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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' BRIEF IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL**

I. INTRODUCTION

Plaintiffs seek to appeal this Court's order dated 14 February, 2011, denying Plaintiffs all relief in this matter. Federal Defendants' imminent plans to capture and send to slaughter several hundred wild bison in and around Yellowstone National Park will likely cause irreparable harm to Plaintiffs and the environment, and an injunction pending appeal is necessary to preserve Plaintiffs' rights and interests in this matter. Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Plaintiffs now move this Court for an injunction pending appeal of its February 14 decision. Plaintiffs seek urgent relief, given Defendants' indications to Plaintiffs on February 15, 2011 that they would likely begin shipping bison to slaughter as early as February 16, 2011.

II. STANDARD FOR INJUNCTION PENDING APPEAL

The standards of review for an injunction pending appeal of a decision on a preliminary injunction are essentially the same standards that apply to the motion for preliminary injunction. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). To obtain a preliminary injunction, the moving party must show it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest."

Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 374 (2008). Alternatively, the movant can obtain a preliminary injunction when the balance of the hardships tips sharply in their favor, and they show only "serious questions" that they will succeed on the merits. Alliance for the Wild Rockies v. Cottrell, No. 09-35756, 2011 WL 208360, at *4 (9th Cir. Jan. 25, 2011).[1]

The purpose of granting an injunction pending appeal is to preserve the status quo to prevent irreparable harm that violates environmental laws from occurring before a favorable appellate decision is granted. See Kettle Range Conservation Group v. U.S. Bureau of Land Management, 150 F.3d 1083, 1087 (9th Cir. 1998)(Reinhardt, J. concurring) (stating judges must be "particularly sensitive" to the consequences of their decision when interim relief is determinative of ultimate outcome of litigation, because of "the need to ensure that the court does not inadvertently lose its ability to enforce an important Congressional mandate."); see also Blue Mountains Biodiversity Project v. Blackstone, 161 F.3d 1208, 1215 (9th Cir. 1998) (expressing disapproval that in the time between district court denial of motion for injunction pending appeal and Ninth Circuit's injunction after oral argument, "over half the trees in the Big Tower project area have been cut and removed

[1] The Ninth Circuit concluded in Cottrell that the sliding scale was still applicable after the Winter decision. Id. at *7.

without the benefit of meaningful environmental analysis.").

III. ARGUMENT

A. Plaintiffs are likely to succeed on the merits

1. National Environmental Policy Act (NEPA) Violations

The United States Supreme Court has made clear that federal agencies cannot simply rest upon an initial environmental impact statement when significant new information or changed circumstances arise that alter the initial environmental analysis and potential impacts of federal actions and decisions. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371, 374 (1989); also see Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000). When new information comes to light, the federal Defendants must carefully evaluate potentially new or significant impacts. Id. at 379-85.

To satisfy NEPA once a project is undertaken but not yet complete and new information arises, federal agencies must examine the new information and circumstances in terms of NEPA's "significance factors" as set forth in NEPA's implementing regulations. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 845, 856 (9th Cir. 2005); 40 C.F.R. Sec. 1508.27. The agencies also must provide a "convincing

statement of reasons" based on these factors, to justify a decision not to prepare a supplemental environmental impact statement (SEIS). Id.

The record indicates Defendants' recognition of "substantial" new information regarding bison, brucellosis, and the management of transmission risk, yet they still repeatedly decide *not* to examine such information in terms of the significance factors, as NEPA requires. Id.; ARY7678. New information and changed circumstances that Defendants have not evaluated for significance, include the removal of all cattle from Horse Butte which was grazed at the time the EIS was prepared (ARY6204; A.R. 839); change in landownership and land use on Horse Butte such that current landowners welcome bison and want them on their land (ARY5836; 3521-3541); evidence that the IBMP is resulting in an increase or constant rate of seroprevalence in bison rather than a decrease as anticipated in the EIS (ARY7681; 7691); several genetics studies indicating the population substructure, genetic composition, and minimum viable population are all different than that understood at the time the EIS was prepared (ARY7677; 7374-7379; 6940; 6588-6589; 7683; 4679-4709; 6586; 7682-7683; FEIS Vol. I, p. 288); the quantification of brucellosis transmission risk, which was thought impossible at the time the EIS was prepared and the IBMP was adopted (ARY7219-7228; FEIS Vol. I, p. 11); and concrete evidence that elk

are transmitting brucellosis to domestic cattle while bison are not, which was thought unlikely and thus was not addressed for brucellosis transmission risk management under the EIS and IBMP (ARY6110; 9349; 7616-7619; 9349).

As each of these items of new information and circumstances formed the basis of impacts analysis, affected environment, comparison of alternatives, cost-benefit calculations, and selection of an alternative that would achieve the dual purposes of the IBMP, they all present information and circumstances that are likely to affect the environment in a significant manner or to a significant extent not already considered. Marsh, 490 U.S. at 374. Defendants' decisions not to evaluate the information under the significance factors, and the fact that impacts are likely quite different from those initially analyzed, is a violation of NEPA, and Plaintiffs are likely to prevail on the merits of their appeal that an SEIS is required.

2. National Forest Management Act (NFMA) Violations

NFMA requires the Forest Service to "provide for diversity of plant and animal communities" on the Gallatin National Forest (GNF). 16 U.S.C. § 1604(g)(3)(B); 16 U.S.C. § 1604(i). This duty "requires planning for the entire biological community - not for one species alone," and "requires Forest Service planners treat the wildlife resource as a controlling, co-equal factor in forest management." Seattle Audubon Society v. Moseley, 798 F.

Supp. 1484, 1489 (W.D. Wash. 1992); aff'd 998 F.2d 699 (9th Cir. 1993).

In order to implement the diversity mandate, the GNF adopted into its Forest Plan the 1982 planning regulations, which required the Forest Service to manage wildlife habitat "to maintain viable populations of existing… species". 36 C.F.R. § 219.19 (2000); See, GNF Forest Plan, A.R. #1, at II-1, VI-42. A viable population is one "which has adequate numbers and dispersion of reproductive individuals to ensure the continued existence of the species population in the planning area." A.R. #1, at VI-41.

Bison are native to the GNF, and their migrations onto GNF habitat are natural and essential to their long-term survival. FEIS Vol. I, p. ii, vii-viii; ARY5305, 5307; 6589. As a species unique to the area, with a keystone species role (A.R. # 19 at 2; ARY6093-6107; ARY6536), and which would naturally occur on the Forest if not prohibited by Forest Service actions (and those sanctioned and agreed upon by the Forest Service) (ARY4017, 4028), bison management demands some Forest Plan provisions, yet the GNF Plan does not even *mention* bison let alone provide management direction for them. Despite this glaring omission and lack of direction for bison and habitat management, the GNF continues to make decisions and implement actions that directly and indirectly affect bison and other native species on the GNF, including approving livestock grazing in

otherwise suitable bison habitat, adopting new iterations of the IBMP through "adaptive adjustments", approving additional connected projects (Royal Teton Ranch fencing permit; Horse Butte capture facility permit) that require intensive bison management and restrict bison access to and use of the GNF. ARY4368-4369; ARY5319-5320; A.R. 832; ARY7284-7294; A.R. 798; A.R. 68.

In order to demonstrate compliance with the diversity and viability requirements, GNF must have completed analyses showing that the diversity and viability of species existing on the forest is ensured. Lands Council v. McNair, 537 F.3d 981, 994 (9th Cir. 2008); see e.g., Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 761 (9th Cir. 1996); Seattle Audubon Society v. Evans, 771 F. Supp. 1081 (W.D. Wash 1991), aff. 952 F. 2d 297 (9th Cir. 1991); Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 970 (9th Cir. 2002). However, GNF has never conducted viability analyses for bison in the history of the Forest Plan and its various actions and decisions related to the IBMP and connected actions.

The IBMP Plans require the capture and slaughter of bison without an adequate assessment of the impacts to forest diversity or bison viability from these actions. At best, the IBMP Plans limit the number of bison on the Forest to 100 animals for a limited duration on small tracts of land. FEIS,

A.R. #3, Vol. 1, pg. 192. This 100 animal "tolerance limit" is not set based on the need to ensure viable populations of bison, or based "on carrying capacity limits, but on logistical feasibility, risk management and risk to private property." ROD, A.R. # 2, at 52. Rather than protecting diversity and ensuring a viable population of bison dispersed throughout the Forest, as required by NFMA and the Forest Plan, the IBMP Plans "[c]learly define a boundary line beyond which bison will not be tolerated." FEIS, A.R. #3, Vol. 1, at xiii.

GNF has repeatedly acted without reliable and accurate assessments of the "quality and quantity of habitat . . . necessary to support" viable populations of bison on the Forest. Native Ecosystems Council v. United States Forest Service, 428 F.3d 1233, 1250 (9th Cir. 2005). By excluding bison from most of the forest, the GNF is limiting diversity in violation of NFMA, and jeopardizing the viability of the species in violation of the Forest Plan. Without a viability assessment and/or Forest-wide standards to ensure viable populations of bison, the GNF is unable to ensure that lethal removal of bison will not jeopardize the viability of bison on the Forest.

The Forest Plan direction is clear the GNF must also provide for adequate numbers and dispersion of reproductive individuals of sagebrush-dependent species to ensure the continued existence of these species on the

Forest. FP, I-1, VI-43. Despite this charge, the Forest Plan fails to provide any guidance on sagebrush habitat or dependent species, except to state that it may be burned as part of cattle forage improvement projects. See e.g. Forest Plan III-53; A.R. 415-5; A.R. 549-10, A.R. 528-15.

Because the Forest Plan does not contain specific standards and guidelines to ensure the viability of bison and sagebrush dependent species, it, and actions implemented under it affecting those species, are invalid under NFMA. Seattle Audubon, 771 F. Supp. 1081. Plaintiffs are likely to prevail on the merits of these claims on appeal.

3. National Park Service and Yellowstone National Park Organic Act Violations

The National Park Service and Yellowstone National Park are prohibited under their organic acts from taking actions that jeopardize the bison population or other Park resources. 16 U.S.C. Sec. 1 & 1a-1; 16 U.S.C. Sec. 22. Despite the clear mandates to preserve bison for future generations, the Park Service repeatedly decides to adopt new iterations of the IBMP, and decides to capture and send to slaughter masses of bison resulting in unacceptable impacts and likely impairment to the bison population and other Park resources.

The Park Service does not have discretion to take actions that impair park resources, except where *directly and specifically* provided by Congress.

Sierra Club v. Andrus, 487 F.Supp. 443, 448-49 (D.D.C. 1980). The only direct and specific authority from Congress to destroy Park wildlife provides wildlife may be destroyed when they are found to be detrimental to the use of the Park. See National Rifle Association v. Potter, 628 F. Supp. 903, 910 (D.D.C. 1986). After thoroughly examining the legislative history of 16 U.S.C. Sec. 1, the court in Potter concluded that the Secretary of Interior's "primary management function with respect to park wildlife is its preservation, unless Congress has determined otherwise." Id. at 912. Section 22 further limits Park authority to destroy wildlife, requiring the Secretary to "provide against the wanton destruction of the . . . game found within [Yellowstone National] park . . ."

Moreover, evidence in the record suggests the Park's actions and decisions that result in repeated large-scale, non-random culls are likely impairing the bison population and other Park resources. See, e.g., ARY7677 (noting culls have negatively affected age and sex structure of the bison, and that continued large culls and population fluctuations could "diminish the ecological processes within the park and the suitability of the park to serve as an ecological baseline . . . for assessing the effects of human activities outside the park.") To comply with its statutory mandates and its own management policies, the Park must but has failed to assess and make a

written determination whether its actions may be causing impairment, and take actions to immediately halt such impairment if it may be occurring. NPS Management Policies 1.4.7.

By continuing to make management decisions that adversely impact bison and other resources, the Park is not only violating Section 1 and 1a-1, it is also causing the wanton destruction of bison in violation of Section 22. That section requires the Secretary of Interior to "provide against the wanton destruction of the . . . game found within the park . . ." 16 U.S.C. Sec. 22. The common definition of "wanton" is "having no just foundation or provocation." *Merriam-Websters Dictionary Online*, http://www.merriam-webster.com/ (last accessed February 15, 2011).

The record indicates the bison slaughter is without adequate justification at this time. Congress' General Accounting Office found that the agencies were acting without justification in a report issued in 2007 (ARY5458-5471); a recent study concluded that in most years the risk of brucellosis transmission from bison to cattle is nearly zero (ARY7706); the Park often decides not to test bison even for exposure to brucellosis before sending them to slaughter (ARY7681, 7693); and even if bison continue to be heavily managed, such actions will not prevent brucellosis from entering domestic cattle herds because elk carrying brucellosis roam freely and

brucellosis prevalence in wildlife is exacerbated by feeding grounds in Wyoming (ARY9355; 7302). Thus, the Park's stated justifications for heavy bison management and large slaughters do not currently support such actions, particularly where evidence indicates such actions are destroying and impairing the population as discussed *supra*.

For all these reasons, the Park Service is in violation of its Organic Act mandates, and Plaintiffs are likely to succeed on the merits of their appeal regarding these claims.

B. Plaintiffs will likely suffer irreparable harm absent an injunction pending appeal

Irreparable harm is harm that cannot be remedied by money damages, or is permanent, or of long duration. See e.g. Earth Island Institute v. United States Forest Service, 442 F.3d 1147, 1177 (9th Cir. 2006). The Supreme Court holds that "environmental injury, by its very nature" is seldom reparable, precisely because it cannot be remedied by money damages and is often of long duration. Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987); see also Id.

Accordingly, the Ninth Circuit also has held that killing wildlife is "by definition, irreparable." Humane Society of the United States v. Gutierrez, 527 F.3d 788, 790 (9th Cir. 2008). The Ninth Circuit recently concluded that irreparable harm is likely to occur when plaintiffs have "articulated" losses

to their interests such as the ability to "view, experience, and utilize . . . in their undisturbed state" natural resources such as forests. Alliance for the Wild Rockies v. Cottrell, ---F.3d---, 2011 WL 208360 (9th Cir. 2010). Such losses occur when a certain area of forest or portion of a wildlife population will be removed. Id.; see also Fund for Animals v. Norton, 281 F.Supp.2d 209, 220-21 (D.D.C. 2003)(holding plaintiffs met irreparable injury burden where defendants would kill 525 mute swans out of a 3600 swan population, in remote locations and over the course of several months)(citing Fund for Animals v. Clark, 27 F.Supp.2d 8, 14 (D.D.C. 1998)(plaintiffs would suffer irreparable injury by seeing or *contemplating* bison being killed in an organized hunt where even smaller proportion of bison population than proportion of swan population in Fund v. Norton was to be killed).

Here, there is no dispute that Defendants are likely to kill many bison this season, and they expect more than 1000 bison to migrate to the northern boundary alone. Dkt. 59-1, par. 4. The Plaintiffs have expressed through declarations their connection to and interests in the bison and their habitat that will be irreparably harmed if the federal Defendants are allowed to proceed with mass bison slaughter once again. 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. Cole (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 longterm survivability of bison due to Defendants' action, and identifying harm from witnessing past actions against bison). Plaintiffs' interests in seeing the bison on their native range inside YNP and on the Gallatin National Forest, and their spiritual connections to the bison will certainly will certainly be harmed by the removal of the captured bison and likely hundreds more bison this season.

As discussed in the recent briefing for Plaintiffs' motion for a preliminary injunction and/or temporary restraining order, the administrative record indicates irreparable harm is likely to occur to the bison population as well, if large culls continue to occur such as that the Defendants intend to carry out now. See, e.g., ARY7677. While Defendants suggest that 2500-4500 bison *may* be sufficient to maintain adequate genetic diversity, they cannot ensure this population level will be maintained given their prediction

that more than 1,000 bison may migrate to the northern boundary of the park this winter, and that these bison may be captured and slaughtered this season alone. See Dkt. 59-1, par. 4. With a current population of approximately 3,700 (Dkt. 59-1, par. 16), removal of over 1,000 plus any additional winter kill, could easily reduce the population below even the lower end of the predicted range necessary.

Further, new information indicates irreparable harm is likely to occur even if the population is maintained within the range YNP suggests *may* be sufficient. A new study released in its complete form on February 7, 2011 by Dr. Thomas Pringle, indicates that a high percentage of the Yellowstone bison carry mutated genes that threaten their survival, and that genetically uninformed culls may inadvertently remove bison with healthy genes and leave the population largely comprised of the genetically compromised bison. See Ex. 1.[2]

New materials such as the Pringle study and declaration are appropriately considered for purposes of interim relief, and Plaintiffs do not offer them as supplements to the administrative record at this time. See Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (recognizing need to allow extra-record evidence at the preliminary injunction stage); American

[2] Plaintiffs hereby submit as Exhibit 1 the declaration of Dr. Thomas Pringle, including a copy of his study and two studies he relied upon in reaching his scientific conclusions.

Rivers v. United States Army Corp. of Engineers, 271 F. Supp. 2d 230, 247 (D.D.C. 2003) (use of "extra-record" declaration is appropriate in context of preliminary injunction); Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1259-1261 (10th Cir. 2003) (allowing expert witness evidence on issue of irreparable harm in record review case); Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) (party must make specific showing of irreparable injury); Sierra Club v. U.S. Army Corp of Engineers, 935 F. Supp. 1556, 1568 (S.D. Ala. 1996) (in context of a preliminary injunction, evidence that goes to irreparable injury rather than the correctness of the agency's decision, will be considered by the court); GTE Sylvania, Inc. v. Consumer Products Safety Comm'n, 404 F. Supp. 352, 368 n.68 (D.Del. 1975) (in record review case, "affidavits submitted by the plaintiffs are essential to establish irreparable harm before a preliminary injunction can be issued").

It is also allowable and common practice in the Ninth Circuit for parties to submit, and for district courts to consider extra-record materials to determine relief, particularly regarding irreparable harm, balance of the equities, and impacts to the public interest. See Idaho Watersheds Project v. Hahn, 307 F.3d 815, 823, 833-34 (9th Cir. 2002), *overruled on other grounds by* Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010) (reviewing agency declaration to determine appropriateness of permanent injunction

and interim protective measures); Natural Resources Defense Council v. Winter, 530 F.Supp.2d 1110, 1118 (9th Cir. 2008), *overruled on other grounds by* Natural Resources Defense Council v. Winter, 555 U.S. 7 (2008) (court concludes irreparable harm nearly certain to occur, based upon scientific studies, declarations, reports, and other evidence submitted to the court); see also Earth Island Institute v. Evans, 256 F.Supp.2d 1064, 1075-77 (N.D. Cal. 2003) (considering multiple declarations to assess irreparable harm and impacts to public interest).

Dr. Pringle's research became available in completed form on February 7, 2011, and Plaintiffs learned of the availability of the completed study at that time.[3] As the findings suggest any genetically uninformed

[3] Had the research been available during administrative proceedings or earlier during the course of this litigation, Plaintiffs certainly would have brought it to the attention of Defendants and this Court at an earlier time, as the Court would have preferred. See Dkt. 46, p. 67-68. As it only became available in completed form at the time Plaintiffs were filing their reply in support of their motion for preliminary injunction, it was at that time Plaintiffs submitted it for the sole purpose of demonstrating irreparable harm, balance of the equities, and impact to the public interest. Plaintiffs submitted the research as soon as it was available, believing in good faith that it represented evidence of imminent irreparable harm and that it was appropriate to submit for reasons discussed *supra* regarding evidence outside the record being admissible for reviewing remedies. Plaintiffs would note that Defendants themselves submitted new studies during the course of litigation that had not been published or peer-reviewed, and were submitted without opportunity for Plaintiffs to review before arguments were made. Dkt. 52-1 (Declaration submitted with Defendants' reply brief regarding summary judgment motions, two days before summary judgment hearing, including a new unpublished study – see Dkt 52-1 at p. 7); Dkt. 59-1 (Declaration submitted in response to motion for preliminary injunction, including two previously undisclosed studies, one marked as an "uncorrected proof"). Given that this appeared to be acceptable practice, Plaintiffs were simply acting – in good faith – to support their own arguments and the protection of their interests and the bison population from irreparable harm. Further, as noted in Dr. Pringle's declaration, he did

lethal removal of bison – particularly from the Northern herd – may place the population in such jeopardy that it cannot be recovered, it presents evidence of imminent and most irreparable harm to the bison and Plaintiffs' interests should bison continue to be removed from the population. See Dec. Pringle par.15-16.

C. The balance of equities favors an injunction pending appeal

"[I]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." High Sierra Hikers Association v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004). For the reasons presented in Plaintiffs' briefs in support of their motion for preliminary injunction, the balance of the equities tips sharply in favor of the Plaintiffs. Dkt. 57 & 60. The Court did not note any harms to Defendants that would occur should they be enjoined from capturing and slaughtering up to half of the 380 bison in the capture facility at the time of the prior motion, or a larger number of the more than 500 reportedly in the facility now. Dkt. 64, p. 69. The Court simply noted that full NEPA analysis had been undertaken before the IBMP was implemented, and that bison might eventually conflict with traffic or otherwise conflict with

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not work in conjunction with WWP or any other plaintiff, but worked independently on his research; the research was not created for the purpose of supporting Plaintiffs' claims or this litigation in any way.

humans if allowed to roam freely. Id. However, the agencies have made decisions and taken actions since the initial NEPA review was completed, which have not been benefited by NEPA analysis examining the impacts associated with significant new information and changed circumstances. The public has a strong interest in the provisions NEPA has to offer – that of agency disclosure of information, and public opportunity to review and comment upon such information and analysis, followed by opportunities for agency level challenges. Without any noted harms to Defendants if they are enjoined from capturing and slaughtering bison during the remainder of the season, while the case is on appeal, the balance of equities tips sharply in favor of an injunction pending appeal. See Amoco, 480 U.S. at 542 (court must balance the competing claims of injury and consider the effect on each party).

D. An injunction pending appeal is in the public interest

The Ninth Circuit has noted the importance of preserving the public's interest in "preserving precious, unreplenishable resources," and the preservation of our environment as required by NEPA and NFMA. Earth Island Institute v. United States Forest Service, 442 F.3d 1147, 1177 (9th Cir. 2006), *overruled on other grounds by* Winter, 129 S.Ct. at 375. Given that much of the public – including landowners surrounding Yellowstone

National Park – are clamoring for bison to be naturally managed and allowed to access habitat beyond YNP's boundaries, the public interest would be served by an injunction pending appeal that would simply prevent large-scale slaughter from occurring this year. See ARY5836; 3521-3541. The public has clearly expressed an interest in having the federal land and wildlife managers (the Park Service and Forest Service) discontinue large-scale slaughter of bison. See e.g. Dec. Cole, par. 19-20; Second Dec. Hockett, par. 7, 12-18; Second Dec. Geist, par. 39.

Various courts have also noted "ensuring that government agencies comply with the law is a public interest of the highest order." National Wildlife Federation v. National Marine Fisheries Service, 235 F.Supp.2d 1143, 1162 (W.D. Wash. 2002); Colorado Wild Inc. v. United States Forest Service, 523 F.Supp.2d 1213, 1223 (D. Colo. 2007). Plaintiffs allege various violations of laws through the federal Defendants' actions and decisions regarding bison management, and Plaintiffs are likely to prevail on the merits of their appeal. Thus, it is in the public interest to maintain the genetic diversity, uniqueness, and full population of bison until such time as the merits are decided by the Court of Appeals.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request this Court issue an injunction pending appeal to preserve Plaintiffs' and the public's rights and interests in this matter until it is fully resolved.

Respectfully submitted this 16th 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 4250 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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