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

WESTERN WATERSHEDS  
PROJECT, BUFFALO FIELD  
CAMPAIGN, TATANKA OYATE,  
GALLATIN WILDLIFE  
ASSOCIATION, NATIVE  
ECOSYSTEMS COUNCIL,  
YELLOWSTONE BUFFALO

) Case No.: 9:09-cv-00159- CCL  
)  
)  
) DEFENDANTS' REPLY  
) MEMORANDUM IN SUPPORT OF  
) THEIR MOTION FOR SUMMARY  
) JUDGMENT AND IN OPPOSITION  
) TO PLAINTIFFS' MOTION FOR  
) SUMMARY JUDGMENT  
)

FOUNDATION, MEGHAN GILL,  
CHARLES IRESTONE, and, DANIEL  
BRISTER,

Plaintiffs,

v.

KENNETH SALAZAR, Secretary of  
the Interior; SUZANNE LEWIS, Park  
Superintendent, Yellowstone National  
Park; NATIONAL PARK SERVICE,  
an agency of the U.S. Department of  
Interior; LESLIE WELDON, Regional  
Forester, U.S. Forest Service Northern  
Region; UNITED STATES FOREST  
SERVICE, an agency of the U.S.  
Department of Agriculture; MARY  
ERICKSON, Gallatin National Forest  
Supervisor,

Defendants.

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**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants, by their undersigned counsel, hereby file their Reply Memorandum in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

**I. The Agencies Have Complied With NEPA and the APA  
(Counts 1-6).**

In Plaintiffs' Reply brief, their primary argument in support of their National Environmental Policy Act ("NEPA") claims is that the Agencies did not take a sufficiently "hard look" at the information that Plaintiffs assert is "new" and "significant" or provide a "convincing statement of reasons" why such information did not require preparation of a supplemental environmental impact statement ("SEIS"). Pls.' Resp. (Dkt. 50) at 2-4. Plaintiffs have misconstrued the law.

Once an agency has prepared an EA or EIS, further analysis is only required if the agency makes substantial changes in the proposed action relevant to environmental concerns, or if significant new information arises that will affect the quality of the environment "in a significant manner or to a significant extent not already considered." Marsh v. Or. Natural Res. Council, 490 U.S. 260, 374 (1989). NEPA supplementation is not required for every change or every new item of information that may arise related to a project.



Moreover, it is not the Agencies' burden to preemptively document the *insignificance* of every new development that some plaintiff might later argue requires NEPA supplementation. Plaintiffs' cite to no legal authority to support their position because none exists. The burden of demonstrating that the Agency's actions were arbitrary and capricious lies with the plaintiff alleging such a claim. See Comm. to Preserve Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1555 (10th Cir. 1993). Plaintiffs cannot carry their burden merely by showing an omission of agency documentation about the significance of new information; the plaintiffs must show that the agencies failed to consider information that is significant within the meaning of NEPA's supplementation requirement . Plaintiffs cannot carry their burden here.

**A. Plaintiffs Have Not Shown That The Agency Failed to Adequately Consider New and Significant Information.**

**1. Kilpatrick Article**

Plaintiffs dismiss as “counsel’s interpretation” and a “post hoc rationalization” our assertion that the Agencies considered the Kilpatrick article on the quantified assessment of risk of transmission from brucellosis from bison to cattle. See Pls’ Resp. at 4. The record shows that Defendants did consider this article, (NPS AR 7680, 7864). Moreover, the record shows that this article does not present significant new information.

The article does not conclude what Plaintiffs suggest that it does – that the risk of brucellosis transmission is always near zero. Instead, the Kilpatrick article noted that as bison are allowed to occupy new areas outside Yellowstone National Park (“YNP”) in close association with cattle, the risk of brucellosis transmission will change. (NPS AR 7226) Although the article does indicate that the risk of brucellosis transmission from bison to cattle has now been nearly eliminated, it also recognizes that this reduction in risk is attributable to the implementation of the IBMP. (NPS AR 7681.) Indeed, this was an objective of the IBMP. (NPS AR 614, 2830, 2810.) To conclude that this is “new” information the Agency must consider in *supplemental* NEPA analysis turns logic on its ear.

## **2. Rate of Seroprevalence of Brucellosis**

Plaintiffs argue that Defendants have not considered new information about the seroprevalence of brucellosis. Defendants agree that the proportion of adult females in the population that are seropositive for brucellosis exposure has increased slightly or remained constant at approximately 60% during the IBMP implementation period. (NPS AR 7487.) However, this information is not significant new information that has not been considered. The IBMP called for “a safe and effective vaccine of vaccination eligible bison using a safe and effective delivery system according to established criteria and protocols.” (NPS AR 2833.) It was anticipated that vaccination would reduce seroprevalence of brucellosis in

bison throughout the life of the IBMP. (NPS AR 2833.) The agencies are continuing their efforts to deliver an effective vaccine that meets the established criteria and protocols. The agencies made adjustments in the 2008 Adaptive Management Plan to increase vaccination of bison and cattle. (NPS AR 7186-87.) Additionally, the NPS is considering remote vaccination for bison inside the Park and has released a draft environmental impact statement on remote vaccination for public review and comment. See 75 F.R. 30022. The fact that this ongoing process expected to lower the rate of seroprevalence has not yet reached its goal does not constitute new information.

### **3. Polymerase Chain Reaction (“PCR”) Test**

The information related to the development of a PCR test is also not significant new information requiring NEPA supplementation here. While the PCR test could produce significant new information *if* it were proven effective as a means for detecting brucellosis infection rather than mere exposure to the bacterium, , that is not the case here. The scientists who developed the PCR test reported in 2007 that, though suitable for cattle, the test may not be effective for bison because the results from the PCR test have not been consistent with results of culture tests. (NPS AR 8997.) Plaintiffs wrongly suggest that the agencies have accepted the PCR test as a more accurate field test is available is incorrect. See Pls.’ Resp. at 6 (citing NPS AR 6126-27). In the draft letter that Plaintiffs’ cite,

Defendants acknowledge it is possible to detect *Brucella* DNA in blood samples and thereby determine actual infection. (NPS AR 6127.) Defendants further state that this “has the potential to be an important management tool.” (NPS AR 6127.) However, there is no conclusion in the record that there is currently a reliable test for detecting brucellosis infection in bison. Plaintiffs have misconstrued this draft letter; it does not constitute significant new information relevant to bison management.

#### **4. Genetic Diversity and Population Demographics**

Plaintiffs argue that Defendants have not considered new information about bison genetics and subpopulations of bison in YNP. However, as information on genetics is developing, Defendants are continuing to take a hard look at it. Wallen Decl. Ex. 1 at ¶3, Sept. 16, 2010. Rick Wallen, Wildlife Biologist with NPS at YNP, collaborated with Dr. Gordon Luikart during 2005-2010 to study the genetic diversity of Yellowstone bison. Id. The findings of these studies were not available at the time of the submission of the Administrative Record, but a Declaration by Mr. Wallen and the report produced from these studies are submitted as an exhibit to this filing. Id. The data shows that there are not two distinct subpopulations, as Plaintiffs suggest, and thus, there remains no significant new information requiring supplementation on this issue. Id. Microsatellite DNA results suggest that males commonly disperse and contribute to gene flow between

the two breeding herds. Id. The effects of management removals on genetic diversity were evaluated in a recent, rigorous assessment using genetic information collected from Yellowstone bison. Id.; see also Yellowstone Center for Resources, Conserving Genetic Diversity in Yellowstone Bison (June 2010), Ex. A to Wallen Decl (hereinafter “Wallen Decl. Ex. A”). Conservation of 95% of current allelic diversity is likely over the next 100-200 years when more than 2,000-3,000 bison are in the population, regardless of the culling strategy. Wallen Decl. ¶3; Wallen Decl. Ex. A. Because the most recent data shows that there are not two genetically distinct subpopulations, there is no new information on bison genetics that affects the quality of the environment to a significant extent or in a significant way not already considered. See Marsh, 490 U.S. at 374.

**B. The Information That is New Does Not Significantly Impact the Quality of the Environment**

**1. Removal of Cattle from Horse Butte and Other Areas**

Defendants agree that the decision to close a grazing allotment on Horse Butte is a changed circumstance. However, it is not a changed circumstance that will affect the quality of the environment “in a significant manner or to a significant extent not already considered.” Marsh, 490 U.S. at 374

As is documented in the record, irrespective of the status of the Horse Butte allotment, cattle remain on the southwest side of the Horse Butte peninsula and

north of Lake Hegben (which is adjacent to the Horse Butte peninsula), and bison will swim across the Lake, walk across it when it is frozen, or walk around the water's edge to access cattle-occupied areas. (USFS AR Doc.68, App. A at 1-2, 6, 11.) Thus, bison management is still needed in this area regardless of the closure of the allotment.

**C. There Are Not Substantial Questions that Significant Impacts May Occur**

Plaintiffs argue that the original FEIS was based upon false assumptions. This is incorrect. The IBMP was based on the knowledge available at the time it was approved. The fact that knowledge relevant to bison management has increased in the interim does not in and of itself raise substantial questions that environmental impacts will occur that will affect the quality of the environment “in a significant manner or to a significant extent not already considered.” Marsh, 490 U.S. at 374. Plaintiffs’ assertion that “false assumptions” in the FEIS render that document “stale” are not supported by the facts. Pls.’ Resp. at 9.

Contrary to Plaintiffs’ argument, the FEIS was not based upon the assumption that brucellosis could be eliminated in wildlife. Pls.’ Resp. at 10. The FEIS expressly indicated that “elimination of brucellosis, even in bison, is not within the scope of this management plan.” (NPS AR 614.) Likewise, the 2000 Record of Decision (“ROD”) states the IBMP is not a plan for brucellosis

eradication, but a commitment to the eventual elimination of the disease in the bison. (NPS 2816.)

Contrary to Plaintiffs' argument, the FEIS was not based upon the assumption that elk were poor transmitters of brucellosis. Pls.' Resp. at 10. The agencies always knew that elk were transmitters of brucellosis, (NPS AR 1265), and there is no evidence that elk wintering in the northern and western boundary areas of YNP, where bison migrate during winter, have higher rates of brucellosis than previously thought. (NPS AR 9379-87.)

Contrary to Plaintiffs' argument, the FEIS was not based upon the assumption that cattle would continue to occupy areas of the Gallatin National Forest ("GNF") adjacent to YNP. Pls.' Resp. at 10. The FEIS considered that cattle grazing would be restricted on lands adjacent to YNP. (NPS AR 615, 619, 755, 2800, 2806, 2825.)

Finally, Plaintiffs' argue the FEIS analyses were based upon the assumption that the bison population would stabilize. Pls.' Resp. at 10. However, as clarified in 2006, a population size of 3,000 bison as referenced in the ROD was an indicator to guide brucellosis risk management actions, but it is not a target for deliberate population adjustment or an assumption of population stabilization. (NPS AR 5319.)

**D. The Agencies Complied With NEPA For the Adaptive Management Adjustments**

Plaintiffs next argue that Defendants have skirted compliance with NEPA by implementing adaptive management adjustments to the IBMP without sufficiently evaluating the impacts of the changes pursuant to NEPA. Pls.' Resp. at 14-18. Plaintiffs' argument is belied by the record.

Plaintiffs identify only five specific actions that they claim were not addressed in the IBMP FEIS: the Royal Teton Ranch grazing restriction and bison access agreement (the "RTR Agreement"), the bison quarantine feasibility study, the proposed Remote Vaccination study, the "hunting demonstration project" in the Western Management Area, and the APHIS bull study. Pls.' Resp. at 15, 17. Contrary to Plaintiffs' contention, these five items were either addressed in the IBMP FEIS or were the subject of separate NEPA analysis.

The impacts of the RTR Agreement were included in the IBMP FEIS analysis of the Modified Preferred Alternative. Steps 2 and 3 of the IBMP include increased bison tolerance outside the northern boundary of the park based in part on the expected execution of the RTR Agreement. (NPS AR 615, 619, 755.) Furthermore, the RTR Agreement does not have the impact Plaintiffs suggest that it does, because it does not require that all bison moving towards the northern boundary of YNP be captured and tested. Rather, it is consistent with Step 2 of the



ROD which indicates that bison attempting to exit the park in the Reese Creek area will be captured and tested at the Stephen's Creek capture facility. (NPS AR 2822.) Plaintiffs have not identified any specific environmental analysis with respect to the RTR agreement that was required but not included in the FEIS. Plaintiffs have not identified any specific environmental analysis with respect to the RTR agreement that was not included in the FEIS.

Similarly, the impacts of a bison hunt as part of bison management outside the park was specifically analyzed and discussed in the IBMP FEIS and Plaintiffs identified no specific shortcomings in that analysis.<sup>1</sup> (NPS AR 784, 2811.)

The bison quarantine feasibility study, the remote vaccination study, and the APHIS bull study are each the subject of their own NEPA analysis.<sup>2</sup> (NPS AR 4503-4571 –quarantine study; 75 F.R. 30022 Draft EIS for the remote vaccination study; <http://ibmp.info/Library/EA%20Study/Bison%20shedding%20FONSI.pdf> - EA for the APHIS' bull study.) Thus, Plaintiffs' assertion that the Agencies have used the adaptive management process to skirt NEPA analysis is not borne out by the record.

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<sup>1</sup> Defendants do not participate in coordinating Montana's bison hunt. Montana Fish, Wildlife, and Parks manages hunting outside the park. (NPS AR 2809, 3661, 3791; see also NPS AR 3662-3774, 3791-3816, 4368-69.)

<sup>2</sup> Quarantine was considered as an option in the FEIS as well (NPS AR 2805, 2807, 2811). In any event, the Quarantine Feasibility Study does not result in a substantial change because the 216 calves that were transferred to the study would have been removed from the population regardless of the study because they would have otherwise gone to slaughter. (NPS AR 3825, 4005, 5698.)

To the extent that Plaintiffs contend more broadly that the IBMP FEIS did not analyze the effects of adaptive management adjustments, their argument is equally unavailing. The FEIS for the IBMP was expansive, and analyzed in detail eight alternatives. (NPS AR 671-755.) The analysis of the environmental consequences of these alternatives encompasses a wide range of management activity related to bison including impacts on the bison population, recreation, livestock operations, socioeconomics, threatened, endangered and sensitive species, other wildlife species, human health, cultural resources, and visual resources, as well as cumulative impacts. (NRS AR 904-1179.)

From its inception, the Modified Preferred Alternative (now the IBMP) was a three step management plan, with each step building toward greater tolerance for bison outside of YNP. (NPS AR 2795-2869.) To meet that goal, the IBMP contemplated an adaptive management process in which the Agencies would progress from step to step after reaching certain milestones and acquiring knowledge and experience managing Yellowstone bison. (NPS AR 2804-07.) The IBMP specifically anticipated that the Agencies would adjust some of the particulars of bison management based on knowledge and experienced gleaned while progressing from step to step. (NPS AR 2804-07.) In describing Step 3 of the management plan, the ROD said:

The third step of the alternative begins when certain conditions, described below, have been met. These conditions include research on the viability and persistence of *B. abortus* in the environments particular to the western and northern boundary areas sufficient to allow the agencies to determine an adequate temporal separation period, experience in managing bison in the areas they are allowed to occupy, and the initiation of a vaccination program for all vaccination-eligible bison in the herd. . . . Because the data and experience collected during the first two steps would provide the agencies the tools and knowledge to manage bison outside the park, Step Three would allow bison to leave the park and enter management zones without the agencies first testing them.

NPS AR 2807. The IBMP FEIS included a thorough description and analysis of the impact of the three step process. (NRS AR 738-55, 958-67.)

Plaintiffs criticize the Agencies' 2008 adaptive management adjustments by restating criticisms of the Agencies' earlier adaptive management efforts contained in a March 2008 Government Accountability Office ("GAO") report. Pls.' Resp. at 17-18. Plaintiffs have the chronology backwards. The December 2008 adaptive management adjustments responded to the GAO's March 2008 criticisms. Indeed, the 2008 adjustments established specific management objectives and included detailed management actions and metrics for each objective, as GAO had urged. (NPS AR 7179-88.) Contrary to Plaintiffs' argument that the Agencies' 2008 adaptive management adjustments were capricious, those adjustments demonstrate how seriously the Agencies took the GAO criticisms and the vigor of the Agencies' efforts to refine IBMP management.

Plaintiffs suggest that the adaptive management adjustments constituted a dramatic change in direction for IBMP management that warranted reconsideration of the entire program in a new EIS. A review of the adaptive management adjustments paints a different picture. (NPS AR 7179-88). For the Court's convenience, a copy of the 2008 Adaptive Management Adjustments are attached to this Reply brief as Exhibit 2. As the Court will readily see, the adjustments are entirely consistent with the goals and management direction approved in the IBMP. The adjustments include more specific management actions to meet shared management objectives and metrics by which the Agencies can measure their success in achieving their goals and objectives. These types of improvements are precisely what GAO recommended in its report.

Plaintiffs' mistakenly rely upon Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549 (9th Cir. 2006) in support of their position that the IBMP adaptive management adjustments are too "dramatic" to fall within the range of impacts considered in the FEIS. Pls.' Resp. at 17. In Boody, the Ninth Circuit found that the Bureau of Land Management ("BLM") used an adaptive management process to remove protections for the red tree vole in the range of the threatened northern spotted owl (for which the vole is a prey species) without required NEPA analysis. In reaching its conclusion, the appellate court focused on the fact that the EIS upon which BLM based its adaptive management process had

specifically rejected the reduced red tree vole protections that the agency subsequently adopted, using its adaptive management process, just months after the EIS was finalized. Id. at 558-59. The facts in Boody are distinguishable from those presented in this case. Here, the management adjustments implemented through adaptive management were considered in the IBMP FEIS or in separate NEPA analyses appropriate to the adjustments. Moreover, in contrast to the facts in Boody, the 2008 adaptive management adjustments about which Plaintiffs complain are intended to increase tolerance for bison to migrate outside Yellowstone and enhance their conservation status.

Finally, Plaintiffs claim that use of adaptive management will “leave the public facing the possibility of never again participating in bison management decisions.” Pls.’ Resp. at 17. That is not the case. First, as noted above, adaptive adjustments not fully addressed in the IBMP FEIS have already been addressed in separate NEPA analyses. Furthermore, the public has many opportunities to participate in bison management decision making. In response to a recommendation of the GAO Report, the IBMP partner agencies created a website to house all documents and information related to IBMP management. The website is entitled “[www.ibmp.info](http://www.ibmp.info)” and includes a library of IBMP related documents, announcements of meetings open to the public, summaries of meetings (including public input), and more. In light of the record, Plaintiffs claim that

adaptive management is preventing them from participating in bison management rings hollow.

**E. The NEPA Analysis for the Horse Butte Special Use Permit, the Royal Teton Ranch (“RTR”) Fence Special Use Permit, and the RTR Grazing Restrictions Were Appropriate.**

Plaintiff contend in their final NEPA argument that the Forest Service violated NEPA when it approved the Horse Butte Capture Facility Special Use Permit and the RTR Fence Special Use Permit without conducting a complete reanalysis of the entire IBMP based on what Plaintiffs characterize as “significant new information”. For the same reasons, Plaintiffs argue the NPS violated NEPA when it approved the RTR grazing restriction and bison access agreement (the “RTR Agreement”) without further NEPA analysis beyond that included in the FEIS. (Pls.’ Resp. at 18-20.) As explained supra at I.B.1, the information Plaintiffs claim is new and significant is neither.

Plaintiffs’ also attempt to characterize the Horse Butte Capture Facility, the RTR Fence, and the RTR Agreement as “connected” actions under NEPA that must be analyzed in a single EIS. Plaintiffs misapply NEPA’s definition of connected actions. Under NEPA, “[a]ctions are connected if they: (i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) are interdependent parts of a larger action and depend on

the larger action for their justification.” 40 C.F.R § 1508.25(a)(1). As the Ninth Circuit has noted, “The purpose of this requirement is ‘to prevent an agency from dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006).

While the bison capture facility, the RTR Fence, and the RTR Agreement each further the objectives of the IBMP to increase tolerance of bison outside of the Park, these actions are not “connected” with respect to their environmental impacts in the sense that term is used in NEPA regulations. 40 C.F.R. § 1508.25(a)(1). The minimal environmental impacts resulting from the construction of the capture facility and the RTR Fence, which are many miles apart, have no relation to each other. Moreover, they are not interdependent in any way. The capture facility was first approved more than ten years ago, whereas the RTR Fence Special Use Permit was first approved in December 2008, shortly after the RTR Agreement was approved. (NPS AR 6243-48.) Bison management could be implemented without the use of the capture facility, the RTR fence, or the RTR Agreement. Moreover, there is no indication in the record that the Agencies considered these actions in separate NEPA analyses to avoid completing an EIS – they had already completed an extensive EIS.

In summary, none of Plaintiffs' NEPA claims are well founded in the record or in the relevant law. The Court should grant judgment to Defendants on all of Plaintiffs' NEPA claims (Counts 1 – 6).

**II. The Forest Service Has Complied With NFMA's Diversity Requirement (Counts 7-12).**

In their Resonse brief, Plaintiffs argue that the Forest Service has failed to comply with NFMA's requirements with respect to bison, despite the fact that Yellowstone bison are, in fact, viable and there is abundant habitat for the Yellowstone bison population in the Greater Yellowstone Ecosystem including on the GNF. Pls.' Resp. at 20-32. Because the IBMP management regime does not permit the Yellowstone bison population access to all habitat suitable for big game on the GNF, Plaintiffs contend that the Forest Service has not complied with its NFMA duty to provide for diversity of animal species on the Forest. Plaintiffs misconstrue NFMA's requirements.

The Forest Service manages the National Forest System pursuant to the National Forest Management Act ("NFMA") as well as the Multiple Use Sustained Yield Act of 1960 ("MUSY"), 16 U.S.C. §§ 528-531. Section 528 of MUSY provides, in relevant part:

It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.



16 U.S.C. § 528. Managing national forest system lands for wildlife purposes is thus just one of many duties. The Forest Service must balance competing uses and viability of one species is not the only consideration. Lands Council v. McNair, 537 F.3d 981, 990 (9th Cir. 2008). MUSY § 528 goes on to provide, “Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. 16 U.S.C. § 528. The statute recognizes what is well-settled -- that “wildlife management is a field which the States have traditionally occupied.” Wyoming v. United States, 279 F.3d 1214, 1231 (10th Cir. 2002). MUSY, therefore, preserves the State of Montana’s traditional role in management of wildlife within the national forests in the State.

Ignoring MUSY’s carefully crafted preservation of the State’s role in wildlife management on national forests, Plaintiffs take the position that pursuant to NFMA’s requirement, and in order to preserve the viability of the Yellowstone bison population on the Forest, the Forest Service must override Montana’s management scheme for bison. Not only have Plaintiffs’ misconstrued the law, but they have done so on the basis of a misplaced belief that Yellowstone bison are at risk, which is not supported by the record.

The Yellowstone bison population, which had dwindled to a mere 23 animals in the late 19th century, numbered approximately 3900 animals during

July 2010 with access to large tracts of habitat within and outside the GNF and the park. See 72 F.R. 45717 et seq., Fish and Wildlife Service Notice of 90-day Petition Finding (August 15, 2007); Wallen Decl. ¶3. Moreover, the recent history of bison management has demonstrated the Yellowstone bison population's resilience. See Defs.' Mot. (Dkt. 41) at 29-30; 72 F.R. 45721; NPS AR 7695, 7754; Wallen Decl. ¶3. There is simply no evidence in the record to support Plaintiffs' contention that IBMP management has jeopardized the viability of the Yellowstone bison population.

Furthermore, there is no evidence suggesting a lack of big game habitat for a viable population of bison on the GNF. Elk are the management indicator species for big game on the GNF, and the Forest Plan discussed the availability of big game habitat and demonstrated it was sufficient. (USFS AR Doc. 1 at V-11.)

Plaintiffs do not claim otherwise.<sup>3</sup> Furthermore, they have come forward with no

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<sup>3</sup> Plaintiffs' suggestion that elk habitat is an inappropriate proxy for bison habitat because elk and bison are not managed in the same way on the GNF with respect to the risk of brucellosis transmission ignores the facts. Bison have a much higher rate of brucellosis exposure than do elk. (NPS AR 502, 510, 7678, 9379-87.) Moreover, Plaintiffs' reliance on Native Ecosystems Council v. Tidwell, 599 F.3d 926 (9th Cir. 2010) is misplaced. That case addresses a question about the reliability of the Forest Service's scientific methodology which is not present in this case. In that case, the Forest Service had designated sage grouse as the management indicator species (i.e. the proxy) for all sagebrush communities. Id. at 933. Furthermore, the agency used sagebrush habitat as a proxy for sage grouse. However, there were virtually no sage grouse in the planning area. Under those facts, the appeals court held that the scientific reliability of using sage grouse as management indicator species was questionable and thus violated NFMA. Id. at 934. Here, Plaintiffs do not dispute that elk are an appropriate management indicator species for big game because they are abundant on the Forest. The question here is whether NFMA requires the Forest Service to give migrating bison access to all suitable big game habitat. Native Ecosystems v. Tidwell is inapposite.

evidence to show that there is insufficient habitat for bison on the Forest. Instead, their argument is that NFMA prohibits the Forest Service from excluding migrating bison from any suitable habitat on the Forest. The rule that Plaintiffs' advocate would likely prohibit the Forest Service from allowing the State of Montana to haze bison off the Forest and it would prohibit the Forest Service from keeping bison separate from cattle on the Forest. Under the factual circumstances presented in this case, and in the context presented here, where the State and Federal Governments have jointly developed a cooperative management plan to advance legitimate State and Federal natural resource management goals, NFMA does not require the Forest Service to override the State's authority on bison management.

In Wyoming v. United States, the Tenth Circuit addressed a claim by the State of Wyoming that the National Wildlife Refuge System Improvement Act of 1997 (the "Improvement Act"), 16 U.S.C. §§ 668dd-668ee, granted the state exclusive authority to manage elk on the National Elk Refuge. The Improvement Act contained the following provision:

Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area with the System.

16 U.S.C. § 668dd(m). The appeals court held that this “savings” provision did not completely strip the federal government of power to make decisions regarding elk management on the Refuge, if it disagreed with the State. Wyoming, 279 F.3d at 1233-34. However, the court concluded that Congress did not intend to preempt state management on the Refuge either. Id. Consequently, Wyoming retained authority to manage wildlife on the Refuge to the extent that the State’s management approach did not conflict with the federal government’s approach.

Wyoming is instructive in this case as well. That case confirms that the “savings” provision of the MUSY Act preserves the State of Montana’s longstanding management authority over bison on the GNF, and NFMA does not require the Forest Service to override Montana’s approach to bison management on the GNF, which includes spatial and temporal separation of bison and cattle.

Plaintiffs also contend that the Forest Service violated NFMA because it did not conduct a viability analysis for bison or for sagebrush dependent species. The IBMP FEIS analyzed the impact of the IBMP on bison and demonstrated that the Modified Preferred Alternative would not reduce bison viability. (NRS AR 738-755, 958-967.) Analysis of sagebrush dependent species would be futile. They are not found regularly on the Forest because of the altitude and, as a result, they have limited distribution on the Forest. (USFS AR Doc 680, 694.) NFMA does not require the Agency to conduct a viability analysis for every species that might

appear on the Forest. Seattle Audubon Soc’y v. Mosely, 798 F. Supp. 1473, 1480 (W.D. Wash. 1992). Moreover, because Plaintiffs do not challenge any site-specific final agency action with respect to sagebrush habitat or sagebrush dependent species, their claim that the Forest Plan is deficient in addressing sagebrush dependent species should be dismissed on that basis as well. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004); Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 732 (1998); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990).

Finally, Plaintiffs contend that the Forest Service has violated NFMA by failing to consider the best available science in approving the specific projects at issue in this case. Pls.’ Resp. at 31-32. The record tells a different story. As explained in Defendants’ opening brief at pages 16-23, and supra, the Agencies have relied upon the most current science in support of their management decisions and have even commissioned their own scientific studies to further investigate various issues involving bison management. The fact that the Agencies and Plaintiffs do not necessarily agree on what constitutes best available science does not amount to a NFMA violation. The Court should defer to the conclusion of the Agency, unless it appears from the record the Agency’s approach was arbitrary or capricious. To the extent that Plaintiffs’ gripe is that the Forest Service may not have invoked the term “best available science,” Pls’ Rep. at 31, Plaintiffs’

argument is unavailing because it was not required to do so. See Utah Environmental Congress v. Russell, 518 F.3d 817, 829-30 (10th Cir. 2008); Sierra Club v. Wagner, 555 F.3d 21, 27-28 (1st Cir. 2009).

Plaintiffs' NFMA claims are, in essence, an attempt to impose a new duty upon the Forest Service which no Court has previously recognized -- a duty to override state wildlife management despite the demonstrated health and viability of the species and habitat at issue. Plaintiffs have failed to carry their burden to establish that the Forest Service's management decisions challenged in this case are arbitrary and capricious or fail to comply with NFMA's requirements and they should be dismissed.

### **III. The Park Service is Not Violating the NPS Organic Act or the Yellowstone Enabling Act (Counts 13-14)**

Plaintiffs contend that the National Park Service ("NPS") is not ensuring the conservation and "no impairment" of Yellowstone bison. Plaintiffs' argument is without merit.

There is no question that the NPS has a duty to conserve and not impair Park resources under the National Park Service Organic Act, 16 U.S.C. §1. Plaintiffs argue that the NPS Management Policies 2006 ("Management Policies") require that Defendants "continue to assess the impacts [of bison management activities] and make written determinations" for each decision about whether the actions

might cause impairment. Pls.' Resp. at 34. As a threshold matter, the Management Policies "are intended only to provide guidance within the Park Service, not to establish rights in the public generally," see River Runners for Wilderness v. Martin, 593 F.3d 1064, 1072 (9th Cir. 2010) (discussing 2001 Management Policies); see also Wilderness Soc'y v. Norton, 434 F.3d 584, 595 (D.C. Cir. 2006), and they "are not enforceable against the Park Service." See Martin, 593 F.3d at 1073; Norton, 434 F.3d at 596.

Even though not enforceable, the NPS complied with its Management Policies. The Management Policies only require a written determination for "proposed action that could lead to an impairment of park resources and values." NPS Mgmt. Pol. at 1.4.7 (2006), available at [www.nps.gov/policy/MP2006.pdf](http://www.nps.gov/policy/MP2006.pdf) (emphasis added). However, there is no writing mandated by the Management Policies for ongoing actions. NPS Mgmt. Pol. at 1.4.7.

The NPS complied with the internal procedures for proposed actions because the Agency made a written determination, before implementing the IBMP, that the bison management actions contemplated in the IBMP would not impair park resources. (NPS AR 2803-04, 2832-34.) Plaintiffs selectively quote from the ROD in an attempt to make it seem as though the NPS did not consider whether impairment would occur. However, the full paragraph from which Plaintiffs quote makes it clear that the opposite is true. It states,

Neither the DEIS nor the FEIS evaluated specifically whether the bison management actions would impair park resources and values, although the evaluation of the level of effects on park resources and values provides sufficient analysis to draw conclusions about whether impairment will occur. As explained above and based on the impact analysis in the DEIS and FEIS, there is no indication that the actions set out in the Joint Management Plan will cause the impairment of any park resources and values. The National Park Service recognizes that with this cooperative Joint Management Plan, it is better able to preserve bison and is in keeping with the Yellowstone enabling act.

(NPS AR 2834.)

The NPS has also complied and continues to comply with the internal procedures for investigating whether there will be an impairment due to an ongoing activity. Plaintiffs argue that there is evidence of potential impairment in the record regarding the genetic integrity and diversity of the bison population. To the contrary, the evidence in the record shows the Yellowstone bison population is being conserved.

Yellowstone bison are the largest (currently 3,900 bison) wild population of plains bison in North America, and are unique in that they have existed in a wild state since prehistoric times. (NPS AR 8240, 9517.) Yellowstone bison are managed as wildlife in multiple, large herds that migrate and disperse across an extensive landscape (more than 90,000 hectares) and are subject to a full suite of native ungulates and predators, other natural selection factors, and substantial environmental variability. (NPS AR 8941, 9182.)



There is no evidence that culling to date has threatened the adaptive capabilities of the Yellowstone bison population, altered the genetic structure or contributed to a loss of genetic diversity in the Yellowstone bison population. (NPS AR 4012, 9012); Wallen Decl. ¶3. Yellowstone bison retain a high level of allelic richness and contribute significant and unique genetic diversity to plains bison. (NPS AR 3236, 7768, 7828, 7839.) Simulations indicate that conservation of 95% of current allelic diversity is likely over the next 100 years when more than 2,000-3,000 bison are in the population, regardless of the culling strategy. Wallen Decl. ¶3.

Considering these factors, NPS staff have recommended managing the bison population between approximately 2,500-4,500 animals, which should reduce the need for large-scale culls and satisfy collective interests concerning the park's forage base, bison movement ecology, retention of genetic diversity, brucellosis risk management, and prevailing social conditions. (NPS AR 9182.)

NPS staff evaluated potential demographic and genetic effects on Yellowstone bison from the IBMP, and concluded there was no impairment. NPS staff indicated in an evaluation of the effects of IBMP implementation that the effects of large-scale, non-random culls could diminish the ecological role of the largest remaining free-ranging plains bison population in the world if they were continued over time. (NPS AR 7676.) Thus, the NPS suggested adaptive management adjustments during 2008 and 2009 to reduce the potential for adverse effects from

culling by implementing smaller selective culls, including increased hunting opportunities in Montana and relocations of disease-free bison after quarantine. (NPS AR 7179, 7570.) These adjustments were included in the 2008 Adaptive Management Plan and the 2009 IBMP Annual Report. (NPS AR 7179, 7570.) Further evidence that there has been no impairment includes the fact that both breeding herds in the Yellowstone bison population have grown since the large culls in 2006 and 2008 to a total abundance of 3,900 during summer 2010. (NPS AR 9379-87, 9698.)

Additionally, the NPS not is causing wanton destruction of bison in violation of the Yellowstone Enabling Act, 16 U.S.C. § 22, as Plaintiffs contend. As Plaintiffs note, wanton is not defined in the statute but a dictionary definition is “having no just foundation or provocation.” Pls.’ Motion (Dkt. 33) at 31 (citing *Merriam-Websters Dictionary Online*, <http://www.merriam-webster.com/> (last accessed June 21, 2010)). The record is full of information that demonstrates that there is a rationale for all of Defendants’ management actions, including any bison slaughter. (NPS AR 2795-2869, 7179-88.) Thus, there is no wanton destruction of bison through Defendants’ actions.

Furthermore, this Court has previously determined that NPS is permitted “to determine whether selective removal of individual bison protects and conserves the YNP bison herd.” Intertribal Bison Coop. v. Babbitt, 25 F. Supp. 2d 1135, 1138

(D. Mont. 1998). Plaintiffs assert, without citing to the record, that the removal has not been selective. This is simply not true as the entire bison management scheme was designed in such a manner that all actions are selective in nature and geographic area. (NPS AR 2795-2869, 7179-88.) Even the removal of untested bison is not non-selective because removal only occurs in certain situations. (NPS AR 7179-7188, 7676-7701.) Thus, Plaintiffs' argument that Defendants' bison management actions are not appropriate because they are not selective is without merit.

### **CONCLUSION**

For all the foregoing reasons, the Court should grant Defendants' Motion for Summary Judgment, Deny Plaintiffs' Motion for Summary Judgment, and render judgment on all of Plaintiffs' claims in favor of Defendants.

Respectfully submitted this 17th day of September, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of September, 2010, 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

**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 limit of 6,500 permitted by this Court's order dated August 19, 2010 (Dkt. 45). The attached brief contains 6,490 words of text, excluding the caption, signature line, certificate of service, and certificate of compliance.

Dated this 17th day of September, 2010.

/s/ Anna K. Stimmel

Anna K. Stimmel