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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 INJUNCTION PENDING APPEAL

I. INTRODUCTION

Defendants, by their undersigned counsel, hereby file their opposition to Plaintiffs' Motion for Injunction Pending Appeal (Dkt. 68; see also Dkt. 69). Plaintiffs seek the extraordinary remedy of an injunction pending appeal in a case that they have lost on the merits. This Court held, without equivocation, that the Park Service and Forest Service complied with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), the National Park Organic Act, 16 U.S.C. § 1, the Yellowstone Enabling Act, 16 U.S.C. §22, the National Forest Management Act ("NFMA") 16 U.S.C. § 1604(i) and its implementing regulations, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 et seq. Plaintiffs merely repeat the same arguments they made in their summary judgment briefs, and cannot show that they are likely to prevail in their appeal of their claims.

Additionally, Plaintiffs have not shown and cannot not show that they will suffer irreparable injury if their motion is not granted or that the balance of harms or public interest favor an injunction. Plaintiffs thus cannot meet any of the four prerequisites for injunctive relief. Therefore, this Court should deny Plaintiffs' motion for an injunction pending appeal.

II. STANDARD FOR INJUNCTION PENDING APPEAL

"While an appeal is pending from . . . [a final judgment], the court may . . . grant an injunction on terms for bond or other terms that secure the opposing

party's rights." Fed. R. Civ. P. 62(c). Like any injunction, however, an injunction pending appeal is "an extraordinary remedy that should be granted sparingly." See Ctr. for Biological Diversity v. Salazar, No. CV-09-8207-PCT-DGC, 2010 WL 3190628, at *1 (D. Ariz. Aug. 12, 2010). The standards for reviewing motions for injunctions pending appeal, stays pending appeal, and preliminary injunctions are all similar.[1]

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).[2] If a plaintiff fails to meet

[1] Tribal Village of Akutan, 859 F.2d 662, 663 (9th Cir. 1988) (citing Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)).

[2] Additionally, the Ninth Circuit recently has held that a showing that there are "serious questions going to the merits and a hardship balance that tips *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). The United States has not yet taken a position on whether it will seek relief from the Ninth Circuit ruling in Cottrell. Nonetheless, the reasons underlying Defendants' arguments throughout this brief that Plaintiffs

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 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 to ensure that the agency considered the relevant factors and articulated a rational

have not satisfied the Winter standard for an injunction also demonstrate that Plaintiffs have not satisfied the Cottrell standard either.

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 drastic remedy will adequately address plaintiff's injury. Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2748 (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, 129 S.Ct. at 376-77. 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).

III. Argument

A. Plaintiffs Are Not Likely to Succeed on the Merits

To meet the first prong of the standard for an injunction, Plaintiffs must show a likelihood of success on the merits on appeal. Winter, 129 S.Ct. at 374. Plaintiffs' motion for an injunction pending appeal must be denied because Plaintiffs have not demonstrated a likelihood of success on the merits on appeal.

Plaintiffs argue that they are likely to succeed on the merits because (1) there are six areas of substantial new information that Defendants did not examine in terms of significance factors, (2) that the Forest Service did not properly analyze

and ensure the viability to bison and sagebrush dependant species, and (3) that the NPS's actions result in unacceptable impacts and likely impairment to Park resources. Plaintiffs raised all of these arguments in their motion for summary judgment and this Court ruled against them. For the reasons stated in the Court's opinion, Dkt. 64 (hereinafter "Opinion, Dkt. 64"), and Defendants' briefs in support of their motion for summary judgment, Dkt. 40, 41, 52, Plaintiffs' arguments on the merits are unavailing.

1. Plaintiffs Have Not Shown That There is Substantial New Information That Defendants Did Not Adequately Examine

Plaintiffs' have not shown a likelihood of success on the merits of their NEPA claims because they have not shown that there is significant new information that Defendants have not adequately considered. Plaintiffs are correct that further NEPA analysis is 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. 360, 374 (1989). In determining if the new information is significant, the agency must consider context and intensity. 40 C.F.R. § 1508.27. However, NEPA supplementation is not required for every change to a project, and where an agency reviews the relevant factors and makes a determination that

supplementation is not necessary, a court "must defer to that informed discretion." Price Road Neighborhood Ass'n v. Dept. of Transp., 113 F.3d 1505, 1509-12 (9th Cir. 1997) (citations and internal quotations omitted).

Plaintiffs summarily identify the new information as: removal of all cattle from Horse Butte; the change in landownership and land use on Horse Butte; that the rate of seroprevalence is either increasing or constant; information regarding genetics; the quantification of the transmission risk, and evidence that elk are transmitting brucellosis to cattle but bison are not. The Court carefully considered each of these claims in its Order, Dkt 64, and found against Plaintiffs on all them. Plaintiffs do not attempt to show why the Court's determination was incorrect or otherwise support their argument that any of this information is significant new information which requires further NEPA analysis. Accordingly, Plaintiffs have not met their burden to show a likelihood of success on the merits on these claims. See Nat'l Ass'n of Mfrs. v. Taylor, 549 F. Supp. 2d 68, 74 (D.D.C. 2008) (declining to reconsider the court's own prior analysis when the movant did not offer any new arguments or points of law). Although it is not Defendants' burden to show that Plaintiffs are not likely to be successful, Defendants will briefly explain why Plaintiffs cannot be successful.

a. Horse Butte

The removal of cattle from and change in landownership on Horse Butte is not significant new information that requires further NEPA documentation. Defendants have considered this information, NPS AR 4410, 7604-7605, made adaptive management changes as authorized by the IBMP in light of it, NPS AR 5319, 6601, 7179, 7570, and have determined there remains a need for the State to have the option of operating the capture facility in light of the proximity of cattle grazing in the area which bison could reach from Horse Butte by swimming across Lake Hegben or walking across it when it is frozen, USFS AR Doc. 68, App. A at 1-2, 6, 11. See also Opinion, Dkt. 64 at 34-35.

b. Rate of Seroprevalence

The current rate of seroprevalence is not significant new information that requires further NEPA documentation. The IBMP assumed that seroprevalence would decline in part as a result of vaccination of bison against brucellosis, NPS AR 2851, and the record indicates that seroprevalence has not declined as anticipated in the IBMP, NPS AR 7487, 7691. However, the IBMP states that the plan is not a brucellosis elimination program, but rather recognizes that the agencies commit to the eventual elimination of brucellosis when technology provides feasible methods. The IBMP calls for "the vaccination with 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. The NPS is continuing their efforts to develop a safe and effective vaccine program. See 75 F.R. 30022 (May 28, 2010) (draft environmental impact study on the remote vaccination of bison inside YNP released for public comment); see also NPS AR 7186-87 (adaptive management adjustments to increase vaccination of bison and cattle). As the Court correctly noted, in light of the fact that the vaccination program is in a stage of ongoing development and Defendants are aware of and have considered the current rate of seroprevalence in the herd, "no significant information has arisen that would justify revisiting the NEPA analysis of the IBMP." Opinion, Dkt. 64 at 30.

c. Genetic Diversity

There is not significant new information regarding genetics that requires further NEPA analysis at this point. The record shows that Defendants considered the issue of genetic diversity in the IBMP FEIS, NPS AR 650-52, 782, have diligently kept abreast of scientific studies regarding the genetic diversity of the Yellowstone bison population, and have considered new studies as they have emerged, NPS AR 6885-86, 6910-6925, 6926-6936, 6593. The NPS contracted with Dr. Luikart of the University of Montana to further study the genetic issue, see Dkt. 52-1, Wallen Decl. ¶ 3; see also Opinion, Dkt. 64 at 32. As already stated by this Court, "Plaintiffs fail to show that new scientific information is significant

to an extent or degree not analyzed in the existing NEPA documents by the Defendants or that additional NEPA analysis is necessary." Opinion, Dkt. 64 at 34.

d. Transmission Risk

There is not significant new information related to the risk of transmission of brucellosis that requires further NEPA analysis. Defendants have considered the Kilpatrick article which suggests, *with bison management under the IBMP*, the risk of transmission from bison to cattle may be near zero in many years, but it is significantly higher in years of harsh winters when more bison migrate from the Park. NPS AR 7220, 7222, 7226, 7681. As previously noted by this Court, under a scenario in which the herd is not culled, the Kilpatrick study estimates that the herd abundance would increase to 7,000, and that this would substantially increase the number of bison outside the Park to thousands of bison in the winter, and the risk of transmission would increase by 20-fold compared to the scenario in which the herd size is 3,000 with less than 200 bison migrating outside the Park. NPS AR 7223; see also Opinion, Dkt. 64 at 27. Thus, "the Kilpatrick study does not actually prove anything significantly new, in a legal sense, in the context of this case, e.g., it does not reject prior scientific understandings or present novel information of a type that has never before been considered by the Defendants in prior NEPA analysis." Opinion, Dkt. 64 at 27-28.

Additionally, NPS has considered several ongoing and recently completed studies of brucellosis transmission in bison and elk. NPS AR 7594. The FEIS did not assume that elk did not transmit brucellosis, as Plaintiffs argued they did. NRS AR 1265. As stated by the Court,

> Evidence regarding elk-to-cattle transmission is not new and significant evidence relevant to the bison, except that it does prove that wildlife-to-cattle transmission does occur, and it also provides no reason to think that it would not occur were Yellowstone bison to be allowed to come into contact with neighboring herds of cattle.

Opinion, Dkt. 64 at 36.

For all the reasons just stated, Plaintiffs have failed to show a likelihood of success on the merits on their claims that there is significant new information which requires further NEPA analysis.

2. Plaintiffs Have Not Shown That the Forest Service Violated NFMA

Plaintiffs have not shown a likelihood of success on their NFMA claims either. Plaintiffs argue that the Forest Service violated NFMA by failing to include in the Forest Plan for the Gallatin National Forest ("GNF") enforceable standards to provide diversity of species, including Yellowstone bison and sagebrush dependent species, and by failing to ensure the viability of Yellowstone bison on the GNF. NFMA provides that land management plans shall be developed under guidelines which "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall

multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B). Under NFMA, species diversity is not the Forest Service's only consideration, but rather the statutory provision "is to be addressed in light of overall multiple use objectives" Seattle Audubon Soc. v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996) (internal quotations omitted). Furthermore, the Forest Service is entitled to deference in determining what evidence is necessary to determine compliance with a Forest Plan and NFMA. Lands Council v. McNair, 537 F.3d 981, 992-93 (9th Cir. 2008).

As a threshold matter, this Court concluded that Plaintiffs' claim failed because failed to link their challenge of the GNF Forest Plan with any challenge to a site-specific final agency action. Opinion, Dkt. 64 at 47; see also Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004); Ohio Forestry, 523 U.S. at 732; Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 872 (1990). Plaintiffs have not shown why the Court's ruling on this issue was erroneous, nor could they. Hapner v. Tidwell, 621 F.3d 1239, 1250 (9th Cir. 2010). However, even if their NFMA claims were cognizable, Defendants have met all the requirements of the statute.

Contrary to Plaintiffs' contention, the IBMP FEIS analyzed the impact of the IBMP on bison and demonstrated that the Modified Preferred Alternative would not reduce Yellowstone bison viability. NRS AR 738-755, 958-967. Additionally, the IBMP FEIS and ROD analyzed the impacts of bison management on species diversity, NPS AR 525-531, 541-545, 605, and Plaintiffs still do not cite any

record evidence or authority to support their assertion that the FEIS's analysis was inadequate. Furthermore, the Forest Plan discusses the availability of big game habitat, with elk as the indicator species, and demonstrated it was sufficient. USFS AR Doc. 1 at V-11; see also USFS AR Doc. 1 at II-1.

The record demonstrates that bison are viable in the Yellowstone ecosystem and their status is secure. See 75 F.R. 45717-1; NPS AR 4012, 6100-6103, 8941, 8944, 9013-9014, 9188. The IBMP and related actions have expanded and are aimed at continuing to expand bison habitat outside of the Park, including on GNF land, thus providing more habitat for the Yellowstone bison. See, e.g., USFS AR Doc. 68 at 12, Doc. 87 at 7. The Court also noted that "there are already diverse and abundant big game on the Gallatin National Forest such that NFMA's animal diversity requirement is met." Opinion, Dkt. 64 at 47.

Moreover, the Court correctly concluded that Plaintiffs' contention that the Forest Service violated NFMA because it did not conduct a viability analysis for sagebrush dependent species was meritless. Sagebrush dependent species are not found regularly on the Forest because of the elevation and, as a result, they naturally have limited distribution on the Forest. See Opinion, Dkt. 64 at 49; USFS AR Doc. 680, 694; Seattle Audubon Soc'y v. Mosely, 798 F. Supp. 1473, 1480 (W.D. Wash. 1992) (noting that NFMA does not require the Agency to conduct a viability analysis for every species that might appear on the Forest).

Accordingly, Plaintiffs have not shown a likelihood of success going to the merits on any of their NFMA claims.

3. Plaintiffs Have Not Shown That the NPS Violated the National Park Service Organic Act or the Yellowstone Enabling Act

Plaintiffs have also not shown a likelihood of success on their National Park Service Organic Act and Yellowstone Enabling Act claims because they have not shown that Defendants' actions will impair or cause the wanton destruction of Park resources. The Organic Act provides that the Service is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Additionally, the Yellowstone Enabling Act requires that the Park Service "provide against the wanton destruction of the fish and game found within the park, and against their capture or destruction for the purposes of merchandise or profit." 16 U.S.C. § 22. The Park Service has the discretion to determine how it will protect Park resources from impairment and wanton destruction. 16 U.S.C. § 36 (giving the Secretary discretion to give, sell, or otherwise dispose of surplus bison); Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996) ("[T]he Park Service has broad discretion in determining which avenues best achieve the Organic Act's mandate."); Intertribal Bison Coop. v. Babbitt, 25 F. Supp. 2d 1135,

1138 (D. Mont. 1998) (NPS is permitted "to determine whether selective removal of individual bison protects and conserves the YNP bison herd.").

Despite Plaintiffs' arguments to the contrary, the NPS' conclusion that the implementation of the IBMP and related bison management actions would not impair the Yellowstone bison herd is supported by the record and is not arbitrary or capricious. NPS AR 2803-2804, 2832-2833; see also Opinion Dkt 64 at 53-54. Moreover, as the Court noted, the NPS has continued to consider the impact of IBMP management on the Yellowstone bison population on an ongoing basis and has made adjustments to management when appropriate to prevent impairment. NPS AR 4407-4456, 6529-6571, 7179, 7570-7605, 9182; Opinion, Dkt. 64 at 52-53. Notably, management under the IBMP and related actions benefit the YNP bison by moving toward making more habitat outside YNP available to bison migrating out of the Park in winter and reducing the need for large scale culling of bison that migrate outside of the Park. NPS AR 6243-48, 7179-88, 7664-75.

Furthermore, the bison herd has shown resilience, with population numbers rebounding after management culls, further supporting the notion that management actions are not causing impairment. NPS AR 7695, 7754, 9379-87, 9698; see also, Opinion, Dkt. 64 at 60. 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; Dkt. 52-1, Wallen Decl. ¶ 3.

Additionally, the Court appropriately concluded that Defendants' management actions are not causing the wanton destruction of bison. Opinion, Dkt. 64 at 52. The record is replete with information that demonstrates that there is a rationale for all of Defendants' management actions, including any bison slaughter. Opinion, Dkt. 64 at 52 ("The administrative record in this case belies Plaintiffs' claim that the NPS has ever sanctioned the wanton destruction of bison."); NPS AR 2795-2869, 7179-88. Accordingly, Plaintiffs have not shown a likelihood of success on their Organic Act and Yellowstone Enabling Act claims.

B. Plaintiffs Have Not Shown That They are Likely to Suffer Irreparable Harm

To succeed on their motion, Plaintiffs must show that they will 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. 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).

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 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. With respect to the bison already captured in the facility, the IBMP partners determined that, under early and mid-winter weather conditions, those bison could no longer be hazed back into the Park safely and effectively. See Dkt. 59-1, White Decl. ¶ 2. Moreover, if bison migrate out of the Park, they could pose a threat of brucellosis transmission to cattle under some commingling circumstances. Dkt. 59-1, White Decl. ¶ 12. Accordingly, the Park Service and its IBMP partners are operating the Stephens Creek capture facility, testing captured bison for brucellosis exposure, and, if feasible (more on this below), may send some of those testing seropositive to slaughter. Dkt. 59-1, White Decl. ¶¶ 2, 6.

On February 15, 2011, the Governor of the State of Montana issued Executive Order 1-2011 which prohibits the importation of bison into the State of Montana for a period of 90 days, including bison to be shipped to slaughter pursuant to the IBMP to which the State is a party. Ex. 1, Montana Exec. Ord. 1-2011. The Park Service and its IBMP partners have not shipped any seropositive bison for slaughter into the State of Montana or elsewhere this winter. Ex. 2, White Decl. ¶ 3. There is no immediate plan to ship bison to slaughter, however,

the NPS has not ruled out the possibility of slaughter as part of its management of Yellowstone bison this winter. Ex. 2, White Decl. ¶ 4.

With respect to seronegative bison currently held in the Stephens Creek facility, Defendants will endeavor to hold those bison, separate from seroposive bison to minimize probability of disease transmission, for release back into the bison conservation area. Dkt. 59-1, 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, even if some seropositive bison were slaughtered, Defendants' management actions will not cause irreparable harm to the Yellowstone bison population. 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 the summer of 2010 despite culls of more than 1,000 bison in both 2006 and 2008. Dkt. 59-1, White Decl. ¶ 16. The current estimated bison population is 3,700 animals. Dkt. 59-1, 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. Dkt. 59-1, 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. Dkt. 59-1, 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. Dkt. 59-1, White Decl. ¶ 17.

Plaintiffs 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 oversight and the protections provided by the IBMP and National Park Service regulations, the Yellowstone bison may have no protections at all. The State of Montana may 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 for portions of the year. See NPS AR 7570-7596. Thus, Plaintiffs' ability to "view and experience" bison in their natural habitat is actually advanced, 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 Soc'y v. Gutierrez, 527 F.3d 788, 790 (9th Cir. 2008). Pls.' Mot. at 7. However, that case is inapposite. The Humane Society court determined that the killing of individual sea lions was, per se, irreparable. Sea lions are marine mammals afforded special protection by the Marine Mammal Protection Act, 16 U.S.C. § 1371 et seq, and can only be taken subject to a permit. The Yellowstone bison at issue in this case have no similar protected status. Indeed, federal law specifically authorizes the Park Service to "give . . . sell, or otherwise dispose of surplus buffalo." 16 U.S.C. § 36. Therefore, Humane Society does not support the Plaintiffs' position that removal of individual Yellowstone bison under the circumstances presented in this case constitutes irreparable harm for which an injunction is appropriate. See also

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) ("[T]o consider any taking of a listed species as irreparable harm would produce an irrational result.").[3] Under the facts and circumstances before the Court in this case, irreparable harm could only occur if the removal of individual animals would cause direct and measurable harm to the Yellowstone bison population 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, the record demonstrates that management pursuant to the IBMP will not cause harm to the Yellowstone bison population as a whole.

Plaintiffs argue, based on the very recently released study by Thomas Pringle, that new evidence suggests that the Yellowstone bison contain a genetic flaw which, combined with IBMP management removals, could jeopardize the

[3] The non-precedential D.C. district court cases Plaintiffs cite are not applicable here. The actions challenged in those cases would have killed animals that were not otherwise in danger of lethal removal. See Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003); Fund for Animals v. Clark, 27 F. Supp. 2d 8 (D.D.C. 1998).

conservation status of the Yellowstone bison population.[4] As noted in Defendants' Surreply to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, Dkt. 63, Pringle only posted his paper on-line less than two weeks ago and it has not been peer-reviewed. However, based on the Park Service's preliminary review of Pringle's findings, and their own observations and review of published, peer-reviewed literature regarding Yellowstone bison, Pringle's work does not require any change in management under the IBMP at this time. Dkt. 63-1, White Decl. ¶ 5.

Finally, though Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction sought an injunction seeking a halt to both slaughter and capture and extended confinement of Yellowstone bison, Dkt. 57 p. 2, their Motion for Injunction Pending Appeal does not seek an injunction against capture and

[4] Pringle argues in his declaration that his service on Plaintiff Western Watersheds Project's advisory board was not a conflict of interest that he was obliged to disclose when he published his paper on-line. However, he does not deny that he purposely timed the release of his study to influence litigation involving an organization on whose advisory board he sits. See http://www.westernwatersheds.org/about. Moreover, regardless of whether Pringle should have disclosed his affiliation with Plaintiffs himself, Plaintiffs should have disclosed his affiliation to the Court and Defendants, rather than suggest by silence that Pringle was an unbiased, objective scientist, which was not the case. In light of the circumstances in which the paper was presented to the Court and Defendants by Plaintiffs, Pringle's association with Plaintiffs, and the fact that his paper has not yet been peer-reviewed, the Court did not abuse its discretion it affording it little or no weight. See Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir. 2009) (a district court's determination of the weight to give evidence offered in support of a motion for injunction is reviewed for abuse of discretion).

confinement of bison migrating out of the Park, Dkt. 68, and Plaintiffs have made no attempt to argue or show that capture and confinement of bison would cause them irreparable harm. Dkt. 69 pp. 13-19. Accordingly, the Court may conclude that Plaintiffs have abandoned their request for an injunction against bison capture and confinement at this time.

For all the foregoing reasons, Plaintiffs cannot meet their burden to show that Defendants' implementation of the IBMP is likely to cause irreparable harm to Plaintiffs. Therefore, the Court should deny Plaintiffs' motion.

C. Balance of Harms

To succeed on their motion for an injunction, Plaintiffs must also show that the balance of the equities favor an injunction.[5] Winter, 129 S.Ct. at 374. 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). 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).

[5] If Plaintiffs persuade the Court that they have raised "serious questions" on the merits, they must attempt to convince the Court that the balance of the equities tips sharply in their favor. Alliance, 2011 WL 208360, at *4.

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.

Plaintiffs cannot show that the balance of harms favors an injunction. If Defendants are enjoined from implementing IBMP management, bison likely will migrate north into Montana where there are cattle ranches, where they would be subject to repeated hazing to maintain separation from cattle. Dkt. 59-1, White Decl. ¶¶ 11-12. Such 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. Dkt. 59-1, White Decl. ¶12.

Furthermore, when Yellowstone bison are on lands outside the Park in Montana, the State of Montana has management authority over them. NPS AR 2800. Montana 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). Moreover, a bill passed the Montana State Senate on February 18, 2011, that, if enacted into law, would prohibit the Department of Fish, Wildlife, and Parks from relocating wild bison or allowing free-roaming bison in the State, demonstrating that there continues to be little or no tolerance for free-roaming bison in Montana. Ex. 3, Montana Senate Bill 144.

Furthermore, if Defendants' bison management actions are enjoined, it will likely hamper the goal of increasing 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. Dkt. 59-1, 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. Dkt. 59-1, White Decl. ¶ 14.

The harm to Defendants that would result from an injunction is great, and Plaintiffs have not shown any legal harms if their request for an injunction is denied. Even if the Court finds that Plaintiffs may face some minimal hardship if IBMP management is continued, the balance certainly does not tip in favor of Plaintiffs. Thus, Plaintiffs cannot succeed on this factor.

D. Public Interest

Finally, to succeed on their motion for an 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 allowing Defendants to continue 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 both seropositive and seronegative bison by further depleting their energy reserves and increasing aggression and resistance to hazing, and cause risk to human safety and property damage.

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 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 an injunction would compromise the ability of the

United States to implement a plan that balances the conservation of bison and reduces the risk of brucellosis transmission. The currently employed cooperative 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 and a management regime in which hundreds of bison have been allowed to roam outside the Park on private and federal land for portions of the year. See NPS AR 7570-7596. The interests of the public in conserving the Yellowstone bison population and preventing the spread of brucellosis from bison to cattle would not be served by the issuance of an injunction.

IV. Conclusion

For all of the reasons just stated, Defendants respectfully urge the Court to deny Plaintiffs' Motion for Injunction Pending Appeal.

Respectfully submitted this 25th day of February, 2011,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th 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
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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 6,475 words of text, excluding the caption, signature lines, certificate of service, and certificate of compliance.

Dated this 25th day of February, 2011.

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