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

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs, v. SALAZAR, et al., Defendants.	CV-09-159-M-CCL **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Defendants assert throughout their argument that many speculative harms "may" occur if they are not allowed to immediately kill hundreds of bison, and allege an injunction would have profound impacts that suggest they have lost sight of the preliminary nature of the requested relief. Defendants do not allege they will not kill potentially several hundreds (if not a thousand or more), absent a preliminary injunction and/or temporary restraining order. Rather, they simply speculate that without their preemptive slaughter, the State of Montana may later act on its own to do even more harm to bison and the Plaintiffs' interests. The speculative and inaccurate presentation of the consequences of slaughtering or enjoining slaughter of bison are not sufficient to overcome the imminent and certain harm that would be caused to Plaintiffs if the federal Defendants capture and kill masses of bison this season.

ARGUMENT

I. Standard for preliminary injunction and/or temporary restraining order

While an injunction should not be awarded "as of right" (Dkt. 59, p. 6) the purpose of preliminary relief is to "preserve the status quo" pending a determination on the merits. Chalk v. United States District Court Central District of California, 840 F.2d 701, 704 (9th Cir. 1988). This equitable

relief is designed to prevent such harm as Plaintiffs seek to prevent here – permanent loss of hundreds of bison and the genetics they carry, and injury to Plaintiffs' cultural, spiritual and other connections to the bison that will be irreparably harmed by the deaths of the bison destined for slaughter this season. Without equitable relief to maintain the status quo, Plaintiffs will needlessly suffer the irreparable loss of bison lives while the courts may yet determine that Defendants actions were contrary to law.

II. Plaintiffs have demonstrated they are likely to suffer irreparable harm without a preliminary injunction and/or temporary restraining order

The Ninth Circuit's recent decision in Alliance cuts against Defendants' arguments that Plaintiffs have not shown they will suffer irreparable injury if Defendants capture and slaughter hundreds of bison this season. Alliance for the Wild Rockies v. Cottrell, ---F.3d----, 2011 WL 208360 (9th Cir. 2010). Defendants have imminent plans to slaughter numerous bison, and both parties agree that more capture and slaughter is likely this season. Defendants misconstrue what is required to demonstrate irreparable injury, and misconstrue the type of relief Plaintiffs' seek (and thus the impacts of the harm and the relief).

Defendants have not illuminated how the loss of hundreds of bison, opportunities to view bison inside YNP, on GNF lands, lost spiritual and

cultural connections, and likely losses of critical genetic material, are not irreparable harms to Plaintiffs. Instead, Defendants simply assert that the harm must be demonstrated and not speculative, positing Plaintiffs have not demonstrated the harm factor not because they are unlikely to suffer irreparable harm but because they have not demonstrated that "*Defendants' actions* will cause such irreparable harm." Dkt. 59, p. 11 (emphasis supplied).

To support this contention, Defendants state generally their actions will "further the IBMP's goals," and overall abundance of bison indicates their continuing management actions will not cause irreparable harm. Dkt. 59, p. 11-12. This misses the point. Plaintiffs need not demonstrate that the entire population would be jeopardized, but merely need to show that their aesthetic interests will be hared by Defendants' actions and that the harm cannot be repaired by money damages or something other than injunctive relief. See e.g. Alliance, 2011 WL 208360 at *8.

As the Ninth Circuit made clear in Alliance, a plaintiff satisfies the irreparable harm element by simply "articulating" the likely injury such as loss of just part of a forest that the plaintiffs' members desire to "view, experience, and utilize . . . in their undisturbed state." Id. Plaintiffs here have articulated that the loss of bison held in captivity, and the likely loss of

additional bison this winter, will harm their cultural and spiritual relationships with the bison and other interests in viewing them "undisturbed" by the federal Defendants, by permanently eliminating them from the population, when they may not otherwise be killed. See Dec. Little Thunder (par. 2: noting "deep connection" to bison and federal Defendants' actions impact that connection); Dec. Hockett (par. 35: identifying harm to interests in bison and habitat caused by the Defendants' actions before a decision on the merits of Plaintiffs' claims); Dec. Kole (par. 19-20: expressing "strong desire" to see bison freely migrating to GNF lands, and expressing "dismay" that GNF does not ensure bison habitat access and maintain a viable population); Dec. Gutkoski (par. 11: "seeing wild bison on wild land makes my spirit soar", and par. 9: expressing concern over long-term survivability of bison due to Defendants' action, and identifying harm from witnessing past actions against bison).

Even if Plaintiffs had to demonstrate irreparable harm to the overall bison population, they have established that likelihood as well. The population *is* likely to suffer irreparably if Defendants continue to implement large-scale non-random removals, as indicated in Plaintiffs' opening brief. Dkt. 57, p. 10. While Defendants suggest 2500-4500 bison *may* be sufficient to maintain adequate genetic diversity, they cannot ensure

these numbers will be sustained when they "predict more than 1,000 bison may migrate to the northern boundary of the park this winter" and they intend to capture and slaughter more bison. See Dkt. 59-1, par. 4.

Further, a newly released genetic study indicates the YNP bison contain high frequencies of once rare deleterious alleles, and that such mutations have "significant implications" particularly when the current "genetically uninformed culls" occur. Pringle, Thomas H.; *Widespread Mitochondrial Disease in North American Bison*, Nature Procedings 07 February 2011. Available at http://precedings.nature.com/documents/5645/version/1/files/npre20115645-1.pdf; also see "Study links Yellowstone bison fate to genetic flaw", Reuters Feb. 7, 2011, available at http://uk.reuters.com/article/2011/02/08/us-bison-yellowstoneidUKTRE7170DA20110208.[1] The author warns that "continuing take of the remaining bison with wildtype mitochondria may recapitulate errors of nineteenth century bison stewardship *bringing bison conservation to the point of no return*." Id. (emphasis supplied). This study, and record evidence referenced by Plaintiffs, presents the likelihood the bison population will be irreparably harmed if Defendants continue to capture and slaughter large numbers of bison.

[1] Copies of both these items are attached as exhibits 13 and 14.

Defendants further claim that irreparable harm will not occur from Defendants' bison slaughter based on speculation that, the bison – and thus Plaintiffs' interests – would suffer even greater harm if they are enjoined. Dkt. 59, p. 13. Defendants tout the IBMP's increased protection for bison and Plaintiffs' interests, and suggest the State of Montana would cause more damage if the federal Defendants are enjoined from slaughtering bison now. Dkt. 59, p. 13. This ignores reality, and again misconstrues what is required to demonstrate irreparable harm.

As Plaintiffs pointed out in summary judgment arguments, the record shows the IBMP has actually resulted in substantially *more bison deaths* than years preceding it. ARY7678; 6592. Not only are more bison killed under the IBMP, but the federal government provides over 95% of the funding necessary to carry out these costly activities, and provides personnel, capture facilities, permits, and other resources that enable the mass slaughter. ARY6165, 6167, 6169 (2008 GAO Report indicating the agencies had spent over $2 million annually, with over 95% provided by the federal government, and additional costs of land acquisition and other expenses incurred by the federal government).

Moreover, the question regarding irreparable harm is not whether the State of Montana *might* kill more bison if the federal Defendants do not

intercept and slaughter the bison now, but whether the federal Defendants' imminent actions will likely cause irreparable harm to Plaintiffs now. Regardless whether Montana has a "right" to manage and kill bison as they please when they enter the state[2], (Dkt. 59, p. 13) there are no indications that Montana will take unilateral actions imminently nor that they have the resources to maintain the high level of slaughter the IBMP has maintained. In contrast to the speculative harm by another party that Defendants assert somehow eliminates the harm they will cause, harm to Plaintiffs is imminent and certain, as Defendants currently hold almost 400 bison many of which will be shipped to slaughter, and Defendants are likely to capture and slaughter hundreds more this season absent injunctive relief. See e.g. Dkt. 59-1, par. 4, 6.

Defendants also claim that the loss of hundreds of bison does not constitute irreparable harm, by inaccurately assessing the Gutierrez case ("Humane Society" in Defendants' brief). That case was not based on Endangered Species Act claims, as Defendants report in their brief, and thus

[2] Plaintiffs would point out that in numerous instances, the courts have recognized the "plenary power" of the federal government over federal lands, including the ability and authority of the federal government to manage wildlife on those lands even when contrary to state hunting regulations or other state wildlife management interests. See, e.g., California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 593 (1987); Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal Wild and Free-Roaming Horses and Burros Act preempted State of New Mexico from enforcing its estray regulations on Bureau of Land Management and Forest Service lands); Hunt v. United States, 278 U.S. 96 (1928).

does not implicate a differing standard for reviewing irreparable harm or other elements of the preliminary injunction test. Dkt. 59, p. 14-15; Humane Society of the United States v. Gutierrez, 527 F.3d 788 (9th Cir. 2008); Humane Society of the United States v. Gutierrez, 625 F.Supp.2d 1052, 1058, 1066 (D. Or. 2008)(plaintiffs claims included National Environmental Policy Act, Marine Mammal Protection Act, and Administrative Procedure Act).[3] Nor did it involve the "take" of an ESA-protected species as that term is contemplated in the ESA. See 16 U.S.C. Sec. 1532(19)(defining "take") and Sec. 1538(1)(B),(C)(making it unlawful for any *person* to take an ESA-protected species). Rather, the court assessed whether the loss of protected salmonids was substantial enough to justify the MMPA exception allowing the federal defendant to kill sea lions, and the court concluded that the removal of a *non-ESA species* – the sea lions – would irreparably harm the plaintiffs, even though that species would naturally feed upon the ESA-protected salmonids. Gutierrez, 527 F.3d at 790. Defendants have not identified any Ninth Circuit case overruling the clear statement in Gutierrez that lethal removal is irreparable, and the district court case they refer to was decided prior to the Ninth Circuit's Alliance decision, in which the court held that cutting some trees would cause irreparable harm, similar to the

[3] Although ESA "interplayed" with these claims, it was not apparently a claim itself, and the Ninth Circuit addressed only the MMPA.

irreparable harm caused by killing some wildlife. Dkt. 59, p. 14 (citing Defenders of Wildlife v. Salazar, Case Nos. 09-77-M-DWM & 09-82-M-DWM); Alliance, 2011 WL 208360 at *8.

III. The balance of the equities tips sharply in Plaintiffs' favor

As Defendants note, the court "must balance the competing *claims of injury* and must consider the *effect on each party* of the granting or withholding of the requested relief." Dkt. 59, p. 17 (citing Amoco Production Company v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987) and Lands Council v. McNair, 537 F.3d 981, 1004 (9th Cir. 2008) (emphasis supplied). Yet Defendants have not clearly identified "claims of injury" that will affect *them* as the party to this suit, but instead list further speculative results of enjoining their slaughter activities, many of them affecting other parties' economic interests. Dkt. 59, p. 17-20.

The courts have repeatedly held that economic loss alone cannot outweigh the need to protect our environment from irreparable harm. See e.g. National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2001); Idaho Sporting Congress v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000); Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986); Sierra Club v. U.S. Forest Service, 843 F.2d 1190, 1191 (9th Cir. 1988); National Wildlife Federation v. Marsh, 721 F.2d

767, 786 (11th Cir. 1983); Montana Wilderness Association v. Fry, 408 F.Supp.2d 1032, 1034 (D. Mont. 2006); National Wildlife Federation v. National Marine Fisheries Service, 235 F.Supp.2d 1143, 1162-1163 (W.D. Wash. 2002); Sierra Nevada Forest Protection Campaign v. Tippin, 2006 WL 2583036 at 21 (E.D. Cal. 2006); High Sierra Hikers Association v. Moore, 561 F.Supp.2d 1107, 1113 (N.D. Cal. 2008); Seattle Audubon Society v. Evans, 771 F.Supp. 1081, 1096 (W.D.Wash. 1991); Baykeeper v. U.S. Army Corps of Engineers, 2006 WL 2711547 *16 (E.D.Cal. 2006); Citizen's Alert Regarding Environment v. U.S. Dept. of Justice, 1995 WL 748246 at *11 (D.D.C. 1995); Federation of Japan Salmon Fisheries Co-op Association v. Baldridge, 679 F.Supp. 37, 48 (D.D.C. 1987); Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213, 1222 (D. Colo. 2007); Sierra Club v. Martin, 71 F.Supp. 2d 1268 (N.D. Ga. 1996)

Defendants' reliance on Lands Council to support their claim that economic harms and other risks can outweigh the environmental harms to Plaintiffs' is misplaced. Dkt. 59, p. In Lands Council, the court concluded the alleged harms to plaintiffs were outweighed by economic concerns and a number of additional risks to the public, in part *because* they were not likely to succeed on the merits and the alleged environmental injury "was not at all probable." Lands Council, 537 F.3d at 1004-05. Here, Plaintiffs are likely

to succeed on the merits for all the reasons explained during summary judgment, and the injuries are certain in that Defendants are prepared to imminently slaughter hundreds of bison the Plaintiffs seek to view in a natural setting, and maintain cultural and spiritual ties to, among other interests.

To the extent the Court considers the economic harms Defendants allege may occur if they are prevented from slaughtering hundreds of bison before the Court renders a final decision on the merits, it should conclude that even the economic consequences weigh heavily in favor of an injunction. While a loss of brucellosis class-free status in Montana could affect some livestock producers' costs, the capture and slaughter actions under the IBMP are far more costly than other alternatives. ARY7219-7228, 7226 (indicating brucellosis transmission risk could be managed effectively in most years with "no management" and at a thousand-fold lesser cost than under the IBMP); ARY481. Thus, even the economic considerations weigh in favor of Plaintiffs' requested relief.

Defendants speculate again that if the federal Defendants cannot preemptively slaughter hundreds of bison now, bison "may" be later removed by Montana, and harm the interests of the livestock industry and the state. Dkt. 59, p. 18-19. They rely in part on a former decision by this

Court that was decided thirteen years ago under different circumstances and factual understandings than are present today. Id. at 18 (citing Intertribal Bison Cooperative v. Babbitt, 25 F.Supp. 2d 1135, 1136 (D. Mont. 1998). For example, at that time, it was thought impossible to quantify the risk of brucellosis transmission from bison to cattle, and the agencies and the Court thus had to rely on limited information. Id.; ARY511. Since then, the risk has been quantified and the study's conclusions indicate little or no management is necessary, and that bison migration into Montana does not pose the level of threat previously presumed. See ARY7219-7228.

Defendants also claim that if they are prevented from slaughtering hundreds of bison now, this will "hamper efforts to increase tolerance of bison outside of the Park" because Montana will only tolerate bison when brucellosis prevalence is decreased. Dkt. 59, p. 19. However, Defendants fail to explain how the slaughter of hundreds of bison – even if tested for *exposure* to brucellosis – will likely result in decreased brucellosis prevalence. The record indicates IBMP management has resulted in an increase or constant level of seroprevalence in adult female bison, rather than a decrease. ARY7622, 7681, 7691. Additionally, Defendants' argument ignores the fact elk also carry brucellosis, actually transmit it to cattle, and are free to roam and mingle with livestock in Montana.

ARY6110; ARY9349; ARY 7616-7619 (documenting elk transmissions to cattle). Thus, Defendants arguments regarding prevalence and tolerance fail.

Defendants also argue that preliminary injunctive relief would cause the bison population to grow beyond its carrying capacity of 5500-7500, be confined within YNP, and potentially harm Park resources. Dkt. 59, p. 19. Given it is not birthing season and the bison population is expected to *decrease* throughout the winter and spring, it is hard to imagine a population explosion and this speculative resultant resource damage would occur before this Court renders a decision on the merits. Nor would a preliminary injunction prevent Defendants from seeking to make additional habitat available on the GNF or elsewhere. The speculative injury from an injunctive is too far-fetched at this juncture to support Defendants' claims.

The balance of the equities tips sharply in favor of an injunction, where the harms Defendants pose are speculative, or conflict with the facts of the record. While Defendants are unable to identify likely harms to them should they be restrained from slaughtering masses of bison before this Court has an opportunity to rule on the merits, the harms to Plaintiffs are imminent and real, and clearly outweigh speculative harms to Defendants.

An injunction is in the public interest

Defendants again list speculative harms they assert would negatively impact the public interest if they are temporarily enjoined from capturing, slaughtering and confining hundreds of bison. As noted previously, the public has a strong interest in environmental protection, enforcing environmental laws, and in preserving the genetics necessary for a species' survival. Dkt. 57, p. 12-15.

The public has also expressed an overwhelming interest in more range for bison outside YNP, and natural management by the federal Defendants. See e.g. ARY002815 (outlining the environmentally preferred alternative in the EIS, which the public was "overwhelmingly" in favor of). The publicly supported alternative during IBMP development reflected public sentiment but also represented the option that would provide the best outcome for the environment – as the courts hold is in the public interest. See Id. That sentiment and alternative represent the public interests at stake, and demonstrates that the public interest would be served by the requested preliminary injunction.

Defendants simply repeat their speculative claims of injuries and potential hampering of IBMP goals that were unavailing regarding the balance of the equities. Dkt. 59, p. 21-22 (suggesting an injunction would increase risk of brucellosis transmission, and risk of Montana losing its

brucellosis class-free status, and affect private livestock producers' interests). For the same reasons stated above, these arguments do not support a conclusion that slaughtering or confining hundreds of bison is in the public interest. Defendants have not pointed to any evidence that slaughtering bison is likely to prevent brucellosis transmission and protect Montana's class-free status, when elk roam freely and transmit the disease, and a quantified risk assessment indicates bison capture, slaughter, and hazing is expensive and unnecessary. *Supra*.

Nor would a preliminary injunction or temporary restraining order against imminent bison slaughter cause a "reversion" to a less protective system without cooperation between the state and federal Defendants. Dkt. 59, p. 22. First, as discussed above, the IBMP has not offered more protection to bison than prior systems, as more bison are killed under the IBMP than prior. Second, Plaintiffs are only seeking temporary relief at this time to maintain the current population of bison until the Court can make a decision on the merits. Preliminary relief preventing the irreparable loss of bison would not create a "reverted" and "less protective" system for bison management overall.

Given the public's clear interest in preserving bison and halting mass slaughter, and the speculative and inaccurate nature of Defendants' alleged

harms to the public interest, this Court should conclude that an injunction to preserve the bison from slaughter is in the public interest.

Conclusion

For all the foregoing reasons, Plaintiffs respectfully request this Court grant a preliminary injunction and/or temporary restraining order against federal Defendants' plans to capture and slaughter or confine hundreds of bison this season, until the Court is able to issue a decision on the merits.

Respectfully submitted this 8th day of February, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to the United States District Court for the District of Montana, Local Rules of Procedure 7.1(d)(2)(E), this brief complies with the word limits of this rule. This brief contains 3191 words, excluding caption, signature block, and certificates of compliance. The undersigned relied upon the word count of the wordprocessing system used to prepare this brief.

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