants' actions will cause such irreparable harm.

In the absence of a restraining order or injunction, Defendants will operate the Stephens Creek capture facility in accordance with the IBMP as they have done in past years. IBMP partners determined that, under current conditions, bison leaving the Park could no longer be hazed back into the Park safely and effectively. See White Decl. ¶ 2. Accordingly, they are operating the Stephens Creek capture facility, testing captured bison for brucellosis exposure, and intend to send those testing seropositive to slaughter. See White Decl. ¶¶ 2, 6. Defendants will endeavor to hold those bison that test seronegative at the facilities for release back into the Park in the spring. See White Decl. ¶ 6. These management actions will further the IBMP's goals to conserve a wild, free ranging bison population, and to prevent the transmission of brucellosis from bison to cattle. See USFS AR Doc. 4.

The administrative record shows that Defendants' management actions will not cause irreparable harm. The bison population has not been depleted from year to year due to past culling, nor have Defendants' actions caused threat to the genetic diversity of the herd, the ecological processes in the Park related to bison, or the migratory behavior of bison. The overall abundance of Yellowstone bison during the IBMP period (2001-2010), based on summer counts, was between 2,432 and 5,015 animals, with a count of 3,900 bison in 2010 despite culls of more than 1,000 bison in both 2006 and 2008. See White Decl. ¶ 16. The current estimated bison population is 3,700 animals. See White Decl. ¶ 16.

Recent demographic and genetic assessments indicate that an average of more than 3,000 bison on a decadal scale should maintain a demographically robust and resilient population that retains its adaptive capabilities with relatively high genetic diversity. See White Decl. ¶ 16. A population range of 2,500 to 4,500 bison should help sustain ecological processes such as competition, predation, scavenging, herbivory, migration, and nutrient cycling in Yellowstone. See White Decl. ¶ 17. Furthermore, culling has not substantially altered the migratory behavior of bison in the park and bison continue to try to move out of Yellowstone National Park to lower-elevation, less-snowy areas during winter in search of accessible food. See White Decl. ¶ 16.

Plaintiffs seem to argue that Defendants' actions are causing irreparable harm because bison are not allowed to move freely across public and private lands outside the Park boundaries in the State of Montana and that they will be better able to "view and experience" bison in their natural state if Defendants' actions are enjoined. However, both history and current conditions demonstrate that, without Defendants' management actions, the situation would be even farther from Plaintiffs' desired scenario of free bison movement outside Park boundaries. Without the IBMP in place, the State of Montana has the absolute right to lethally remove all bison that leave the Park without consulting with the Park Service or Forest Service. See Fund for Animals, Inc. v. Lujan, 794 F.Supp. 1015, 1020 (D. Mont. 1991). The implementation of the IBMP, and agency actions taken in furtherance of the IBMP, have resulted in greater tolerance for bison outside of YNP and a management regime in which hundreds of bison are allowed to roam outside the park on private and federal land. See NPS AR 7570-7596. Thus, Plaintiffs' ability to "view and experience" bison in their natural habitat is actually benefited, rather than harmed, by the IBMP. Indeed, it is circumstances like this harsh winter, which were the impetus behind development of the IBMP, and the Court should allow the agencies to implement this management direction.

Plaintiffs argue that capturing bison and sending bison to slaughter constitutes irreparable injury per se, and rely on Humane Society v. Gutierrez, 527

F.3d 788, 790 (9th Cir. 2008). Pls.' Mot. at 7. However, that case is inapposite here. The Humane Society court determined that the taking of some individuals, even from an Endangered Species Act ("ESA") listed species, was an acceptable consequence of protecting other wildlife. In fact, Plaintiffs themselves note that the Humane Society court found that the taking of some salmon was acceptable "because it appeared the salmon run could sustain the level of consumption anticipated." Pls.' Mot. at 9. Additionally, a court in this district, after considering Humane Society, determined that, "to consider any taking of a listed species as irreparable harm would produce an irrational result." Defenders of Wildlife v. Salazar, Case Nos. 09-77-M-DWM & 09-82-M-DWM (consolidated) at 10 & n.2. (D. Mont. Sept. 8, 2009).

Defendants note that the plaintiff's claims in Humane Society were brought under the ESA, a statute specifically designed to protect listed species. Recognition of the special protection afforded by the ESA, is demonstrated by the Ninth Circuit's approach to preliminary injunctions for ESA claims. The Circuit has determined that the traditional balancing of harms prong of the preliminary injunction standard does not apply in the ESA context because by statute Congress has determined that the balance is struck in favor of protecting endangered species, and courts are not free to strike a different balance. See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 793-94 (9th Cir. 2005). Thus, if the

taking of some individual members of a species protected by the ESA does not constitute irreparable harm, it follows that Plaintiffs are incorrect in their suggestion that the killing of individual members of a non-listed species, such as bison, automatically constitutes irreparable harm.

The non-precedential D.C. district court cases Plaintiffs cite in an attempt to support their position that the taking of even a small proportion of a population causes irreparable harm do not help them either, as those cases are not applicable here. The actions in question in those cases would have allowed the removal of individual animals from species that would not otherwise be in danger of lethal removal. See Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003) (challenge to permits authorizing the taking of mute swans that otherwise were protected from taking); Fund for Animals v. Clark, 27 F. Supp. 2d 8 (D.D.C. 1998) (challenge to a controlled hunt designed to reduce the size of the bison herd). As noted above, bison may be removed from the population after they leave the Park even if Defendants' actions are enjoined.

Additionally, there are also district court opinions directly contrary to Plaintiffs' argument that the taking of even a small proportion of a population constitutes irreparable harm. Such cases state that irreparable harm only occurs when the removal of individual animals causes harm to the species as a whole. See Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1195, 1210

n.12 (E.D. Cal. 2008) ("Other district courts have issued injunctive relief where an agency action would cause harm to a small number of individual species' members, but always under circumstances in which the loss of those individuals would be significant for the species as a whole."). As explained above, Defendants' actions will not cause harm to the Yellowstone bison as a whole.

For all these reasons, Plaintiffs cannot meet their burden to show that Defendants' actions they seek to enjoin are likely to cause irreparable harm to Plaintiffs. Accordingly, the Court should deny Plaintiffs' motion.

3. Plaintiffs Cannot Show That the Balance of Equities Tips in Their Favor

To succeed on their motion for a temporary restraining order or preliminary injunction, Plaintiffs must also show that the balance of the equities favor an injunction (or, if they persuade the Court only that they have raised "serious questions" on the merits, that the balance of the equities tips *sharply* in their favor). Winter, 129 S.Ct. at 374; Alliance, 2011 WL 208360, at *4. The fact that the alleged injury is an environmental one, does not allow a court to abandon the balance of harms analysis. Lands Council, 537 F.3d at 1005; Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995) ("Injunctive relief is an equitable remedy, requiring the court to engage in the traditional balance of harms analysis, even in the context of environmental litigation."). There is also no

presumption that environmental harm should outweigh other harm to the public interest. See Lands Council, 537 F.3d at 1004-05; Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992).

In assessing the balance of equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Amoco Prod. Co., 480 U.S. at 542; see also Lands Council, 537 F.3d at 1004. In Lands Council, the Ninth Circuit found that the district court, in denying a preliminary injunction, properly weighed the plaintiffs' claimed environmental injuries against economic hardship and the risks of fire, insect infestation, and disease that the project was designed to address. Id.

Not only can Plaintiffs not show irreparable harm here, as detailed below, it is clear that there will be significant harm to Defendants, the environment, and the public interest if an injunction is issued. Thus, the balance of equities does not tip in Plaintiffs' favor.

If Defendants' actions are enjoined, some bison likely will migrate north into Montana where there are ranches occupied by cattle during the time period of highest brucellosis transmission risk in late winter and spring. See White Decl. ¶¶ 11-12. Some of these bison would likely need to be repeatedly hazed to maintain separation from cattle and prevent the tangible risk of brucellosis transmission. See White Decl. ¶12. This repeated hazing would harm bison by further depleting

their energy reserves, which are already low due to the nutritionally stressful nature of the winter season. See White Decl. ¶12. Additionally, with repeated hazing, some bison become aggressive and resist being hazed. See White Decl. ¶11.

Furthermore, when bison are on lands outside the Park in Montana, the State of Montana has management authority over them. NPS AR 2800. Montana state law provides that when publicly owned bison from a herd that is infected with a dangerous disease enters the state of Montana on public or private land and the disease may spread to persons or livestock, the state may take actions including lethal removal, shooting, and permitting bison to be taken through a public hunt. Mont. Code Ann. 81-2-120; see also NPS AR 7431 (acknowledging this state authority). Accordingly, if Defendants' actions are enjoined and bison move onto Montana lands, they may be lethally removed or otherwise managed by the State with little or no consultation with the NPS regarding their conservation. See White Decl. ¶12. Such removal by the state of Montana is likely because Montana state officials have expressed concerns about: brucellosis infected bison jeopardizing the brucellosis-free status of their livestock industry, the risk to human safety and property damage, conflicts with traffic on highway 89, conflicts with private landowners, depredation of agricultural crops, competition with livestock grazing, lack of local public support, and lack of funds for state management. See White Decl. ¶ 13; see also Intertribal Bison Coop. v. Babbitt, 25 F. Supp. 2d 1135, 1136

(D. Mont. 1998) (recognizing that migration of bison outside of the Park and into the state of Montana presents a danger to the Montana cattle industry, as well as a health risk to humans).

Furthermore, if Defendants' bison management actions are enjoined, it will likely hamper efforts to increase the tolerance of bison outside of the Park, a goal that furthers Plaintiffs' alleged interests. The State of Montana has indicated that increased tolerance for bison outside Yellowstone National Park is linked to decreasing the prevalence of brucellosis in the population. See White Decl. ¶ 14. However, if Defendants are enjoined from removing bison from the population that test positive for exposure to brucellosis, the efforts to reduce the prevalence of the disease will be hampered. See White Decl. ¶ 14.

If Defendants' actions are enjoined and Defendants cannot cull bison, the herd may reach an estimated food-limited carrying capacity of 5,500 to 7,500 animals in the Park, which will likely cause harm to other Park resources. See White Decl. ¶ 15. High densities that would result could cause significant deterioration to vegetation, soils, other ungulates, and ecological processes. See White Decl. ¶ 15.

Plaintiffs argue that there are other conflict-free places available outside of the Park where bison could be relocated. Defendants are acting according to the IBMP to make such places available, and an injunction would not further such

efforts. Consistent with Step 2 of the IBMP, the State of Montana currently allows 25 bison that test negative for brucellosis to migrate to a specified area north of the Park, and allows untested bison to remain in the Eagle Creek/Bear Creek area northeast of Gardiner, Montana where there is no grazing by domestic cattle. See White Decl. ¶ 8; see also NPS AR 2824. After gaining sufficient experience in successfully enforcing separation between the 25 test-negative bison and cattle, the IBMP calls for up to 50 and eventually 100 test-negative bison to be tolerated in Zone 2 area located north of the Park and south of Yankee Jim Canyon, subject to adjustment based on experience gained during Step 2. See White Decl. ¶ 8; see also NPS AR 2822. Once Step 3 of the IBMP is reached, up to 100 untested bison will be allowed to move into Zone 2 north of the Park boundary. There are public lands (Gallatin National Forest), conservation easements (e.g., Royal Teton Ranch), and private lands owned by citizens willing to have bison on their property (e.g., Dome Mountain Ranch) that could provide suitable habitat for bison north of the Park, pending tolerance for bison on these lands by the State of Montana. See White Decl. ¶ 8; see also NPS AR 2824.

The harm to Defendants that would result from an injunction is great, and the balance does not favor Plaintiffs. Additionally, even if the Court finds that Plaintiffs may face some hardship, the balance does not tip sharply toward

Plaintiffs. Thus, if the Court finds that Plaintiffs have only raised serious questions going to the merits, they cannot succeed on the sliding scale test.

4. Plaintiffs Cannot Show That an Injunction Is In the Public Interest

Finally, to succeed on their motion for a temporary restraining order or preliminary injunction, Plaintiffs must show that an injunction is in the public interest. Winter, 129 S.Ct. at 374. The Ninth Circuit has stated that while the public interest in avoiding irreparable environmental injury generally outweighs purely economic concerns, economic concerns combined with other public interests may outweigh environmental injury. Lands Council, 537 F.3d at 1004-05.

Here, the public interest is best served by Defendants continuing to manage bison pursuant to the IBMP, and not through an injunction. As discussed above, if the Court grants the equitable relief Plaintiffs seek, it would increase the risk of transmission of brucellosis to cattle, hamper efforts to increase the tolerance for bison outside of the Park, require repeated hazing which would cause harm to the bison by further depleting their energy reserves and increasing aggression and resistance to hazing, and cause risk to human safety and property damage present when these massive wild animals are allowed to migrate across Montana land, conflicts with traffic on highway 89, conflicts with private landowners, depredation of agricultural crops, and competition with livestock grazing.

Additionally, an injunction is not in the public interest because it would increase the risk of Montana losing its brucellosis class-free status, which would be very costly to the State's livestock industry. See NPS AR 608-09.

Finally, an injunction of Defendants' management actions would not be in the public interest because bison management would revert to a less protective system in which there is not cooperative management between the State of Montana and the federal government. The currently employed management actions, through the implementation of IBMP and agency actions taken in furtherance of the IBMP, have resulted in greater tolerance for bison outside of the Park, fewer lethal removals by the State of Montana, and a management regime in which hundreds of bison are allowed to roam outside the park on private and federal land. See NPS AR 7570-7596. Accordingly, the interests of the public, including Plaintiffs, would not be served by the issuance of an injunction.

IV. Conclusion

Plaintiffs have not demonstrated that they are entitled to the extraordinary remedy of a temporary restraining order or preliminary injunction. They have failed to show that they are likely to prevail on the merits or that they have raised "serious questions" on the merits. They have also failed to demonstrate a likelihood of irreparable harm to themselves, that the balance of hardships weighs in their favor, and that a restraining order or injunction is in the public interest.

Accordingly, the Defendants respectfully urge the Court to deny Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order.

Respectfully submitted this 7th day of February, 2011,

MICHAEL COTTER
United States Attorney

MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103
2929 Third Avenue, North, Suite 400
Billings, MT 59101
(406) 247-4667

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

By: /s/Anna K. Stimmel
PAUL D. BARKER, JR.
ANNA K. STIMMEL
Trial Attorneys
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
paul.barker@usdoj.gov
anna.stimmel@usdoj.gov
(202) 305-0434
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2011, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

/s/ Anna K. Stimmel
Anna K. Stimmel
Attorney for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E) of the Local Rules, I hereby certify that the attached brief complies with the word limits of Rule 7.1(a)(2)(A). The attached brief contains 5076 words of text, excluding the caption, signature line, certificate of service, and certificate of compliance.

Dated this 7th day of February, 2011.

__/s/ Anna K.Stimmel__________
Anna K. Stimmel
Attorney for Defendants