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

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

**DEFENDANTS' SURREPLY TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING
ORDER**

Defendants, by their undersigned counsel, hereby file this Sur-reply to Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order (Dkt. 57), as permitted by the Court's Order (Dkt. 61).

In Plaintiffs' Reply Brief (Dkt. 60), in support of their argument that their interests will be irreparably harmed, they rely on a non peer-reviewed paper authored by Thomas Pringle,¹ which claims that Yellowstone bison have a genetic mutation which, in combination with management culls of the bison, could irreparably harm the bison's conservation status. Notably, Pringle posted the paper on a website established for pre-publication research and preliminary findings on February 7, 2011, and it appears he posted it before it was peer-reviewed solely for the purposes of this litigation. Pls. Reply Ex. 14 ("Pringle said he was motivated to release his findings in advance of scientific peer review because Yellowstone bison can't afford the months-long wait while his paper is accepted for formal publication."). Ironically, although Pringle states that individuals with this genetic mutation "are predicted (sic) significantly impaired in aerobic capacity, disrupting

¹ While Defendants acknowledge that extra-record information may sometimes be appropriate for the Court to consider on the issue of harms, it is not appropriate for consideration on the merits, because it is not part of the administrative record before the Court. Furthermore, the Pringle paper and Reuter's article included with Plaintiffs' Reply should not be given any weight for the reasons stated herein.

highly evolved cold tolerance, winter feeding behaviors, escape from predators and competition for breeding,” Pringle is also quoted by Reuters as saying “[t]hey're taking a really high risk of killing bison with healthy genes and getting into a situation where they can't go back; the good DNA will be lost.” Pls. Reply Ex. 14.

Pringle's paper is entitled to no weight for at least three reasons. First, it is unclear whether the paper represents sound science and presents valid conclusions as it has not been peer-reviewed and the Park Service biologists have not had the opportunity to have the paper reviewed by expert geneticists. Ex. 1, White Dec. ¶ 4. Indeed, the Park Service biologists responsible for supervising Interagency Bison Management Plan (“IBMP”) implementation and assessing the genetic status of the Yellowstone bison were not aware of Pringle's paper prior to February 8, 2011, when Plaintiffs' Reply brief was filed. Ex. 1, White Declaration ¶ 3.

Second, it does not appear that Pringle's paper is an unbiased study. As noted above, it appears Pringle posted his paper on-line for the purpose of this litigation. Furthermore, it appears Pringle is on the advisory board for plaintiff Western Watersheds Project. <http://www.westernwatersheds.org/about>. Pringle did not disclose his affiliation with Western Watersheds Project in his paper—instead he affirms he has no conflicts to disclose, Pls. Reply Ex. 13, nor did Plaintiffs note Pringle's affiliation to the lead plaintiff in their reply brief. Pls. Reply p. 6.

Third, and perhaps most importantly, peer-reviewed, published literature supports the conclusion that even if Yellowstone bison have a genetic mutation, “it has not been manifested through any biologically significant effect on their ability to survive.” Ex. 1, White Dec. ¶ 5 (and literature cited therein).

Even if the objectivity and credibility of Pringle’s paper were not undercut by his affiliation with the lead plaintiff and the fact that it was posted on-line for the purposes of this litigation, the Park Service is entitled to rely on its own scientific experts on the question of whether IBMP management poses harm to the genetic diversity of Yellowstone bison. *Earth Island Inst. v. Forest Service*, 351 F.3d 1291, 1300-1301 (9th Cir. 2003) (citing *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

Plaintiffs’ Reply argues that they seek maintenance of the status quo. However, in this case, the status quo is not static but dynamic, with Yellowstone bison attempting to migrate out of the Park every day. When the bison migrate out of the Park, they are no longer subject to the protections of the National Park Service regulations, 36 C.F.R § 1.2 (providing, in relevant part, that the regulations apply to lands “administered by the National Park Service”). In the absence of the IBMP and the flexible approach it approves for the partner agencies, any and all such bison could thus be hazed, captured, tested, and/or lethally removed at the

discretion of the State Veterinarian, without consultation with the National Park Service.

To protect bison even when they migrate beyond the Park boundaries, the IBMP struck a reasonable balance among competing interests. The IBMP provides for the protection of a healthy Yellowstone bison population while recognizing the State of Montana's interest in protecting its cattle from exposure to brucellosis-carrying bison and avoiding harm from them to its citizens and their property. The Court should not enjoin the implementation of IBMP management.

CONCLUSION

As the briefing and argument on cross-motions for summary judgment in this case demonstrated, Plaintiffs have not shown a likelihood of success, or even serious questions, on the merits of their claims. Similarly, their briefing on their Motion for Temporary Restraining Order and/or Preliminary Injunction has not shown that in the absence of an injunction they would suffer irreparable harm, or that the balance of equities tips sharply in their favor. Finally, the public interest does not favor granting an injunction. Accordingly, the Court should deny Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction.

Respectfully submitted this 10th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th 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/ Paul D. Barker, Jr.
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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 915 words of text, excluding the caption, signature line, certificate of service, and certificate of compliance.

Dated this 10th day of February, 2011.

/s/ Paul D. Barker, Jr.
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