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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 **NOTICE OF ADDITIONAL AUTHORITY AND CLARIFICATION**

By and through their attorneys of record, Plaintiffs hereby file this notice of additional authority and clarification in response to the Court's order of February 8, 2011.

It appears from the Order that the Court misunderstood Plaintiffs' purposes in filing the exhibits attached to their Reply Brief in support of their Motion for a Preliminary Injunction and/or Temporary Restraining Order. At this stage, Plaintiffs are not attempting to supplement the administrative record, and did not submit the materials for consideration of the merits, just as they presume Defendants were not seeking to supplement the administrative record or have their "extra-record" materials considered regarding the merits of the summary judgment motions. See Defendants' Exhibit 1 at Dkt. 59-1 (Declaration of P.J. White, and two attached 2011 studies, including one "Uncorrected Proof").

While a court's review of administrative cases generally focuses on the administrative record, a court's review is not limited to the record when determining relief. It is common practice to submit extra-record materials at the preliminary injunction stage, and many courts have held that such materials can be considered for the non-merits prongs of the preliminary injunction test - that is to evaluate irreparable harm, balance of the equities, and the public interest. 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 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 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).

Thus, it was for the purpose of aiding this Court's assessment of irreparable harm, the balance of the equities, and the public interest that Plaintiffs submitted the new study and article discussing the implications of the study. Dkt. 60, 60-1, 60-2. Plaintiffs were not attempting to supplement the administrative record, but merely were demonstrating the harm that is likely to occur if Defendants are allowed to slaughter hundreds of bison at this time. Plaintiffs respectfully submit this notice and authority in an attempt to ease the Court's "perplexed" state, and explain that such materials are admissible for purposes of determining that the prongs of irreparable harm, the balance of the equities, and the public interest all weigh in favor of

granting a preliminary injunction and/or temporary restraining order to preserve the status quo until the Court is able to render a decision on the merits of this case.

Respectfully submitted this 9th day of February 2011.

/s/Summer L. Nelson
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